No. 01-705

# In the Supreme Court of the United States

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY, PETITIONER

*v.*

PEABODY COAL COMPANY, ET AL.

JO ANNE B. BARNHART, COMMISSIONER OF SOCIAL SECURITY, PETITIONER

*v.*

BELLAIRE CORPORATION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONER

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## REPLY BRIEF FOR THE PETITIONER

1. Respondents concede (Peabody Br. in Opp. 7; Bellaire Br. in Opp. 4) that the Sixth Circuit's decisions below are in direct conflict with the Fourth Circuit's decision in *Holland* v. *Pardee Coal Co.*, 269 F.3d 424 (2001), which upheld the authority of the Commissioner of Social Security under the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 U.S.C. 9701 *et seq.*, to make initial assignments of beneficiaries of the United Mine Workers of America Combined

Benefit Fund (Combined Fund) to signatory operators on or after October 1, 1993. Despite their acknowledgment of the division in appellate decisions on that question, respondents contend that the conflict does not warrant resolution, at least at this time, because (a) the conflict at present involves only two circuits; (b) the issue concerns the financing of the benefits of only a minority of Combined Fund beneficiaries; and (c) even if petitioners and other signatory operators similarly situated to them are absolved of the obligation to pay for the health care costs of those beneficiaries, the Combined Fund can find the money to cover those costs elsewhere. Those submissions are wide of the mark.

a. The conflict between the Sixth and Fourth Circuits is real and important. More than half of the companies that were assigned responsibility for miners on or after October 1, 1993, are located in those Circuits. See Pet. 23-24. Thus, while other courts of appeals may eventually rule on the question presented here as well, that is no warrant for delay in this Court's resolution of the issue presented when the conflicting decisions already govern most of the cases that might be brought concerning this issue.[1]

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[1] In addition, some signatory operators that do not reside within the Sixth Circuit have attempted to gain the benefit of that Circuit's decision in *Dixie Fuel Co.* v. *Commissioner of Social Security*, 171 F.3d 1052 (1999), by joining litigation brought within the Sixth Circuit by operators that do reside there. Those non-resident operators have argued that, even though venue would not be proper in the Sixth Circuit if the litigation were brought by them alone, venue is proper under 28 U.S.C. 1391(e)—which permits an action to be brought against a federal agency in the district where "the plaintiff resides"—as long as any plaintiff resides in the district where the litigation is brought. See *Mead Corp.* v. *Apfel*, 128 F. Supp. 2d 1096 (S.D. Ohio 2001), appeal pending, No. 01-3277 (6th Cir.); *Codell Constr. Corp.* v. *Massanari*, No. 00-271 (E.D. Ky. May 15, 2001), appeal pending, No. 01-5909 (6th Cir.). Thus, the Sixth Circuit's decision in *Dixie Fuel*, to which that court adhered here, is having a distorting effect on the resolution of Coal Act claims.

Nor, contrary to respondents' speculation, is there any reason to believe that either the Sixth or the Fourth Circuit will change its position in future cases. The Sixth Circuit has already twice denied the government's effort to obtain reconsideration of the issue by the full court—first, when the government sought rehearing en banc of that court's decision in *Dixie Fuel Co.* v. *Commissioner of Social Security*, 171 F.3d 1052 (1999); and again, when the government sought initial en banc hearing in these cases, in which it acknowledged the binding authority of *Dixie Fuel* in the Sixth Circuit but again submitted that *Dixie Fuel* was incorrectly decided and should be reconsidered. See Pet. 12 n.8, 15. The Fourth Circuit also denied the operator's request for rehearing en banc of its decision in *Pardee*, even though it was aware of the Sixth Circuit's conflicting decision in *Dixie Fuel*. See Pet. 22 n.14. Accordingly, there is scant likelihood that the Fourth and Sixth Circuits will resolve their conflicting decisions in the absence of this Court's review.

b. Respondents submit that review is not warranted because the Combined Fund will be able to look to other sources of revenue—namely, transfers of interest from the Department of the Interior's Abandoned Mine Land Reclamation (AML) Fund and an additional unassigned-beneficiary premium from all signatory operators—to make up for the shortfall of funds resulting from the fact that signatory operators like respondents will not be required to finance the health-care costs of their own employees. See Peabody Br. in Opp. 8-9. But even if the survival of the Combined Fund is not placed in immediate peril by the decisions below, the Sixth Circuit's decisions nonetheless warrant review, because identifying the proper entity that is responsible for financing a Combined Fund beneficiary's health care costs is fundamental to the functioning of the Coal Act. One of Congress's stated objectives in the Coal

Act was "to identify persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees." Energy Policy Act of 1992, Pub. L. No. 102-486, Tit. XIX, § 19142(a)(2), 106 Stat. 3037.

Indeed, in *Barnhart* v. *Sigmon Coal Co.*, No. 00-1307 (argued Nov. 7, 2000), this Court granted certiorari to resolve a conflict among the circuits on an issue of statutory interpretation concerning the proper entity to be made responsible for the health care costs of Combined Fund beneficiaries, even though in that case, as in this one, the beneficiaries' continued receipt of benefits was not immediately dependent on the outcome of the case. In *Sigmon*, the courts of appeals were divided as to whether the direct successor in interest of a signatory operator could be made responsible for the health care costs of the signatory's retired employees if the signatory was no longer in business. If a successor in interest cannot be made responsible for the signatory's employees, then the cost of financing those retirees' benefits passes either to another entity in a lower tier under the Coal Act's assignment-priority system, to the AML fund, or to all signatory operators (on a *pro rata* basis) by means of an unassigned-beneficiary premium. See Pet. 5-6. Thus, as in this case, the immediate question in *Sigmon* is who shall pay for the retirees' benefits, not whether retirees shall receive benefits at all. Nonetheless, by granting certiorari in *Sigmon*, the Court recognized that the proper *allocation* of financial responsibility for Coal Act benefits is an important matter warranting this Court's review, at least where (as here and in *Sigmon*) two courts of appeals have reached opposing conclusions in published decisions.

It is hardly sufficient to assert, as respondents do (see Peabody Br. in Opp. 10), that the Coal Act does not require a perfect match between each retired coal miner and the signatory operator that actually employed that miner. Con-

gress did recognize that the signatory operator that had employed the miner might no longer be in existence or might not have sufficient assets to pay for the miner's benefits, and so Congress made provision for the Commissioner and the Combined Fund to look to the signatory operator's "related persons" in such circumstances. See 26 U.S.C. 9701(c)(2)(A), 9704(a). But Congress did not intend that a signatory operator that had actually employed a beneficiary of the Combined Fund and was still in business and solvent should be able to force responsibility for its own employees onto other, unrelated operators and the public at large. To the contrary, that is exactly the kind of maneuver that precipitated the crisis in the predecessor health-care trusts for coal industry retirees, and that led Congress to enact the Coal Act. See Pet. 4.

Moreover, respondents simply disregard the fact that Congress expressly intended the Combined Fund to operate as a "privately financed self-sufficient program." Pub. L. No. l02-486, § 19142(b)(3), 106 Stat. 3037. In establishing the Combined Fund, Congress rejected proposals that the government undertake the burden of financing retired miners' benefits. Rather, Congress made transfers of interest from the AML Fund available only as a back-up to ensure that "orphan" retirees whose employers (and all related persons) had gone out of business would not be deprived of their benefits. The assignments at issue in these cases do not involve such "orphan" retirees. Rather, they involve miners who worked *for respondents* (or their related companies). By allowing respondents to shift responsibility for their retirees to the government, the Sixth Circuit's decisions contravene the "pay for your own" principle on which the Coal Act's assignment-priority system is based, and undermines Congress's intent that the Combined Fund be financed, to the extent possible, from private sources.

Respondents Peabody *et al.* argue (Br. in Opp. 10-11) that this case does not warrant review because the issue prospectively affects financing of benefits for only ten percent of the Combined Fund's beneficiaries. But as Peabody's own figures demonstrate, the total number of assignments potentially affected by this issue (about 7500 retirees, plus their dependents) is *greater* than the number of assignments (about 6000) affected by this Court's decision in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), and it is probably on a par with, or greater than, the number of assignments potentially at issue in *Barnhart* v. *Sigmon Coal Co.*, No. 00-1307 (argued Nov. 7, 2000). Moreover, the financial impact of this issue on the Combined Fund is not limited to future years—although that impact is considerable, especially since we are informed that the Combined Fund is expected to pay for health care costs for some beneficiaries for 30 years. The Sixth Circuit's reading of the Coal Act, if applied nationwide, could require the Combined Fund to make refunds to signatory operators, or to provide them credit against premiums in future years, reflecting the premiums that were assessed in *past* years for beneficiaries assigned after October 1, 1993, even if those beneficiaries are now deceased. The total net amount of such refunds and credits for past years could exceed $57 million. See Pet. 26 n.18.

2. Respondents argue that, because the Coal Act provided that the Commissioner "shall, before October 1, 1993," make the initial assignments of Combined Fund beneficiaries to a signatory operator, see 26 U.S.C. 9706(a), the Commissioner lost all authority to make initial assignments after that date. See Bellaire Br. in Opp. 6-7. That contention is incorrect. As this Court explained in *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 718 (1990), "Congress' mere use of the word 'shall' [is] not enough to remove the [agency's] power to act." At issue here is not whether

Congress's use of the word "shall" placed the Commissioner under a statutory duty to complete the assignment process by October 1, 1993; rather, the question is what consequence should flow from the Commissioner's failure to satisfy that duty in full.[2] Respondents maintain that, because the Commissioner was unable to make all the assignments in time, the beneficiaries who were not assigned by October 1, 1993, should in effect become a public charge or the responsibility of other, unrelated entities rather than the responsibility of the signatories that actually employed them (or their related entities). That proposition "is not, to say the least, of the sort that commands instant assent." *Brock* v. *Pierce County*, 476 U.S. 253, 258 (1986).[3]

Respondents maintain that the Coal Act itself makes clear that the "consequence" of the Commissioner's failure to make a timely assignment of a beneficiary is that the beneficiary shall be deemed "unassigned." See Peabody Br. in Opp. 15-16; Bellaire Br. in Opp. 7-9. But the consequence that, under respondents' submission, would follow from the Commissioner's failure to complete all initial assignments by

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[2] Thus, respondents Bellaire *et al.* err in arguing (Br. in Opp. 7, 10) that our argument renders Congress's use of the word "shall" superfluous. As this Court explained in *Montalvo-Murillo*, where it rejected the same argument, the existence of the duty and the consequence (if any) of the agency's failure to satisfy that duty are two separate questions. In many circumstances, "[a]lthough the duty is mandatory, the sanction for breach is not loss of all later powers to act." 495 U.S. at 718. See also *Pardee*, 269 F.3d at 433 (ruling, contrary to Sixth Circuit, that Congress's use of the word "shall" "is insufficient evidence to establish that Congress intended such a textual provision to be jurisdictional").

[3] Respondents Peabody *et al.* erroneously argue (Br. in Opp. 5 n.2) that the Commissioner had almost a year in which to complete the assignment process. In fact, as we have noted (Pet. 9), Congress did not provide SSA with appropriations for the assignment process until less than three months before October 1, 1993— leaving SSA about 88 days in which to make almost 65,000 assignments (see Pet. 8 n.4).

October 1, 1993, would be a jurisdictional limit on the Commissioner's authority to act in the public interest after that date to ensure that Combined Fund beneficiaries are properly assigned to their former employers. This Court's decisions make clear that a court should not impose such a limit on a federal agency's authority absent the most clear indication in the statute that Congress intended such a bar to be applied. See *United States* v. *James Daniel Good Real Property*, 510 U. S. 43, 63 (1993).

The Coal Act in any event does not provide, either in terms or implicitly, that a beneficiary should be deemed "unassigned" because the Commissioner was unable to determine whether he should be assigned to a signatory operator *before October 1, 1993*. Rather, it (implicitly) provides only that a beneficiary shall be deemed unassigned if the Commissioner is unable to assign the beneficiary to a signatory operator *at all*. Thus, the Act makes clear that if SSA learns, on administrative reconsideration of an assignment decision after October 1, 1993, that a beneficiary should have been assigned to another operator, the Commissioner may make the reassignment to the proper operator. See 26 U.S.C. 9706(f). The Commissioner is not required to treat such a beneficiary as unassigned (and therefore a public charge, or, potentially, the responsibility of unrelated operators) in the face of evidence clearly establishing that, under the Coal Act's criteria, the beneficiary should be assigned to a particular operator. The same is true in this case. The Coal Act does not require the Commissioner to accept the erroneous treatment of a beneficiary as unassigned merely because the evidence showing that the beneficiary should be assigned to a particular operator came to light or could be acted upon only after October 1, 1993.

As the Court stressed in *Pierce County* and *Montalvo-Murillo*, it is particularly inappropriate to treat a statutory requirement that an agency act within a certain time as a

jurisdictional bar to the agency's ability to act after that time when the public interest or the interests of innocent third parties would be adversely affected by such a bar. See *Montalvo-Murillo*, 495 U.S. at 720; *Pierce County*, 476 U.S. at 261-262. Those decisions make clear that the Sixth Circuit's reading of the Coal Act is in error. "[T]he protection of the public fisc is a matter that is of interest to every citizen," *Pierce County*, 476 U.S. at 262; but the Sixth Circuit's ruling would force the government (through the AML Fund) to bear the health care costs of retired miners that were actually employed by respondents. As the Fourth Circuit observed in *Pardee*, 269 F.3d at 437, nothing in the Coal Act suggests that Congress intended that coal mine operators obtain "a financial windfall * * * at the expense of other operators * * * and, more importantly, the public interest," simply because the Commissioner was unable to complete 65,000 assignments in less than three months.[4]

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For the foregoing reasons, and for those set forth in the petition, the petition for a writ of certiorari should be granted.

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[4] Respondents Peabody *et al.* argue (Br. in Opp. 16) that, because only interest from the AML Fund (and not principal) may be transferred to the Combined Fund, the Sixth Circuit's decision cannot jeopardize the core purpose of the AML fund, which is to ameliorate the adverse public health and safety consequences of surface coal mining. The interest that is transferred out of the AML Fund, however, is not available to restore lands subject to surface mining to their original contours. And given the decline in interest rates as well as the large sums of money potentially affected by the issue in this case (see Pet. 25-28), the Combined Fund may be required to impose an unassigned-beneficiary premium on signatory operators if the Sixth Circuit's reading of the Coal Act is upheld.

Respectfully submitted.

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JANUARY 2002