

BRB No. 11-0839 BLA

SANDRA COLEGROVE	)	
(Widow of FREDDIE COLEGROVE)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 08/27/2012
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Director's Motion for Summary Decision and Awarding Survivor's Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Director's Motion for Summary Decision and Awarding Survivor's Benefits (2011-BLA-6011) of Administrative Law Judge Thomas M. Burke (the administrative law judge), rendered on

a subsequent survivor's claim<sup>1</sup> filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010). The amendments, in pertinent part, revive Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l).

Claimant filed her subsequent survivor's claim on April 29, 2011. Director's Exhibit 4. On May 11, 2011, the district director issued a Proposed Decision and Order, wherein he found that claimant was derivatively entitled to benefits pursuant to amended Section 932(l). Director's Exhibit 8. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 10.

On August 5, 2011, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision, arguing that under amended Section 932(l), and given the filing date of her claim, claimant was entitled to benefits based on the award of benefits to her deceased husband.<sup>2</sup> Employer responded, arguing that claimant was not derivatively entitled to benefits, and filed its own motion to dismiss claimant's subsequent survivor's claim, or, in the alternative, to grant employer's motion for partial summary judgment, and declare that derivative entitlement under amended

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<sup>1</sup> Claimant is the widow of the miner, who died on August 21, 1999. Director's Exhibit 7. Claimant filed her initial claim for survivor's benefits on September 23, 1999, which was denied by Administrative Law Judge Daniel L. Leland on June 11, 2003. The Board affirmed the denial of benefits, *see Colegrove v. Island Creek Coal Co.*, BRB No. 03-0630 BLA (May 26, 2004)(unpub.), and the United States Court of Appeal for the Fourth Circuit Court, within whose jurisdiction this case arises, affirmed the decision of the Board on March 1, 2007. Director's Exhibit 2. On January 14, 2008, claimant's request for modification was denied by Administrative Law Judge Richard A. Morgan, and the Board affirmed the denial of modification on April 28, 2010. *Colegrove v. Island Creek Coal Co.*, BRB Nos. 09-0529 BLA and 09-0529 BLA-A (Apr. 28, 2010)(unpub.).

<sup>2</sup> The miner was receiving federal black lung benefits at the time of his death pursuant to a claim filed on January 28, 1988, which was awarded by Administrative Law Judge Frederick D. Neusner on September 27, 1991.

Section 932(l) is not available to claimant. The Director did not file a response to employer's motion. Claimant did not respond to either motion.

In his Decision and Order Granting Director's Motion for Summary Decision and Awarding Survivor's Benefits, the administrative law judge rejected employer's argument that amended Section 932(l) was inapplicable because the miner's claim was filed prior to January 1, 2005, and was not pending on or after March 23, 2010. The administrative law judge found that claimant's subsequent survivor's claim was not barred under 20 C.F.R. §725.309(d), and that claimant satisfied the criteria for derivative entitlement pursuant to amended Section 932(l). Consequently, the administrative law judge awarded benefits to commence as of August 1999, the month in which the miner died.

On appeal, employer argues that the retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005 constitutes a violation of its due process rights and an unconstitutional taking of private property. Employer contends that the operative date for determining eligibility pursuant to amended Section 932(l) is the date that the miner's claim was filed, not the date that the survivor's subsequent claim was filed.<sup>3</sup> Employer also contends that claimant is not eligible for derivative survivor's benefits under amended Section 932(l), because her prior claim was finally denied and her subsequent claim is barred pursuant to the fundamental principles of res judicata and claim preclusion. Employer further argues that claimant is not eligible for derivative survivor's benefits, because amended Section 932(l), when read in conjunction with 30 U.S.C. §§921 and 922, requires that she prove either that the miner's death was due to pneumoconiosis or that the miner had complicated pneumoconiosis. Lastly, employer asserts that any benefits awarded should not commence prior to the filing date of the subsequent claim. Claimant responds in support of the award of benefits. The Director responds, urging the Board to affirm the administrative law judge's award of benefits. However, the Director contends that the appropriate date for the commencement of benefits in this case is July 2010, the month after the month in which the denial of the prior survivor's claim became final. Employer has filed a reply brief in support of its position.<sup>4</sup>

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<sup>3</sup> Employer's request, that further proceedings or action related to this claim be held in abeyance pending guidance from the United States Court of Appeals for the Fourth Circuit, is moot. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *petition for cert. filed*, U.S.L.W. (U.S. May 4, 2012)(No. 11-1342).

<sup>4</sup> Employer's request, that further proceedings or actions related to this claim be held in abeyance pending resolution of the constitutional challenges to the PPACA, is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We reject employer's contention that retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005 constitutes a due process violation and a taking of private property, for the same reasons the Board rejected substantially similar arguments in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011)(Order)(unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). *See also B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Further, the operative date for determining eligibility for survivor's benefits under amended Section 932(l) is the date that the survivor's claim was filed, not the date that the miner's claim was filed. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *petition for cert. filed*, U.S.L.W. (U.S. May 4, 2012) (No. 11-1342). For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary. We also reject employer's contention that claimant's subsequent claim is barred pursuant to the fundamental principles of res judicata and claim preclusion, for the reasons set forth in *Richards v. Union Carbide Corp.*, BRB Nos. 11-0414 BLA & 11-0414 BLA-A, slip op. at 4-6 (Jan. 9, 2012)(en banc)(McGranery, J., concurring and dissenting)(Boggs, J., dissenting), *appeal docketed*, No. 12-1294 (4th Cir. Mar. 8, 2012). Also, as we did in *Fairman v. Helen Mining Co.*, 24 BLR 1-225 (2011), we find no merit to employer's contention that amended Section 932(l) is limited by earlier provisions of the Act. *See Stacy*, 671 F.3d at 380, 25 BLR at 2-85; *Campbell*, 662 F.3d at 243, 25 BLR at 2-37-38. Because claimant filed her subsequent survivor's claim after January 1, 2005, her claim was pending on or after March 23, 2010, and the miner was receiving benefits under a final award at the time of his death, we affirm the administrative law judge's finding that claimant is entitled to receive survivor's benefits pursuant to amended Section 932(l).

Lastly, we reject employer's contention that an award of benefits in this case should commence no earlier than April 2011, the date of filing of claimant's subsequent survivor's claim. In *Richards*, the Board held that derivative benefits are payable in a subsequent survivor's claim filed within the time limitations set forth in Section 1556 of the PPACA from the month after the month in which the denial of the prior claim became

final.<sup>5</sup> *See Richards*, slip op. at 7. Consequently, as the order denying claimant's prior claim became final in June 2010, at the expiration of the sixtieth day after it was issued, *see* 20 C.F.R. §802.406, claimant's survivor's benefits under amended Section 932(l) in her subsequent claim properly commence as of July 2010, the month after the month in which claimant's prior denial of benefits became final. *See* 20 C.F.R. §725.309(d)(5).

Accordingly, the administrative laws judge's Decision and Order Granting Director's Motion for Summary Decision and Awarding Survivor's Benefits is affirmed, as modified to reflect July 2010 as the date from which benefits commence.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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<sup>5</sup> The Board's Decision and Order affirming the denial of modification of claimant's original survivor's claim was issued on April 28, 2010, and became final sixty days later, in June 2010. *See* 20 C.F.R. §802.406.