



BRB No. 11-0348 BLA

DELORES ANN AYERS	)	
(Widow of JAMES AYERS)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ANKER WEST VIRGINIA MINING	)	
COMPANY	)	
	)	
and	)	DATE ISSUED: 01/11/2012
	)	
WEST VIRGINIA CWP FUND	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Francesca Tan (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Paul L. Edenfield (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2010-BLA-5836) of Administrative Law Judge Richard A. Morgan rendered on a survivor's claim 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). Claimant filed her survivor's claim on February 19, 2010.<sup>1</sup> Director's Exhibit 6.

On March 23, 2010, amendments to the Act were enacted, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. The amendments, in pertinent part, revive Section 932(l) of the Act, which provides that the eligible survivor of a miner who was determined to be 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).

In a Decision and Order dated January 6, 2011, the administrative law judge found that the miner was determined to be eligible for benefits at the time of his death, that claimant is an eligible survivor of the miner, *see* 20 C.F.R. §725.212, and that her survivor's claim was filed after January 1, 2005, and was pending on March 23, 2010. Accordingly, the administrative law judge found that claimant is automatically entitled to survivor's benefits pursuant to amended Section 932(l).

On appeal, employer challenges the administrative law judge's application of amended Section 932(l) to this case. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the award of benefits.

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.<sup>2</sup> 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).

---

<sup>1</sup> Claimant is the widow of the miner, who died on January 27, 2010. Director's Exhibits 6, 10, 11. At the time of his death, the miner was receiving federal black lung benefits pursuant to an August 12, 2004, award by an administrative law judge on his lifetime claim. Director's Exhibits 3, 4.

<sup>2</sup> The miner's coal mine employment was in West Virginia. Director's Exhibits 3, 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

Employer argues that retroactive application of amended Section 932(l) is unconstitutional, as a violation of employer's due process rights and as an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 5-15. Employer also contends that the operative date for determining eligibility under amended Section 932(l) is the date the miner's claim was filed, not the date the survivor's claim was filed. Employer's Brief at 16-25. The identical arguments were recently rejected by the United States Court of Appeals for the Fourth Circuit and thus, lack merit. *W. Va. CWP Fund v. Stacy*, No. 11-1020, 2011 WL 6062116, at \*3-9 (4th Cir. Dec. 7, 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010); *see also B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 254-63 (3d Cir. 2011) (rejecting due process and takings challenges to amended Section 932(l)).

Additionally, employer asks that this case be held in abeyance pending the United States Supreme Court's resolution of the legal challenges to Public Law No. 111-148. Employer's Brief at 25-32. Employer's request is denied. *See Stacy*, No. 11-1020, 2011 WL 6062116 at \*3 n.2; *see also Stacy*, 24 BLR at 1-215; *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010).

We therefore affirm the administrative law judge's determination that claimant is derivatively entitled to benefits pursuant to amended Section 932(l), because she filed her survivor's claim after January 1, 2005, the claim was pending on March 23, 2010, and the miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(l); Pub. L. No. 111-148, §1556(b), (c).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

---

NANCY S. DOLDER, Chief  
Administrative Appeals Judge

---

ROY P. SMITH  
Administrative Appeals Judge

---

JUDITH S. BOGGS  
Administrative Appeals Judge