

BRB No. 11-0661 BLA

PATRICIA A. BLIZZARD)
(Widow of CHARLES BLIZZARD))
)
 Claimant-Respondent)
)
 v.)
)
 S & M COAL COMPANY,)
 INCORPORATED)
)
 and)
)
 SUN COAL COMPANY, INCORPORATED) DATE ISSUED: 06/07/2012
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Order Awarding Survivor's Benefits of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams, Rutherford & Reynolds), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer/carrier.

Rita Roppolo (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 Order Awarding Survivor's Benefits (11-BLA-0661) of Associate Chief Administrative Law Judge William S. Colwell (the administrative law judge) rendered on a survivor's claim¹ 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).

On May 5, 2011, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision and argued 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.² Employer filed a Response to the Director's Motion for Summary Judgment, and challenged the constitutionality of amended Section 932(l) and its applicability to the instant claim.

The administrative law judge found that claimant is an eligible survivor of the miner, and that claimant meets the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l). Accordingly, the administrative law judge awarded survivor's benefits, commencing as of November 1, 2010.

¹ Claimant, Patricia A. Blizzard, is the widow of the miner, who died on November 10, 2010. Director's Exhibit 6. Claimant filed her claim for survivor's benefits on December 10, 2010. Director's Exhibit 3.

² At the time of his death, the miner was receiving federal black lung benefits pursuant to an award issued by Administrative Law Judge Ellin M. O'Shea, which was affirmed by the Board on September 24, 1997. *Blizzard v. S & M Coal Co.*, BRB No. 97-0201 BLA (Sept. 24, 1997) (unpub.); Director's Exhibits 1, 2.

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, as such, is unconstitutional. Employer also asserts that the operative date for determining eligibility pursuant to amended Section 932(l) is the date the miner's claim was filed, not the date the survivor's claim was filed.³ Claimant and the Director respond, urging the Board to affirm the administrative law judge's 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. 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, 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, 2010)(Order)(unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). *See also Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011); *B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, BLR (3d Cir. 2011). Further, the Board has held that 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. *Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *aff'd sub nom. West Virginia CWP Fund v. Stacy*, 671 F.3d 378, BLR (4th Cir. 2011). For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary.

Because claimant filed her survivor's claim after January 1, 2005, her claim was pending on 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 422(l) of the Act, 30 U.S.C. §932(l).

³ On April 20, 2012, the Board denied employer's Motion to Hold Appeal in Abeyance pending resolution of the constitutional challenges to Public Law No. 111-148 in federal court. *Blizzard v. S & M Coal Co.*, BRB No. 11-0661 BLA (Apr. 20, 2012) (Order)(unpub.).

Accordingly, the Order Awarding Survivor's Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge