

BRB No. 12-0576 BLA

DOLORES E. KLOVANICH)
(Widow of FRANK KLOVANICH, JR.))
)
 Claimant-Respondent)
)
 v.)
)
 QUARTO MINING COMPANY)
)
 Employer-Petitioner)
) DATE ISSUED: 05/13/2013
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Order of Thomas M. Burke, Administrative Law Judge,
United States Department of Labor.

Anne Megan Davis (Johnson, Jones, Snelling, Gilbert & Davis, P.C.),
Chicago, Illinois, for claimant.

Amy Jo Holley (Jackson Kelly PLLC), Morgantown, West Virginia, for
employer.

Michelle S. Gerdano (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 (12-BLA-5648) of Administrative Law Judge Thomas M. Burke awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). This case involves a survivor's claim filed on January 17, 2012.

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, were enacted. The amendments, in pertinent part, revive Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that a 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).

On January 23, 2012, the district director issued a Proposed Decision and Order, wherein she found that claimant was derivatively entitled to benefits pursuant to amended Section 932(l). At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing.

On April 30, 2012, claimant¹ moved for a summary decision, arguing that there was no genuine issue of material fact concerning whether she was automatically entitled to benefits pursuant to amended Section 932(l). Employer filed a response in opposition to claimant's motion for a summary decision.

In an Order dated July 20, 2012, the administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 932(l) to this case. Claimant and the Director, Office of Workers' Compensation Programs, respond in support of 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 supported by substantial evidence, is rational, and is in accordance with applicable law.² 33 U.S.C. §921(b)(3), as

¹ Claimant is the widow of the miner, who died on December 9, 2011. Director's Exhibit 10. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim. Director's Exhibits 1-4.

² In its adjudication of the miner's claim, the Board noted that the case arose within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *Klovanich v. Quarto Mining Co.*, BRB No. 94-2850 BLA (Oct. 26, 1995) (unpub.).

incorporated into the Act by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363 (1965).

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 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. The arguments employer makes are virtually identical to the ones that the United States Court of Appeals for the Sixth Circuit recently rejected. *Vision Processing, LLC v. Groves*, 705 F.3d 551, BLR (6th Cir. 2013); *see also W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 388, 25 BLR 2-65, 2-83 (4th Cir. 2011), *aff’g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *cert. denied*, 568 U.S. (2012); *B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011). For the reasons set forth in *Groves*, we reject employer’s arguments.³

Employer also contends that claimant is not an “eligible survivor” within the meaning of amended Section 932(l) because she did not prove that pneumoconiosis caused, or contributed to, the miner’s death. Contrary to employer’s contention, the automatic entitlement provisions of amended Section 932(l) provide benefits to a survivor without the requirement that she prove that the miner’s death was due to pneumoconiosis. *Campbell*, 662 F.3d at 249, 25 BLR at 2-37; *Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-231 (2011). Thus, we reject employer’s assertion that claimant is not an “eligible survivor” within the meaning of amended Section 932(l).

In this case, claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under amended Section 932(l): that she filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending after March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death. Therefore, we affirm the administrative law judge’s determination that claimant is derivatively entitled to benefits pursuant to amended Section 932(l). 30 U.S.C. §932(l).

³ To the extent employer requests that this case be held in abeyance pending the outcome of challenges to other provisions of the Patient Protection and Affordable Care Act, Public Law No. 111-148, that were not resolved by *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012), its request is denied.

Accordingly, the administrative law judge's Order awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge