

BRB No. 11-0780 BLA

MYRA L. GIBSON )  
(Widow of BERNARD GIBSON) )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 NEW RIVER COMPANY/MOUNTAIN ) DATE ISSUED: 08/06/2012  
 LAUREL RESOURCES )  
 )  
 and )  
 )  
 WEST VIRGINIA COAL WORKERS' )  
 PNEUMOCONIOSIS 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.

Ashley M. Harman and Kevin T. Gillen (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-5786) of Administrative Law Judge Richard A. Morgan, with respect to 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 application for benefits on March 25, 2011.<sup>1</sup> The administrative law judge determined that claimant is automatically entitled to survivor's benefits under amended Section 932(l) of the Act, based on the award of benefits in the miner's claim.<sup>2</sup> Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the constitutionality of amended Section 932(l), and asserts, in the alternative, that it does not apply to the present claim, based on the filing date of the miner's claim. Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs, responds and asserts that the administrative law judge properly awarded benefits under amended Section 932(l).<sup>3</sup>

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,

---

<sup>1</sup> Claimant is the widow of the miner, Bernard Gibson. Director's Exhibit 2. The miner filed a claim on October 17, 1979, which resulted in an award of benefits. Director's Exhibit 1. The miner was in pay status at the time of his death on March 17, 2011. Director's Exhibits 1, 4.

<sup>2</sup> Section 1556 of the Patient Protection and Affordable Care Act (PPACA) included amendments to the Black Lung Benefits Act (the Act), affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. 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). In pertinent part, the amendments revived Section 422(l) of the Act, 30 U.S.C. §932(l), providing 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.

<sup>3</sup> By Order dated May 11, 2012, the Board denied employer's motion to hold this case in abeyance, pending the resolution of the legal challenges to the PPACA and the appeal in *Stacy v. Olga Co.*, 24 BLR 1-207 (2010). *Gibson v. New River Co.*, BRB No. 11-0780 BLA (May 11, 2012) (Order) (unpub.). Subsequent to the issuance of this order, the United States Supreme Court upheld the validity of the PPACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012).

and is in accordance with applicable law.<sup>4</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer asserts that the retroactive application of amended Section 932(l) to this claim constitutes a violation of its due process rights and an unconstitutional taking of private property. Employer also maintains that the operative date for determining eligibility for survivor’s benefits pursuant to amended Section 932(l) is the date that the miner’s claim was filed, not the date that the survivor’s claim was filed.

The constitutional arguments raised by employer are virtually identical to the ones that the United States Court of Appeals for the Fourth Circuit rejected in *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383-89, 25 BLR 2-65, 2-74-85 (4th Cir. 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, 25 BLR 2-13, 2-44-61 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). For the reasons set forth in *Stacy*, we also reject employer’s arguments. Further, the court in *Stacy* affirmed the Board’s holding 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*, 671 F.3d at 388-89, 25 BLR at 2-82-83. We hold that there is no merit, therefore, in employer’s contention 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 Section 422(l) of the Act, 30 U.S.C. §932(l).

---

<sup>4</sup> The record reflects that the miner’s coal mine employment was in West Virginia. Director’s Exhibit 1. 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 (1989) (en banc).

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

SO ORDERED.

---

ROY P. SMITH  
Administrative Appeals Judge

---

REGINA C. McGRANERY  
Administrative Appeals Judge

---

BETTY JEAN HALL  
Administrative Appeals Judge