

BRB No. 11-0826 BLA

MARY M. KUDLAWIEC)	
(Widow of PETER KUDLAWIEC))	
)	
Claimant-Respondent)	
)	
v.)	
)	
BARNES AND TUCKER COMPANY)	DATE ISSUED: 08/10/2012
)	
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.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose, LLC), Johnstown, Pennsylvania, for employer.

Maia S. Fisher (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 appeals the Decision and Order Granting Director's Motion for Summary Decision and Awarding Survivor's Benefits (2011-BLA-6072) of Administrative Law Judge Thomas M. Burke, rendered on a survivor's claim filed on

April 26, 2011, pursuant to the provisions of the Black Lung Benefits Act,¹ 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).

In ruling on a motion for summary decision filed by the Director, Office of Workers' Compensation Programs (the Director), the administrative law judge found that claimant is derivatively entitled to survivor's benefits, pursuant to amended Section 932(l), as her claim was filed after January 1, 2005, the claim was pending on or after March 23, 2010, and the miner was receiving benefits pursuant to a claim filed during his lifetime.² Accordingly, the administrative law judge awarded benefits.

On appeal, employer requests that the award of survivor's benefits in this case be vacated, pending resolution of the constitutionality of the PPACA. Employer contends that application of amended Section 932(l) is premature because there will be no way for employer to recoup improperly paid benefits in the event that the PPACA is ultimately found to be unconstitutional. Claimant has not responded. The Director has filed a Motion for Summary Affirmance of Award. Employer replies, reiterating its contentions.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order Granting Director's Motion for Summary Decision and Awarding Survivor's Benefits must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.³ 33 U.S.C. §921(b)(3), as incorporated by 30

¹ Claimant is the widow of the miner, who died on April 13, 2011. Director's Exhibit 1.

² At the time of his death, the miner had been found to be entitled to federal black lung benefits, pursuant to a claim filed during his lifetime. Director's Exhibit 1. That award became final on February 25, 1989. *Id.*

³ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc). Director's Exhibit 1.

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In this case, the administrative law judge found that 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 on or after March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death. Decision and Order Granting Director’s Motion for Summary Decision and Awarding Survivor’s Benefits at 1-3. As the Director accurately notes, employer has not challenged any of these findings, so they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Director’s Motion for Summary Affirmance of Award at 2; Employer’s Memorandum in Support of Petition for Review at 7; Petitioner’s Objection to Motion for Summary Affirmance at 1. Employer’s argument, that further proceedings or actions related to this claim should 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). We, therefore, grant the Director’s motion, and affirm the administrative law judge’s determination that claimant is derivatively entitled to benefits pursuant to amended Section 932(l) of the Act. 30 U.S.C. §932(l).

Accordingly, the administrative law judge’s Decision and Order Granting Director’s Motion for Summary Decision and Awarding Survivor’s Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge