

BRB No. 12-0212 BLA

IMOGENE MATNEY)
(Widow of ANDERSON MATNEY))
)
 Claimant-Respondent)
)
 v.)
)
 VANDYKE BROTHERS COAL)
 COMPANY, INCORPORATED)
)
 and)
)
 VIRGINIA PROPERTY AND CASUALTY) DATE ISSUED: 12/04/2012
 INSURANCE GUARANTY ASSOCIATION)
)
 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 Pamela J. Lakes,
Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford &
Reynolds), Norton, Virginia, for claimant.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for
employer/carrier.

Richard A. Seid (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/carrier (employer) appeals the Decision and Order Awarding Benefits (2011-BLA-5414) of Administrative Law Judge Pamela J. Lakes (the administrative law judge), rendered on a subsequent survivor's claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(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).

Claimant filed her current survivor's claim on August 31, 2010. Director's Exhibit 2. On November 9, 2010, the district director issued a Proposed Decision and Order, wherein he found that claimant was derivatively entitled to benefits pursuant to amended Section 932(l). Director's Exhibit 7. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 8.

¹ Claimant is the widow of the miner, who died on March 14, 2000. Director's Exhibit 71-4. The miner filed his first claim for benefits on February 5, 1990, which was denied by Administrative Law Judge Edward Terhune Miller on May 15, 1995. Director's Exhibit 35-82. The Board affirmed the denial of benefits on February 28, 1996. *Matney v. Vandyke Brothers Coal Co.*, BRB No. 95-1685 BLA (Feb. 28, 1996) (unpub.); Director's Exhibit 35-91. The miner filed a subsequent claim for benefits on February 24, 1998. Director's Exhibit 1. During the pendency of the administrative processing of the miner's subsequent claim for benefits, claimant filed her initial claim for survivor's benefits on April 11, 2000. Director's Exhibit 71-1. The miner's subsequent claim and the survivor's claim were remanded to the district director for consolidation. On January 22, 2002, Administrative Law Judge Mollie W. Neal awarded benefits in the miner's claim and denied benefits in the survivor's claim. Director's Exhibit 1. Claimant's subsequent requests for modification of her survivor's claim were denied by the district director on March 20, 2003, April 15, 2004, and May 12, 2004. Director's Exhibit 1.

On September 30, 2011, employer filed a Motion for Summary Decision, arguing that claimant is not entitled to survivor's benefits because her prior claim was finally denied and her subsequent claim is barred pursuant to the principle of res judicata, as claimant has failed to prove a requisite change unrelated to the miner's physical condition at the time of his death pursuant to 20 C.F.R. §725.309(d)(3). On October 7, 2011, the administrative law judge cancelled the hearing in this matter and issued an Order directing the parties to show cause why employer's motion should not be granted. Claimant and the Director, Office of Workers' Compensation Programs (the Director), responded, arguing 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. The Director, therefore, filed a Motion for Summary Judgment in support of an award of survivor's benefits. Employer filed a reply in support of its position and, alternatively, requested that the case be held in abeyance.

In her Decision and Order Awarding Benefits, the administrative law judge agreed with the Director's position that subsequent survivor's claims are not barred under 20 C.F.R. §725.309(d) and that, pursuant to amended Section 932(l), derivative benefits are available to an eligible survivor of a miner who was eligible to receive lifetime benefits at the time of his death, if the claim is filed after January 1, 2005 and is pending on or after March 23, 2010. Finding that claimant meets the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l), the administrative law judge granted the Director's Motion for Summary Decision, and awarded survivor's benefits.

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 an unconstitutional taking of private property.² Employer contends that the operative date for determining eligibility pursuant to amended Section 932(l) is the date that the miner's claim was filed, not the date that any survivor's claim was filed. Lastly, employer argues that claimant is not eligible for derivative survivor's benefits under amended Section 932(l), because her prior claim was finally denied in 2004 and her subsequent claim is barred pursuant to the provisions at 20 C.F.R. §725.309(d)(3) and the fundamental principle of res judicata. 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,

² By Order issued on June 4, 2012, the Board denied employer's motion to hold this appeal in abeyance.

and in accordance with applicable law.³ 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).

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 and a taking of private property, 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, 2011)(Order)(unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). *See also B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Further, 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. *W. Va. CWP Fund v. Stacy*, 671 F. 3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012). For the reasons set forth in *Stacy*, we reject employer’s arguments to the contrary. We also reject employer’s contention that claimant’s subsequent claim is barred under the doctrine of res judicata, for the reasons set forth in *Richards v. Union Carbide Corp.*, 25 BLR 1-31 (2012)(en banc)(McGranery, J., concurring and dissenting)(Boggs, J., dissenting), *appeal docketed*, No. 12-1294 (4th Cir. Mar. 8, 2012). Because claimant filed her subsequent claim after January 1, 2005, her claim was pending on or after March 23, 2010, and the miner was eligible to receive benefits under a final award at the time of his death, we affirm the administrative law judge’s finding that claimant is derivatively entitled to survivor’s benefits pursuant to amended Section 932(l).⁴

³ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant’s last coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director’s Exhibit 35-2.

⁴ Employer’s additional challenges to the constitutionality of the Patient Protection and Affordable Care Act and the severability of its non-health care provisions are moot. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012).

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

BETTY JEAN HALL
Administrative Appeals Judge