

BRB No. 11-0430 BLA

FANNIE L. McCOY)	
(Widow of VIVIAN E. McCOY))	
)	
Claimant-Respondent)	
)	
v.)	
)	
ROYALTY SMOKELESS COAL)	DATE ISSUED: 02/08/2012
COMPANY)	
)	
Employer-Petitioner)	
)	
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, Administrative Law Judge, United States Department of Labor.

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

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Helen H. Cox (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.

Employer appeals the Order Awarding Survivor's Benefits (2011-BLA-5154) of Administrative Law Judge William S. Colwell, rendered on a claim filed on January 24, 2007, 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).¹ On March 23, 2010, while this case was pending before the administrative law judge, amendments to the Act, included in the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, were enacted. The amendments, in pertinent part, changed the entitlement criteria for certain claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this survivor's claim, the amendments revive Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that a 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.²

On December 30, 2010, the Director, Office of Workers' Compensation Programs (the Director), filed a motion for summary decision, asserting that there is no genuine issue as to any material fact concerning whether claimant is entitled to benefits pursuant to amended Section 932(l). Claimant did not file a position statement on this issue.

¹ Claimant is the surviving spouse of the miner, Vivian E. McCoy, who died on December 16, 2006. Director's Exhibits 7, 8. The miner was receiving federal black lung benefits at the time of his death, pursuant to a claim he filed on December 9, 1991, which was awarded by Administrative Law Judge Sheldon R. Lipson on August 2, 1993. Director's Exhibit 1.

² As it existed prior to March 23, 2010, Section 422(l) provided that:

In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner, except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981, [sic].

30 U.S.C. §932(l). On March 23, 2010, the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 amended Section 422(l) as follows: "(b) Continuation of Benefits – Section 422(l) of the Black Lung Benefits Act (30 U.S.C. §932(l)) is amended by striking 'except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981.'" Pub. L. No. 111-148, §1556(b), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §932(l)). Section 1556 of Public Law No. 111-148 provides further that "[t]he amendments made by this section shall apply with respect to claims filed under part B or part C of the Black Lung Benefits Act (30 U.S.C. 921 et seq., 931 et seq.) after January 1, 2005, that are pending on or after the date of enactment of this Act." Pub. L. No. 111-148, §1556(c).

Employer, however, opposed the motion, maintaining that the requirements of amended Section 932(l) are not satisfied in this case, based on the filing date of the miner's claim.

In his Order Awarding Survivor's Benefits, the administrative law judge rejected employer's argument that amended Section 932(l) was inapplicable because the miner's claim was filed prior to January 1, 2005, and was not pending on or after March 23, 2010. The administrative law judge found that claimant satisfied the criteria for derivative entitlement pursuant to amended Section 932(l), and awarded benefits commencing December 2006, the month in which the miner died.

On appeal, employer asserts that retroactive application of the amendments is unconstitutional and that amended Section 932(l) is not applicable to this case, based on the filing date of the miner's claim. Employer also requests that this case be held in abeyance until the constitutional challenges to the PPACA are finally decided. See *Florida v. U.S. Dept. of HHS*, 648 F.3d 1235 (11th Cir. 2011), *cert. granted*, 2011 WL 5515164 (U.S. Nov. 14, 2011) (No. 11-398). Both claimant and the Director respond, urging the Board to reject employer's arguments and affirm the 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.³ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and 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) (unpub. Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). See also *B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, BLR (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Further, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has 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 v. Olga*

³ 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).

Coal Co., 24 BLR 1-207 (2010), *aff'd sub. nom. W. Va. CWP Fund v. Stacy*, F. 3d , BLR , No. 11-1020, 2011 WL 6396510 (4th Cir. Dec. 21, 2011), *pet. for reh'g filed* Jan. 20, 2012. We also deny employer's request to hold this case in abeyance pending resolution of the legal challenges to the PPACA, Public Law Number 111-148.⁴

We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant filed her survivor's claim after January 1, 2005, and that her claim was pending on March 23, 2010. Order Awarding Survivor's Benefits at 2; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). The record also reflects that the miner was receiving black lung benefits at the time of his death, pursuant to a claim he filed during his lifetime. See Director's December 27, 2010 Motion for Summary Decision; Director's Exhibits 1, 2. Thus, we affirm the administrative law judge's finding that claimant is entitled to benefits pursuant to amended Section 932(l).

⁴ We reject employer's assertion that if any portion of the PPACA is declared unconstitutional, the amendments to the Black Lung Benefits Act, including amended Section 932(l), must also be declared invalid. See *W. Va. CWP Fund v. Stacy*, F. 3d , BLR , No. 11-1020, 2011 WL 6396510 (4th Cir. Dec. 21, 2011), *pet. for reh'g filed* Jan. 20, 2012; Employer's Brief in Support of Petition for Review at 4-10.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge