

BRB No. 12-0273 BLA

CAROLYN GOSCINSKI)
(Widow of LEONARD GOSCINSKI))
)
 Claimant-Respondent)
)
 v.)
)
 TERRY EAGLE COAL COMPANY LLC) DATE ISSUED: 01/25/2013
)
 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 Granting Director's Motion for Summary Decision and Awarding Survivor's Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

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

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 HALL, Administrative Appeals Judges.

PER CURIAM:

The West Virginia Coal Workers' Pneumoconiosis Fund (carrier), on behalf of employer, Terry Eagle Coal Company, appeals the Decision and Order Granting Director's Motion for Summary Decision and Awarding Survivor's Benefits (2011-BLA-6288) of Administrative Law Judge Thomas M. Burke rendered on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). Claimant¹ filed this survivor's claim on July 12, 2011.

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*).

On September 30, 2011, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision with the administrative law judge, arguing that under amended Section 932(*l*), and given the filing date of her claim, there was no genuine issue of material fact concerning whether claimant was automatically entitled to benefits pursuant to amended Section 932(*l*). Carrier filed a response in opposition to the Director's motion, challenging the constitutionality and applicability of amended Section 932(*l*) to this case. Claimant did not respond to the motion.

In his Decision and Order Granting Director's Motion for Summary Decision and Awarding Survivor's Benefits, the administrative law judge rejected carrier's arguments and granted the Director's motion. Specifically, the administrative law judge determined that claimant satisfied the criteria for derivative entitlement pursuant to amended Section 932(*l*), finding that her claim was filed after January 1, 2005, the claim was pending after March 23, 2010, and the miner was receiving benefits at the time of his death pursuant to a claim filed during his lifetime.² Accordingly, the administrative law judge awarded benefits, commencing as of June 2011, the month in which the miner died.

¹ Claimant is the widow of the miner, who died on June 29, 2011. Director's Exhibit 7.

² The miner was receiving federal black lung benefits at the time of his death pursuant to a claim filed on May 18, 1999, based on Administrative Law Judge Gerald M. Tierney's September 14, 2001 Decision and Order - Awarding Benefits. Director's Exhibit 2.

On appeal, carrier 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. Carrier also contends that amended Section 932(l) is not applicable to this claim, arguing 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 the survivor's claim was filed. Carrier further requests that the Board hold the case in abeyance pending resolution of the legal challenges to the PPACA.³ The Director responds, urging affirmance of the award of benefits pursuant to amended Section 932(l). Claimant has not filed a response brief.

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.⁴ 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).

Initially, we reject carrier's contention that retroactive application of the automatic entitlement provision of amended Section 932(l) to claims filed after January 1, 2005 constitutes a due process violation. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Corp.*, 24 BLR 1-207 (2010), *cert. denied*, 568 U.S. (2012); *see also B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-16 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). We also deny carrier's request to remand the case to the administrative law judge for development of evidence relevant to the economic impact of amended Section 932(l), since carrier's constitutional argument with regard to the Takings Clause of the Fifth Amendment to the United States Constitution has been rejected by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises. *See Stacy*, 671 F.3d at 387, 25 BLR at 2-80 (holding that "the mere imposition of an obligation to pay money does not give rise to a claim under

³ Carrier's request to hold this case in abeyance is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012); *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Corp.*, 24 BLR 1-207 (2010), *cert. denied*, 568 U.S. (2012).

⁴ As the miner was last employed in the coal mining industry in West Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibits 1, 2.

the Takings Clause.”).

Further, there is no merit to carrier’s assertion that amended Section 932(l) is not applicable, based on the filing date of the miner’s claim. The Fourth Circuit 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. *See Stacy*, 671 F.3d at 388-89, 25 BLR at 2-83-84.

Because claimant filed her survivor’s claim after January 1, 2005, her claim was pending after 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 amended Section 932(l). *See Decision and Order Granting Director’s Motion for Summary Decision and Awarding Survivor’s Benefits at 4; Director’s Exhibits 2, 4.*

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

BETTY JEAN HALL
Administrative Appeals Judge