

BRB No. 11-0720 BLA

KAREN L. ABNER )  
(Widow of CHARLES W. ABNER) )

Claimant-Respondent )

v. )

G & A COAL COMPANY, )  
INCORPORATED )

and )

DATE ISSUED: 06/07/2012

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 Order of Thomas M. Burke, Administrative Law Judge,  
United States Department of Labor.

Jeffrey R. Soukup and Tiffany B. Davis (Jackson Kelly PLLC),  
Morgantown, West Virginia, for employer/carrier.

Emily Goldberg-Kraft (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 Order (11-BLA-5547) of Administrative Law Judge Thomas M. Burke awarding benefits on a 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). This case involves a survivor's claim filed on June 29, 2010.<sup>1</sup>

On March 23, 2010, amendments to the Act affecting claims filed after January 1, 2005, were enacted. The amendments, in pertinent part, revive Section 932(l) of the Act, which provides that a survivor of a miner who was determined to be 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. Pub. L. No. 111-148, §1556(b) (to be codified at 30 U.S.C. §932(l)).

Claimant filed a survivor's claim on June 29, 2010. Director's Exhibit 3. On January 7, 2011, 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 15. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing.

On May 20, 2011, the Director, Office of Workers' Compensation Programs (the Director), moved for a summary decision, arguing that there was no genuine issue of material fact concerning whether claimant was automatically entitled to benefits pursuant to amended Section 932(l). Employer filed a response in opposition to the Director's motion for a summary decision.

In an Order dated June 28, 2011, the administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l). Accordingly, the administrative law judge awarded survivor's benefits, commencing as of April 2010, the month in which the miner died.

On appeal, employer challenges the constitutionality of amended Section 932(l), and its application to this claim. Claimant has not filed a response brief. The Director responds, urging the Board to affirm the administrative law judge's award of benefits. In a reply brief, employer reiterates its previous contentions.

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<sup>1</sup> Claimant is the widow of the miner, who died on April 9, 2010. Director's Exhibit 6. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim. Director's Exhibit 1.

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.<sup>2</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer argues that retroactive application of amended Section 932(l) is unconstitutional, as a violation of employer's due process rights and as an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. Employer also contends that the operative date for determining eligibility under amended Section 932(l) is the date the miner's claim was filed, not the date the survivor's claim was filed. The arguments that employer makes are virtually identical to the ones that the United States Court of Appeals for the Fourth Circuit recently rejected. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383-89 (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 (3d Cir. 2011). For the reasons set forth in *Stacy*, we reject employer's arguments. We also reject employer's request that this case be held in abeyance pending resolution of the legal challenges to Public Law No. 111-148. *See Stacy*, 671 F.3d at 383 n.2; *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011) (unpub.).

In this case, 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 after March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death. Therefore, we affirm the administrative law judge's determination that claimant is derivatively entitled to benefits pursuant to amended Section 932(l). 30 U.S.C. §932(l).

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<sup>2</sup> The record reflects that the miner's last coal mine employment was in West Virginia. Director's Exhibit 1. Accordingly, 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 (1989) (en banc).

Accordingly, the administrative law judge's Order awarding benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge