

BRB No. 11-0745 BLA

KATHERLEEN MULLINS	)	
(Widow of ERNEST MULLINS)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JEWELL RIDGE COAL COMPANY	)	DATE ISSUED: 06/27/2012
	)	
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.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Jonathan Rolfe (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 appeals the Order Awarding Survivor's Benefits (2011-BLA-5650) of Administrative Law Judge William S. Colwell, rendered on a survivor's subsequent 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). Claimant<sup>1</sup> filed her initial claim for benefits on April 21, 2006, which was finally denied by the district director on October 31, 2006, as claimant did not prove that the miner had pneumoconiosis or that his death was due to pneumoconiosis. Director's Exhibit 2.

On March 23, 2010, Congress passed the Patient Protection and Affordable Care Act (PPACA), which included amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. *See* Section 1556 of the PPACA, Public Law No. 111-148 (2010). In pertinent part, the amendments revive Section 422(l) of the Act, 30 U.S.C. §932(l), providing 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.

Claimant filed her present subsequent claim on September 23, 2010. Director's Exhibit 3. In a Proposed Decision and Order awarding benefits dated January 6, 2011, the district director determined that, pursuant to amended Section 932(l), claimant is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis, based on the award of benefits issued in the miner's lifetime claim. Director's Exhibit 14. At employer's request, the case was transferred to the Office of Administrative Law Judges for a hearing and assigned to Administrative Law Judge William S. Colwell (the administrative law judge).

The Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision and argued that there is no genuine issue as to any material fact concerning whether claimant is entitled to benefits under the Act, as amended by the PPACA. Employer urged the administrative law judge to deny the Director's motion. In addition, employer challenged the constitutionality of amended

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<sup>1</sup> Claimant is the widow of the miner, Ernest Mullins. The miner filed a claim for benefits on July 4, 1982, which was denied by the district director on April 6, 1983, because the miner did not prove that he was totally disabled due to pneumoconiosis. Director's Exhibit 1. The miner filed a duplicate claim on August 7, 1984. *Id.* In a Decision and Order Granting Benefits dated March 16, 1989, Administrative Law Judge Giles J. McCarthy found that the miner established the existence of complicated pneumoconiosis and awarded benefits. *Id.* The miner received benefits pursuant to this award until his death on April 7, 2006. Director's Exhibit 6.

Section 932(l) and maintained that its application to this subsequent claim is barred under 20 C.F.R. §725.309(d)(3) and the principle of res judicata. Employer further requested that the administrative law judge hold the case in abeyance, pending promulgation of implementing regulations, resolution of the constitutionality of the PPACA, and review of the Board's decision in *Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), by the United States Court of Appeals for the Fourth Circuit. Alternatively, employer requested that the administrative law judge schedule a hearing and permit employer to submit evidence regarding the economic impact of the amendments in general, and in this case in particular.

The administrative law judge rejected employer's arguments, and requests, and found that claimant is automatically entitled to survivor's benefits, based on the miner's lifetime award of benefits and the recent amendments to Section 932(l). Accordingly, the administrative law judge awarded survivor's benefits, commencing as of December 2006.

On appeal, employer challenges the constitutionality of amended Section 932(l), and its retroactive application to the survivor's subsequent claim, and requests that the Board hold the case in abeyance, pending resolution of the constitutionality of the PPACA and the severability of the non-health care provisions. Employer maintains that if the Board does not reverse the award of benefits, due process requires that the case be remanded to the administrative law judge to give employer the opportunity to submit evidence of the economic impact of the amendments. Employer also asserts that this subsequent claim is barred by 20 C.F.R. §725.309(d)(3) and the principle of res judicata. Employer further contends that the operative date for determining eligibility for survivor's benefits under amended Section 932(l) is the filing date of the miner's claim, which was prior to January 1, 2005. Claimant and the Director respond and urge the Board to reject employer's arguments.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

As an initial matter, 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 an unlawful taking of private

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<sup>2</sup> 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).

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 2-16 (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 in *Stacy*, 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. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-69 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010). Having disposed of employer's allegations concerning the validity of amended Section 932(l), we also deny employer's request to hold this case in abeyance and its request to remand this case to the administrative law judge so that employer can submit evidence establishing that amended Section 932(l) "effects an unconstitutional taking." Employer's Brief at 17; *see Stacy*, 671 F.3d at 383 n.2, 25 BLR at 2-74 n.2; *Mathews*, 24 BLR at 1-201.

Employer next contends that, pursuant to 20 C.F.R. §725.309(d)(3) and the doctrine of *res judicata*, claimant is ineligible for derivative survivor's benefits under amended Section 932(l). In *Richards v. Union Carbide Corp.*, BLR , BRB Nos. 11-0414 BLA and 11-0414 BLA-A (Jan. 9, 2012) (en banc) (McGranery, J., concurring and dissenting, Boggs, J., dissenting), *appeal docketed*, No. 12-1294 (4th Cir. Mar. 8, 2012), the Board rejected arguments substantially similar to those raised by employer in this case. The Board held that, by restoring the derivative entitlement provisions of Section 932(l), Congress effectively created a "change" that established a new condition of entitlement unrelated to whether the miner died due to pneumoconiosis. The Board determined, therefore, that amended Section 932(l) provides a basis for establishing a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d) in a survivor's subsequent claim. Accordingly, we reject employer's arguments that the subsequent claim is barred by 20 C.F.R. §725.309(d) and principles of *res judicata*, for the reasons set forth in *Richards*.

Because claimant filed her subsequent survivor's claim after January 1, 2005, her claim was pending on or 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), commencing December 1, 2006.<sup>3</sup>

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<sup>3</sup> We affirm, as unchallenged on appeal, the administrative law judge's finding that December 1, 2006, is the date from which claimant's benefits are payable. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Accordingly, the administrative law judge's Order Awarding Survivor's 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