

BRB No. 11-0469 BLA

LEONA J. WOOD)	
(Widow of FRED B. WOOD))	
)	
Claimant-Respondent)	
)	
v.)	
)	
ELKAY MINING COMPANY)	DATE ISSUED: 03/12/2012
)	
Employer-Petitioner)	
)	
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Douglas A. Smoot (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Barry H. Joyner (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 Decision and Order Awarding Benefits (2011-BLA-5196) of Administrative Law Judge Thomas M. Burke rendered on a survivor's 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 filed her survivor's claim on July 16, 2010.¹ Director's Exhibit 2.

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 February 8, 2011, 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).² Claimant did not file a position statement on this issue. 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. Employer further argued that the Director's position on this issue is not entitled to deference because it is contrary to the plain language of the statute. In reply, the Director urged the administrative law judge to reject employer's arguments.

In his Decision and Order Awarding 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 July 2010, the month in which the miner died.

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

¹ Claimant is the widow of the miner, Fred B. Wood, who died on July 4, 2010. Director's Exhibits 4, 5.

² The miner was receiving federal black lung benefits at the time of his death, pursuant to a claim filed on June 8, 2000, which was awarded by Administrative Law Judge Michael P. Lesniak on May 23, 2007. Director's Exhibit 1. By Order dated December 17, 2007, the Board granted employer's Motion to Withdraw Appeal and dismissed the appeal. *Wood v. Elkay Mining Co.*, BRB No. 07-0767 BLA (Dec. 17, 2007)(unpub. Order).

constitutes a violation of its due process rights and an unconstitutional taking of private property. Employer also 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 the survivor's claim was filed. Employer requests that further proceedings or actions related to this claim be held in abeyance, pending the resolution of the constitutional challenges to the PPACA in federal court. 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, 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)(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. *West Virginia CWP Fund v. Stacy*, F.3d , BLR , No. 11-1020, 2011 WL 6396510 (4th Cir. Dec. 21, 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010). For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary and, consistent with our reasoning in *Mathews*, we reject employer's request to hold this case in abeyance pending resolution of legal challenges to the PPACA. *See Stacy, slip op.* at 7-14, 16-18; *Mathews*, 24 BLR at 1-201; *Fairman v. Helen Mining Co.*, 24 BLR 1-225 (2011).⁴

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).

⁴ We reject employer's assertion that if any portion of the Patient Protection and Affordable Care Act (PPACA) is declared unconstitutional, the amendments to the Black Lung Benefits Act, including amended Section 932(l), must also be declared invalid. *See*

Because claimant filed her 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 Section 422(l) of the Act, 30 U.S.C. §932(l). Director's Exhibits 1, 2.

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

West Virginia CWP Fund v. Stacy, F. 3d , BLR , No. 11-1020, 2011 WL 6396510 (4th Cir. Dec. 21, 2011); Employer's Brief at 5-10.