

BRB No. 11-0472 BLA

CAUSBIE J. TENNEY)
(Widow of EMERY TENNEY))
)
Claimant-Respondent)
)
v.)
)
DANTE COAL COMPANY)
) DATE ISSUED: 03/14/2012
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.

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

George E. Roeder, III (Jackson Kelly PLLC), Morgantown, 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: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Awarding Survivor's Benefits (2011-BLA-5288) of
Administrative Law Judge William S. Colwell 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 claim on November 27, 2009.¹ Director's Exhibit 3.

Congress amended the Act in 2010, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. The amendments, in pertinent part, revive Section 932(l) of the Act, which provides that the eligible survivor of a miner who was found eligible to receive benefits at the time of his death is automatically entitled to receive payment of survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l).

Upon a motion for summary decision from the Director, Office of Workers' Compensation Programs (the Director), the administrative law judge issued an order on February 10, 2011, finding that the miner was entitled to benefits at the time of his death, that claimant is the miner's widow, and that her survivor's claim was filed after January 1, 2005, and was pending on March 23, 2010. Accordingly, the administrative law judge found claimant automatically entitled to survivor's benefits pursuant to amended Section 932(l).

On appeal, employer challenges the administrative law judge's application of amended Section 932(l) to this case. Claimant and the Director have filed response briefs, urging affirmance of the award of benefits. Employer has filed a reply brief reiterating its contentions.

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.² 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).

¹ Claimant is the widow of the miner, who died on October 21, 2009. Director's Exhibits 3, 14. At the time of his death, the miner was receiving federal black lung benefits pursuant to a November 30, 1988, decision by an administrative law judge that awarded benefits on his lifetime claim. Director's Exhibit 1. Employer does not contest that claimant is an eligible survivor of a miner who was determined eligible to receive benefits.

² The miner's coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United State Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

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's Brief at 5-15. 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. Employer's Brief at 16-19. These same arguments were recently rejected by the United States Court of Appeals for the Fourth Circuit and thus lack merit. *W. Va. CWP Fund v. Stacy*, No. 11-1020, 2011 WL 6396510, at *3-9 (4th Cir. Dec. 21, 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) (rejecting due process and takings challenges to amended Section 932(l)).

Employer also asks that this case be held in abeyance pending the United States Supreme Court's resolution of the legal challenges to Public Law No. 111-148. Employer's Brief at 20-26. Employer's request is denied. *See Stacy*, No. 11-1020, 2011 WL 6396510 at *3 n.2; *see also Stacy*, 24 BLR at 1-215; *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (unpub. Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011).

We therefore affirm the administrative law judge's determination that claimant is derivatively entitled to benefits pursuant to amended Section 932(l), because she filed her survivor's claim after January 1, 2005, she is an eligible survivor of the miner, the claim was pending on March 23, 2010, and the miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(l); Pub. L. No. 111-148, §1556(b), (c).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge