

BRB No. 11-0494 BLA

NELLIE STOTKA)	
(Widow of EDWARD STOTKA))	
)	
Claimant-Respondent)	
)	
v.)	
)	
U.S. STEEL CORPORATION)	DATE ISSUED: 03/29/2012
)	
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.

Vincent J. Roskovensky, II, Uniontown, Pennsylvania, for claimant.

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, 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: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2010-BLA-5772)
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).¹ The district director issued a Proposed Decision and Order on May 17, 2010, in which he found that claimant was automatically entitled to survivor's benefits pursuant to amended Section 932(l) of the Patient Protection and Affordable Care Act (PPACA).² Director's Exhibit 14. Employer opposed the award of benefits and requested a hearing that was held before the administrative law judge on January 19, 2011. At the hearing, the parties agreed that the only contested issues were the applicability and constitutionality of Section 1556 of the PPACA.

After considering the parties' post-hearing briefs, the administrative law judge found that claimant is an eligible survivor of a miner who was receiving benefits at the time of his death; that claimant filed her survivor's claim after January 1, 2005; and that her claim was pending on March 23, 2010. Accordingly, the administrative law judge determined that claimant was automatically entitled to survivor's benefits pursuant to amended Section 932(l), commencing on February 1, 2010, the first day of the month of the miner's death.

On appeal, employer contends that the operative date for determining eligibility for survivor's benefits under amended Section 932(l) is the date the miner's claim was filed, not the date the survivor's claim was filed. Employer also argues that Section 1556 of the PPACA violates Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), because the amendments create irreconcilable inconsistencies within the Act. Additionally, employer maintains that retroactive application of amended Section 932(l) is unconstitutional, because it violates employer's due process rights and constitutes an unlawful taking of employer's property. Employer also asserts that, because the PPACA has been declared unconstitutional in *Florida ex rel. Bondi v. U. S.*

¹ Claimant is the widow of the miner, Edward Stotka, who died on February 10, 2010. Director's Exhibit 4. At the time of his death, the miner was receiving federal black lung benefits pursuant to a Decision and Order Awarding Benefits issued by Administrative Law Judge Daniel L. Sarno, Jr., on March 29, 1988. Director's Exhibits 13, 14. Claimant filed this claim for survivor's benefits on March 12, 2010. Director's Exhibit 2.

² On March 23, 2010, amendments to the Black Lung Benefits Act, contained in the Patient Protection and Affordable Care Act, were enacted, which affect claims filed after January 1, 2005, that were pending on or after March 23, 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).

Dep't of Health & Human Servs., 780 F. Supp. 2d 1256 (N.D. Fla. 2011), the award of benefits should be vacated and the case remanded to the district director for a determination of whether the miner's death was due to pneumoconiosis. Employer further contends, in the alternative, that this case should be held in abeyance pending final resolution of any appeal in *Bondi* and until new regulations are promulgated by the Department of Labor. Finally, employer alleges that the amendments to the Act are not severable if all, or portions, of the PPACA are found to be unconstitutional. Claimant and the Director, Office of Workers' Compensation Programs, respond in support of the 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. 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).

With respect to employer's contention regarding the relevant filing date, the Board has held 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. *Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *aff'd sub. nom. W. Va. CWP Fund v. Stacy*, F.3d , BLR , No. 11-1020, 2011 WL 6396510 (4th Cir. Dec. 21, 2011). For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary.

Furthermore, as we did in *Fairman v. Helen Mining Co.* 24 BLR 1-225, 1-229-30 (2011), *appeal docketed*, No. 11-2445 (3d Cir. May 31, 2011), we reject employer's assertions that application of amended Section 932(l) creates irreconcilable inconsistencies in the Act and violates Section 7(c) of the APA. We also 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 Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011); *B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, BLR (3d Cir. 2011).

Lastly, the decision cited by employer, declaring the individual mandate of the PPACA unconstitutional, has no effect on the instant case, as an order was issued staying that decision, pending appeal, and the United States Court of Appeals for the Eleventh Circuit severed the litigation on the individual mandate from the litigation on the remainder of the Act. *Florida ex rel. Bondi v. U.S. Dep't. of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011); *Bondi*, 780 F. Supp. 2d at 1320. Thus, as we did in

Mathews, we reject employer's request that this case be held in abeyance pending resolution of the legal challenges to Public Law No. 111-148 or pending the promulgation of new regulations. *Mathews*, 24 BLR at 1-201.

Upon review of the administrative law judge's application of amended Section 932(l) in this case, we affirm the administrative law judge's findings that: Claimant is an eligible survivor of the miner; the miner was receiving benefits pursuant to a final award at the time of his death; the survivor's claim was filed after January 1, 2005; and the survivor's claim was pending on March 23, 2010. Decision and Order at 2. We also affirm, therefore, the administrative law judge's determination that claimant is entitled to receive survivor's benefits pursuant to amended Section 932(l). *Id.* at 5.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge