

BRB No. 10-0580 BLA

ROSIE PUGH)	
(Widow of ROBERT J. PUGH))	
)	
Claimant-Respondent)	
)	
v.)	
)	
UNITED STATES STEEL MINING)	
COMPANY)	DATE ISSUED: 05/31/2011
)	
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, Associate Chief Administrative Law Judge, United States Department of Labor.

Joseph Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay, Casto & Chaney PLLC), Charleston, West Virginia, for employer.

Jonathan P. 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 (2009-BLA-5660) of Associate Chief Administrative Law Judge William S. Colwell on a claim filed on September 23, 2008 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

On March 23, 2010, amendments to the Act, relating to claims filed after January 1, 2005, became effective. The amendments, in pertinent part, revived Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that a 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 April 8, 2010, the administrative law judge acknowledged that the miner was receiving federal black lung benefits pursuant to an August 30, 1996 Decision and Order on Remand issued by Administrative Law Judge Alexander Karst and ordered the parties to file position statements as to why benefits should not be awarded in the survivor's claim pursuant to Section 1556 of Public Law No. 111-148. The Director, Office of Workers' Compensation Programs (the Director), moved for summary decision in his response and asserted that, pursuant to amended Section 932(*l*), claimant is automatically entitled to benefits as a matter of law, and that there is no genuine issue as to any material fact concerning her entitlement. Claimant also contended that she is automatically entitled to benefits under Section 1556 of Public Law No. 111-148. Employer disagreed and requested that the Board hold the case in abeyance pending resolution of legal challenges to Public Law No. 111-148. Employer also argued that application of Section 1556 of Public Law No. 111-148 to the present claim would be erroneous, as amended Section 932(*l*) is unconstitutional and conflicts with other provisions of the Act. Employer further alleged that amended Section 932(*l*) cannot be applied because the Department of Labor (DOL) has not promulgated implementing regulations. Finally, employer urged the administrative law judge to deny the Director's request for a summary decision and requested that this claim be returned to the schedule for a hearing on the merits.

The administrative law judge issued an Order Awarding Survivor's Benefits in which he found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(*l*). Accordingly, the administrative law judge awarded benefits.

¹ Claimant is the surviving spouse of the miner, who died on September 8, 2008. Director's Exhibits 2, 8-9, 18; Claimant's Exhibit 1.

In employer's brief on appeal, it challenges the administrative law judge's application of amended Section 932(l) in this case. Claimant responds and urges the Board to affirm the award of benefits. The Director also responds and urges affirmance of the administrative law judge's award of benefits. Employer has replied to the response briefs filed by claimant and the Director and alleges that amended Section 932(l) is not available to claimant, as the relevant date for determining whether Section 932(l) is applicable is the filing date of the miner's lifetime claim. Employer contends that, because the miner's claim was filed before January 1, 2005, amended Section 932(l) does not apply in this case.²

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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We reject employer's arguments regarding the constitutionality of the amendments, as applied in this case. The allegations employer makes regarding the violation of its right to due process and the unlawful taking of its property are identical to the ones that the Board rejected in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-198-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (unpub. Order). We, therefore, reject them here for the reasons set forth in that case. *Mathews*, 24 BLR at 1-198-200; *see also Stacy v. Olga Coal Co.*, 24 BLR 1- , BRB No. 10-0113 BLA, slip op. at 8 (Dec. 22, 2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011).

We further reject employer's assertion that amended Section 932(l) is rendered unenforceable by language in Sections 411(a) and 412(a)(2) of the Act, 30 U.S.C. §§921(a), 922(a)(2). Those two sections provide, in relevant part, that benefits are to be paid at the applicable rate to a survivor when a miner was totally disabled due to pneumoconiosis at the time of his death, "except with respect to a claim filed under part

² We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant filed her survivor's claim after January 1, 2005, that her claim was pending on March 23, 2010, and that, at the time of the miner's death, he was receiving benefits based on the claim he filed on October 2, 1992. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Order Awarding Survivor's Benefits at 1-4.

³ This case arises within the jurisdiction of the of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

C of this subchapter on or after the effective date of the Black Lung Benefits Amendments of 1981. . . .” 30 U.S.C. §§921(a), 922(a)(2). As the Board recently held in *Fairman v. Helen Mining Co.*, 24 BLR 1- , BRB No. 10-0494 BLA (Apr. 29, 2011), Section 932(l), as amended, is not rendered inapplicable by the language in Sections 921(a) and 922(a)(2). In Section 1556, Congress specifically amended Section 932(l) by striking its former language stating that the provision could not apply to claims filed on or after the effective date of the Black Lung Benefits Amendments of 1981, and mandated that the amendment “shall apply with respect to claims,” such as this one, “filed under . . . Part C . . . after January 1, 2005, that are pending on or after the date of enactment of this Act.” Pub. L. No. 111-148, §1556(c), 124 Stat. 119 (2010)(emphasis added). Thus, survivors’ claims filed after January 1, 2005, in which the survivor has derivative entitlement, are not subject to the inconsistent language that employer highlights in 30 U.S.C. §§921(a), 922(a)(2). *Fairman*, BRB No. 10-0494 BLA, slip op. at 4.

We also reject employer’s arguments regarding the operative filing date for determining eligibility pursuant to amended Section 932(l). The Board has held that the operative date for determining eligibility for survivors’ benefits under Section 932(l) is the date that the survivor’s claim was filed, not the date that the miner’s claim was filed. *Stacy*, slip op. at 7. The Board specifically held that, under Section 932(l), an eligible survivor who files a claim after January 1, 2005, that is pending on or after the March 23, 2010 effective date of the Section 1556 amendments, is entitled to benefits, based solely on the miner’s lifetime award, without having to prove that the miner died due to pneumoconiosis. *Id.*; see 30 U.S.C. §932(l).

Finally, as we noted in *Mathews*, the mandatory language of amended Section 932(l) supports the conclusion that the provision is self-executing. Therefore, there is no need to hold this case in abeyance pending the promulgation of new regulations. *Mathews*, 24 BLR at 1-201. Employer’s request, that this case be held in abeyance pending resolution of the legal challenges to Public Law No. 111-148, is also denied. See *Mathews*, 24 BLR at 1-201. Therefore, we affirm the administrative law judge’s determination that claimant is derivatively entitled to benefits pursuant to amended Section 422(l) of the Act, 30 U.S.C. §932(l).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge