

BRB No. 11-0621 BLA

VIRGINIA L. ROBBINS, Deceased)
(Widow of FRANKLIN ROBBINS))
)
 Claimant-Respondent)
)
 v.) DATE ISSUED: 05/03/2012
)
 WESTMORELAND COAL COMPANY)
)
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Order of Dismissal of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Sarah M. Hurley (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, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order of Dismissal (11-BLA-5044) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) canceling the scheduled hearing and awarding benefits 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).

Claimant¹ filed her claim for survivor's benefits on August 21, 2006. Director's Exhibit 2. In a Decision and Order dated May 15, 2008, Administrative Law Judge Paul C. Johnson, Jr., denied benefits because he found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Director's Exhibit 39. Upon review of claimant's appeal, the Board affirmed the denial of benefits. *V.R. [Robbins] v. Westmoreland Coal Co.*, BRB No. 08-0634 BLA (Apr. 16, 2009)(unpub.); Director's Exhibit 48.

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, were enacted. The amendments, in pertinent part, revive 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).

Claimant timely requested modification of the denial of her survivor's claim pursuant to 20 C.F.R. §725.310. Director's Exhibit 49. The district director awarded benefits to claimant pursuant to amended Section 932(l), and employer requested a hearing. Director's Exhibits 53, 54, 58.

On March 25, 2011, the administrative law judge ordered employer to show cause, within thirty days, why claimant should not be found entitled to benefits pursuant to amended Section 932(l). *See* 20 C.F.R. §725.452(d). Employer responded, arguing that amended Section 932(l) should not be applied, and requesting that the case be held in abeyance.

In his Order of Dismissal dated May 4, 2011, the administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l). Accordingly, the administrative law judge canceled the hearing, and awarded survivor's benefits.

On appeal, employer challenges the constitutionality of amended Section 932(l), and its application to this claim.² Claimant has not filed a response brief. The Director,

¹ Claimant was the widow of the miner, who died on April 26, 2006. Director's Exhibit 8. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim. Unstamped Exhibit. Claimant died on September 6, 2011, and her daughter, Deborah Ann Robbins Morris, is pursuing the claim as the personal representative of the widow's estate. *Robbins v. Westmoreland Coal Co.*, BRB No. 11-0621 BLA (Feb. 3, 2012)(unpub. Order).

² Employer does not challenge the administrative law judge's findings that claimant established each fact necessary to demonstrate her entitlement under amended

Office of Workers' Compensation Programs, responds in support of the administrative law judge's application of amended Section 932(l) to this case.

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).

Employer argues that retroactive application of amended Section 932(l) is unconstitutional, as it violates employer's due process rights and constitutes an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 10-19. 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 19-29. The arguments employer makes are virtually identical to the ones that the United States Court of Appeals for the Fourth Circuit recently rejected. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383-89 (4th Cir. 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). For the reasons set forth in *Stacy*, we reject employer's arguments. Further, we deny employer's request to hold this case in abeyance pending resolution of the legal challenges to Public Law No. 111-148. *See Stacy*, 671 F.3d at 383 n.2; *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); Employer's Brief at 4-10.

Because claimant filed her claim after January 1, 2005, timely requested modification such that the claim was pending after March 23, 2010, and the miner was determined to be eligible to receive benefits at the time of his death, *see* n.2, *supra*, we affirm the administrative law judge's finding that claimant is derivatively entitled to

Section 932(l): That she filed her claim after January 1, 2005; that she was an eligible survivor of the miner; that her claim was pending on March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death. Therefore, those findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

³ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mining industry in Virginia. Director's Exhibit 3. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

survivor's benefits pursuant to amended Section 932(l). *See Mullins v. ANR Coal Co.*, BLR , BRB No. 11-0251 BLA (Jan. 11, 2012).

Accordingly, the administrative law judge's Order of Dismissal is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge