

BRB No. 12-0443 BLA

VIOLA LAVERN DAVIS)	
(Widow of JOHNNY E. DAVIS))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
JIM WALTER RESOURCES)	DATE ISSUED: 05/14/2013
INCORPORATED)	
)	
Employer-Respondent)	
)	
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 Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

John C. Webb, V (Lloyd, Gray, Whitehead & Monroe, P.C.), Birmingham, Alabama, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-5138) of Administrative Law Judge Ralph A. Romano (the administrative law judge), rendered

on a subsequent survivor's claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).

On March 23, 2010, Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, amended Section 932(l) provides that a survivor of a miner who was determined to be 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), *amended by* Pub. L. No. 111-148, §1556(b), 124 Stat. 119, 260 (2010).

The administrative law judge determined that claimant filed her current subsequent survivor's claim on April 28, 2010, and that she was an eligible survivor of the miner, who was receiving federal black lung benefits under a final award at the time of his death. Accordingly, the administrative law judge found that claimant is automatically entitled to survivor's benefits pursuant to amended Section 932(l).

On appeal, employer contends that claimant is not eligible for derivative survivor's benefits under amended Section 932(l), because her original survivor's claim was finally denied and this subsequent claim is barred pursuant to 20 C.F.R. §725.309(d) and the fundamental principle of res judicata or claim preclusion. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, responds, urging the Board to affirm the administrative law judge's award of benefits. Employer has filed a reply brief in support of its position.

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

¹ Claimant is the widow of the miner, who died on February 12, 1993. Director's Exhibits 1, 2. Claimant filed her initial claim for survivor's benefits on April 7, 1993, which was denied by Administrative Law Judge Sheldon R. Lipson on June 25, 1996, because he found the evidence insufficient to establish that the miner's death was due to pneumoconiosis. Director's Exhibit 2. Claimant filed a second claim for benefits on March 4, 1998, which was denied by Administrative Law Judge Daniel J. Roketenetz on July 15, 1999. Director's Exhibit 3. Claimant's third claim for benefits was filed on August 28, 2000, and was denied by Administrative Law Judge Pamela Lakes Wood on January 9, 2006. Director's Exhibit 4.

² The Board will apply the law of the United States Court of Appeals for the Eleventh Circuit, as the miner's last coal mine employment occurred in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 2.

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We reject employer’s contention that claimant’s subsequent claim is barred pursuant to Section 725.309(d) and the fundamental principle of res judicata, for the reasons set forth in *Richards v. Union Carbide Corp.*, 25 BLR 1-31 (2012)(en banc)(McGranery, J., concurring and dissenting)(Boggs, J., dissenting), *appeal docketed*, No. 12-1294 (4th Cir. Mar. 8, 2012).³ Because claimant filed her current survivor’s claim after January 1, 2005; her claim was pending 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 amended Section 932(l).

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

³ We deny employer’s motion to hold this case in abeyance pending disposition of the appeal in *Richards v. Union Carbide Corp.*, 25 BLR 1-31 (2012)(en banc) (McGranery, J., concurring and dissenting)(Boggs, J., dissenting), *appeal docketed*, No. 12-1294 (4th Cir. Mar. 8, 2012).