

BRB No. 12-0167 BLA

FRANCES P. RADO)	
(Widow of NICK RADO))	
)	
Claimant-Respondent)	
)	
v.)	
)	
HELEN MINING COMPANY)	DATE ISSUED: 11/08/2012
)	
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.

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

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, for employer.

Maia S. Fisher (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-5572) of Administrative Law Judge Thomas M. Burke (the administrative law judge) rendered

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

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(codified at 30 U.S.C. §§921(c)(4) and 932(l)). 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).

In his Decision and Order Awarding Benefits, the administrative law judge found that claimant¹ satisfied the criteria for derivative entitlement pursuant to amended Section 932(l), and awarded benefits to commence as of December 1, 2008, the first day of the month in which the miner died.²

On appeal, employer challenges the constitutionality of amended Section 932(l), and its application to this claim.³ Both claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the administrative law judge's 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,

¹ Claimant is the widow of the miner, who died on December 14, 2008. Director's Exhibit 4. She filed her survivor's claim on May 26, 2010. Director's Exhibit 2.

² The miner filed a claim on December 20, 1985. Director's Exhibit 1. On December 15, 1988, Administrative Law Judge Gerald M. Tierney issued a Decision and Order - Awarding Benefits. *Id.* Judge Tierney's award of benefits was affirmed by the Board. *Rado v. Helen Mining Co.*, BRB No. 89-0240 BLA (Feb. 12, 1991)(unpub.).

³ Employer challenges the constitutionality of the Patient Protection and Affordable Care Act (PPACA), and the severability of non-health care provisions. Subsequent to the filing of employer's Brief in Support of Petition for Review, the United States Supreme Court upheld the constitutionality of the PPACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012). Thus, employer's arguments regarding the constitutionality of the PPACA are moot.

and in accordance with applicable law.⁴ 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 the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005 is unconstitutional, as a violation of employer’s due process rights and as a taking of private property, in violation of the Fifth Amendment to the United States Constitution. Employer also contends that the automatic entitlement provision of amended Section 932(l) is rendered unenforceable by inconsistent language contained in other sections of the Act that, employer asserts, require claimant to establish that the miner’s death was due to pneumoconiosis. The arguments employer makes are virtually identical to the ones that the United States Court of Appeals for the Third Circuit recently rejected. *B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 247-63, 25 BLR 2-13, 2-35-63 (3d Cir. 2011). For the reasons set forth in *Campbell*, we reject employer’s arguments.

Employer further 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. With respect to the relevant filing date, the Board has held that the operative date for determining eligibility under amended Section 932(l) is the date the survivor’s claim was filed, not the date 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*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012). Thus, for the reasons set forth in *Stacy*, we reject employer’s arguments to the contrary.

Finally, employer contends that this case should be held in abeyance until new regulations are promulgated by the Department of Labor. Consistent with our reasoning in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011) (unpub.), we reject employer’s request that this case should be held in abeyance until new regulations are promulgated. *See Mathews*, 24 BLR at 1-201; *see also Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-229 (2011), *appeal docketed*, No. 11-2445 (3d Cir. May 31, 2011).

Because claimant filed her 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

⁴ The record indicates that the miner was employed in the coal mining industry in Pennsylvania. Director’s Exhibit 1. Accordingly, the law of the United States Court of Appeals for the Third Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

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 Section 422(l) of the Act, 30 U.S.C. §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