

## SECTION 422(l)—DERIVATIVE ENTITLEMENT

### I. Introduction

As amended in 1972, the Act provided that a survivor of a miner could establish entitlement to benefits by showing either that the miner's death was due to pneumoconiosis or that the miner was totally disabled due to pneumoconiosis at the time of his or her death. *See* 30 U.S.C. §901 (1976). In 1977, Congress added Section 422(l), 30 U.S.C. §932(l), which provided that “[i]n no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner.” Pub. L. No. 95-239, §7(h), 92 Stat. 95, 100 (1978). Thus, under Section 932(l), the eligible survivor of a miner who was awarded benefits on a claim filed during his or her lifetime was automatically entitled to receive survivor's benefits. *Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 1328, 12 BLR 2-60, 2-70 (3d Cir. 1988); *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989).

In 1981, Congress toughened the Act's entitlement criteria, in part, by adding limiting language to Section 932(l) that eliminated derivative entitlement for claims filed on or after January 1, 1982. Pub. L. No. 97-119, §203(a), 95 Stat. 1644 (1981). Additionally, Congress added the same limiting language to two other sections of the Act, and deleted the language from Section 901 stating that a purpose of the Act was to provide benefits to the survivors of miners who were totally disabled due to pneumoconiosis at the time of their deaths. *See* 30 U.S.C. §§901(a), 921(a), 922(a)(2). Taken together, those additional changes eliminated survivor's benefits based on a miner's total disability due to pneumoconiosis at the time of death, for claims filed on or after January 1, 1982. *Id.* Thus, after January 1, 1982, survivors could obtain benefits only by filing a claim and establishing that the miner's death was due to pneumoconiosis. *See Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86-87 (1988).

In 2010, as part of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148, §1556(b), Congress amended Section 422(l), 30 U.S.C. §932(l), by removing the limiting language that was added to it in 1981. In Section 1556(c) of the PPACA, Congress specified that amended Section 932(l) applies to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Thus, for such claims, the survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is once again automatically entitled to receive benefits without having to establish that the miner's death was due to pneumoconiosis. *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010).

Regulations implementing the 2010 amendments became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718 and 725 (2014).

Relevant to derivative entitlement under amended Section 932(l), the regulations delineating the conditions of entitlement for a surviving spouse or surviving divorced spouse, a surviving child, and a surviving parent, brother, or sister were updated to provide that eligible survivors of a miner are entitled to benefits if the miner filed a claim “on or after January 1, 1982, which results or resulted in a final award of benefits, and the [survivor] filed a claim for benefits after January 1, 2005 which was pending on or after March 23, 2010.” 20 C.F.R. §§725.212(a)(3)(ii), 725.218(a)(2), 725.222(a)(5)(ii).

The regulation at 20 C.F.R. §725.418 was updated to allow for accelerated processing of survivors’ claims governed by Section 932(l). Specifically, the regulation now provides that a district director may issue a proposed decision and order at any time during the adjudication of a claim filed by a survivor who is entitled to benefits under amended Section 932(l). 20 C.F.R. §725.418(a)(3). In such cases, the district director may designate the responsible operator in the proposed decision and order without having to first notify the operator of its potential liability pursuant to 20 C.F.R. §725.407. 20 C.F.R. §725.418(a)(3),(d).

The regulation at 20 C.F.R. §725.309 was updated to specify that a claimant in a survivor’s subsequent claim need not establish a change in an applicable condition of entitlement if the claimant can establish automatic entitlement to benefits under amended Section 932(l). 20 C.F.R. §725.309(c)(1)(i)-(ii).

## **II. Challenges to Amended Section 932(l)**

All challenges to the application of amended Section 932(l) to eligible survivors’ claims that were filed after January 1, 2005 and were pending on or after March 23, 2010, have been rejected by the Board and the United States Courts of Appeals ruling on the various issues:

### **A. Challenges to the Constitutionality of Amended Section 932(l)**

Constitutional challenges to the application of amended Section 932(l) have been unsuccessful.

The retroactive application of amended Section 932(l) to claims filed after January 1, 2005, and pending on or after March 23, 2010, does not violate an employer’s due process rights, nor is it an unconstitutional taking of private property. *U.S. Steel Mining Co. v. Director, OWCP [Starks]*, 719 F.3d 1275, 1286-88, 25 BLR 2-297, 2-315-17 (11th Cir. 2013)(addressing due process only); *McCoy Elkhorn Coal Corp. v. Dotson*, 714 F.3d 945, 945-56, 25 BLR 2-249, 2-253 (6th Cir. 2013)(same); *Vision Processing, LLC v. Groves*, 705 F.3d 551, 556-58, 25 BLR 2-231, 2-242-45 (6th Cir. 2013); *B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 253-63, 25 BLR 2-13, 2-45-61 (3d Cir. 2011); *W.Va. CWP Fund v. Stacy*, 671 F.3d 378, 382-88, 25 BLR 2-69, 2-74-82 (4th

Cir. 2011), *cert. denied*, 568 U.S. 127 (2012); *Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (2010); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-197-99 (2010).

Amended Section 932(l) does not create an irrebuttable presumption that the miner died due to pneumoconiosis and, therefore, does not violate the Due Process clause of the Fifth Amendment. *B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 253-55, 25 BLR 2-13, 2-45-47 (3d Cir. 2011); *Wright v. E. Associated Coal Corp.*, 25 BLR 1-69, 1-73 (2012).

The Sixth Circuit held that the application of amended Section 932(l) to award benefits in a survivor's subsequent claim does not violate the separation of powers principle by nullifying the final decision of the Article III court that affirmed the denial of the survivor's prior claim. Specifically, the court held that the 2010 amendment to the Act "did nothing to alter, undermine, disturb or overturn the . . . prior denial of [the survivor's] 2003 claim; nor d[id] it challenge this Court's affirmance of that decision." *Consolidation Coal Co. v. Maynes*, 739 F.3d 323, 328, 25 BLR 2-509, 2-518-19 (6th Cir. 2014).

## **B. Statutory Challenges to the Application of Amended Section 932(l)**

### **1. "Claims Filed," Under Section 1556(c)**

Section 1556(c) of the PPACA specifies that "the amendments made by this section shall apply with respect to claims filed . . . after January 1, 2005, that are pending on or after the effective date of enactment of this Act," which was March 23, 2010. Coal mine operators argued that, because Section 932(l) obviates the need for a survivor to file a claim, the claims referred to in Section 1556 are miners' claims, not survivors' claims. Therefore, the operators argued, the PPACA's reinstatement of derivative entitlement does not apply to a survivor's pending claim based on that claim's filing date but, rather, the applicability of Section 932(l) depends upon whether the deceased miner's claim was filed after January 1, 2005, and was pending on or after March 23, 2010. This argument failed.

Based on the plain language of Section 1556(c), which does not distinguish between miners' claims and survivors' claims, the operative filing date for determining eligibility for the application of amended Section 932(l) is the date the survivor's claim is filed. *U.S. Steel Mining Co. v. Director, OWCP [Starks]*, 719 F.3d 1275, 1285-86, 25 BLR 2-297, 2-312-14 (11th Cir. 2013); *Vision Processing, LLC v. Groves*, 705 F.3d 551, 556-58, 25 BLR 2-231, 2-242-45 (6th Cir. 2013); *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 388-89, 25 BLR 2-65, 2-83-84 (4th Cir. 2011), *cert. denied*, 568 U.S. 127 (2012); *Dotson v. McCoy Elkhorn Coal Corp.*, 25 BLR 1-13, 1-16 (2011)(en banc); *Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-229-30 (2011); *Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-211 (2010).

## 2. “Eligible Survivors” under Section 932(l), Given Conflicting Language in Other Sections of the Act

When Congress reinstated Section 932(l) in 2010, it did so by removing limiting language it had added to Section 932(l) in 1981. Specifically, Section 1556(b) of the PPACA provided that Section 932(l) “is amended by striking ‘except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981.’” However, Congress left the same limiting language in two other sections of the Act, Sections 921 and 922(a), governing the payment of benefits. Additionally, Congress did not amend Section 901, leaving the only statement of purpose of the Act regarding survivors to be to provide benefits to survivors of miners whose death was due to pneumoconiosis.

Based on the language retained in the Act, coal mine operators argued that amended Section 932(l) could not be applied, because it was irreconcilable with, and negated by, the inconsistent language in Sections 901, 921, and 922(a). This argument failed.

The Board held that amended Section 932(l) controls, because Congress mandated that the amendment “*shall apply* with respect to claims filed . . . after January 1, 2005, that are pending on or after” March 23, 2010. *Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-230 (2011)(quoting Section 1556(c) of Public Law No. 111-148). Thus, the Board held, survivors who file claims after January 1, 2005 and meet the criteria for derivative entitlement under amended Section 932(l) are entitled to receive benefits, and their claims are not subject to the inconsistent language of Sections 921(a) and 922(a)(2). *Fairman*, 24 BLR at 1-230.

The Third and Fourth Circuits held that amended Section 932(l) controls because, as the most recent amendment to the Act, it overrides any conflicting language in Sections 901, 921(a), and 922(a). *B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 252-53, 25 BLR 2-13, 2-42-44 (3d Cir. 2011); *W.Va. CWP Fund v. Stacy*, 671 F.3d 378, 382-88, 25 BLR 2-69, 2-85-88 (4th Cir. 2011)(expressing this opinion in dicta, having first held that the operator waived the argument that inconsistent statutory language negated amended Section 932(l)).

The Sixth Circuit held that amended Section 932(l) is not irreconcilable with Sections 901, 921(a), and 922(a). The court concluded that Congress’s failure to make corresponding changes to those sections does “not create irreconcilability[,] but merely leaves in place additional language which serves no useful purpose . . . . The fact remains that survivor benefits are paid to the survivors of miners who die due to pneumoconiosis, and the post 2010 amendments simply resurrect a former method for making this showing.” *Vision Processing, LLC v. Groves*, 705 F.3d 551, 558-59, 25 BLR 2-231, 2-245-46 (6th Cir. 2013). Alternatively, the court held that even if Congress

created “opposing mandates, there has to be a tiebreaker to unravel the conflict—to leave one requirement standing and to repeal the opposing requirement by implication. As the most recent act of Congress, the change to [Section] 932(l) governs.” *Groves*, 705 F.3d at 559, 25 BLR at 2-247.

The Eleventh Circuit declined to find a repeal by implication, instead holding that amended Section 932(l) is reconcilable with Sections 901(a), 921(a), and 922(a). Specifically, the court held that, “[i]f a survivor can meet the requirements of § 932(l), she is entitled to benefits, and the language in the unamended [sections] does not apply to her. If a survivor cannot meet the § 932(l) requirements, she must file a claim and make the appropriate showing—including, per § 922(a), that the miner died due to pneumoconiosis.” *U.S. Steel Mining Co. v. Director, OWCP [Starks]*, 719 F.3d 1275, 1284, 25 BLR 2-297, 2-310 (11th Cir. 2013).

### **C. Other Challenges**

#### **1. Administrative Procedure Act**

The Board rejected the argument that amended Section 932(l) violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d), as incorporated by 30 U.S.C. §932(a), by relieving a survivor of the burden of proof to establish entitlement to benefits. The Board held that amended Section 932(l) did not alter a survivor’s burden of proof; it merely altered the facts that a certain class of survivors must prove to qualify for benefits. *Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-231 (2011).

#### **2. Absence of Implementing Regulations**

The Board rejected the argument that amended Section 932(l) could not be applied absent an implementing regulation, holding that the 2010 amendments to the Act were self-executing, and could be applied before the Department of Labor issued implementing regulations. *Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-229 (2011); *Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (2010); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010).

The Department promulgated implementing regulations effective October 25, 2013, thereby removing the lack of regulations as an issue.

#### **3. “Determined to be Eligible to Receive Benefits” under Section 932(l)**

The Board rejected the argument that the miner must have been awarded benefits prior to his death in order for his survivor to be automatically entitled to survivor’s benefits under Section 932(l). The plain language of the Act provides no basis for distinguishing

between survivors of miners who were awarded benefits prior to their deaths and survivors of miners who were awarded benefits posthumously. Because the miner in this case was “determined to be eligible to receive benefits,” claimant is derivatively entitled to survivor’s benefits pursuant to Section 932(l). *Ferguson v. Oak Grove Res., LLC*, BLR (2017) (quoting 30 U.S.C. §932(l)).

The Board rejected the argument that the miner must be receiving benefits from employer at the time of his death in order for his survivor to be automatically entitled to survivor’s benefits under Section 932(l). Because the miner was awarded benefits before his death, it followed that he was “determined to be eligible” for such benefits, notwithstanding the fact that his federal black lung benefits were being offset by an award of state benefits at the time of his death. An offset of benefits is a reduction in benefits, not a termination of benefits. *Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1- 125 (2013).

#### **4. Finality**

The Board held that the administrative law judge erred in concluding that the award of benefits in the underlying miner’s claim must be final for the survivor to be entitled to receive benefits under Section 932(l). The plain text of the Act requires only that the miner “was determined to be eligible to receive benefits . . . at the time of his or her death . . . .” *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141, 1-146 (2014)(quoting 30 U.S.C. §932(l)).

### **III. Application of Amended 932(l) to Survivors’ Claims on Modification, and to Survivors’ Subsequent Claims**

All challenges to the application of amended Section 932(l) to survivors’ claims pending on modification, and to survivors’ subsequent claims, that were filed after January 1, 2005 and were pending on or after March 23, 2010, have been rejected by the Board and the United States Courts of Appeals:

#### **A. Survivors’ Claims Pending on Modification**

The Board rejected the argument that amended Section 932(l) could not be applied to a request for modification of the denial of a survivor’s claim. The Board noted that the language of Section 1556(c) of the PPACA mandates the application of Section 932(l) to all claims filed after January 1, 2005, that are pending on or after March 23, 2010. The Board further noted that, because the Act provides that a timely request for modification of a denied survivor’s claim permits the reopening and readjudication of that denied claim, a timely modification request keeps the claim pending. *See* 20 C.F.R. §725.310. Thus, where a survivor files a claim after January 1, 2005, and timely requests modification of the denial of the claim such that it is pending on or after March 23, 2010, and the miner was determined to be eligible to receive benefits at the time of his death,

the survivor is automatically entitled to receive benefits pursuant to amended Section 932(l). *Mullins v. ANR Coal Co.*, 25 BLR 1-49, 1-52-53 (2012).

## **B. Survivors' Subsequent Claims**

A subsequent claim is one that is filed more than one year after the denial of a previous claim. With only limited exceptions, a claimant who files a subsequent claim must demonstrate a change in an applicable condition of entitlement since the order denying the prior claim became final. 20 C.F.R. §725.309. The regulation that was in effect when Section 932(l) was reinstated provided that a survivor's subsequent claim "must be denied unless the applicable conditions of entitlement in such claim include at least one condition unrelated to the miner's physical condition at the time of death." 20 C.F.R. §725.309(d) (2010).

When survivors whose claims had been finally denied under the pre-PPACA version of the Act filed subsequent claims that met the criteria of amended Section 932(l), coal mine operators argued that, for several reasons, Section 932(l) could not be applied. However, all of the challenges to the application of amended Section 932(l) in survivors' subsequent claims have been rejected:

### **1. "Claims Filed," under Section 1556(c)**

Coal mine operators argued that "claims" in Section 1556(c) of the PPACA does not include subsequent claims. This argument was rejected. The plain language of Section 1556(c) does not distinguish between initial claims and subsequent claims, but covers all claims filed within the applicable time limitations, including survivors' subsequent claims. *Jim Walter Res., Inc. v. Director, OWCP [Davis]*, 766 F.3d 1333, 1335-36, 25 BLR 2-649, 2-654-55 (11th Cir. 2014); *Marmon Coal Co. v. Director, OWCP [Eckman]*, 726 F.3d 387, 394, 25 BLR 2-389, 2-402-03 (3d Cir. 2013); *Union Carbide Corp. v. Richards*, 721 F.3d 307, 314, 25 BLR 2-321, 2-332 (4th Cir. 2013); *Surratt v. U.S. Steel Mining Co.*, 25 BLR 1-75, 1-79 (2012); *Richards v. Union Carbide Corp.*, 25 BLR 1-31, 1-37 (2012)(en banc)(McGranery, J., concurring and dissenting on other grounds)(Boggs, J., dissenting).

### **2. Res Judicata**

Based on the doctrine of res judicata, coal mine operators argued that the final decision denying survivor's benefits in the prior claim bars the survivor from advancing a subsequent claim under amended Section 932(l). The courts to consider that argument, and the Board, rejected it on the basis that res judicata is not implicated by a survivor's subsequent claim under amended Section 932(l), because the subsequent claim does not relitigate the prior finding that the miner's death was not due to pneumoconiosis. The amendment to the Act created a new cause of action, with a basis for entitlement that did

not exist at the time of the prior claim, and which turns on different facts. *Consolidation Coal Co. v. Maynes*, 739 F.3d 323, 327-28, 25 BLR 2-509, 2-516-18 (6th Cir. 2014); *Marmon Coal Co. v. Director, OWCP [Eckman]*, 726 F.3d 387, 394, 25 BLR 2-389, 2-402-03 (3d Cir. 2013); *Union Carbide Corp. v. Richards*, 721 F.3d 307, 314-16, 25 BLR 2-321, 2-332-35 (4th Cir. 2013); *Rose v. Trojan Mining & Processing*, 25 BLR 1-91, 1-95 (2012); *Richards v. Union Carbide Corp.*, 25 BLR 1-31, 1-37 (2012)(en banc)(McGranery, J., concurring and dissenting on other grounds)(Boggs, J., dissenting).

### **3. The Regulatory Requirement to Show a Change in an Applicable Condition of Entitlement**

The argument that 20 C.F.R. §725.309 precluded the application of amended Section 932(l) was also rejected. For purposes of the regulations, the amendment to the Act reinstating Section 932(l) created a change by creating a new condition of entitlement unrelated to whether the miner died due to pneumoconiosis. *Jim Walter Res., Inc. v. Director, OWCP [Davis]*, 766 F.3d 1333, 1337, 25 BLR 2-649, 2-657 (11th Cir. 2014); *Union Carbide Corp. v. Richards*, 721 F.3d 307, 314, 25 BLR 2-321, 2-332 (4th Cir. 2013), *aff'g* 25 BLR 1-31, 1-37 (2012)(en banc)(McGranery, J., concurring and dissenting on other grounds)(Boggs, J., dissenting).

Effective October 25, 2013, 20 C.F.R. §725.309 was revised, and now provides that a claimant in a survivor's subsequent claim need not establish a change in an applicable condition of entitlement if the claimant can establish entitlement to benefits under amended Section 932(l). 20 C.F.R. §725.309(c)(1)(i)-(ii).

### **4. Additional Challenges Rejected**

The Eleventh Circuit rejected the argument that, because amended Section 932(l) obviates the need for a survivor to file a claim, the survivor's subsequent claim cannot be recognized as a "claim" under Section 1556(c). The PPACA provision reinstating Section 932(l) did not eliminate the application process itself, nor does it "in any way prevent[] previously denied claimants from benefitting from the [PPACA] amendments." *Jim Walter Res., Inc. v. Director, OWCP [Davis]*, 766 F.3d 1333, 1336, 25 BLR 2-649, 2-656 (11th Cir. 2014).

The Sixth Circuit held that applying amended Section 932(l) to award benefits in a survivor's subsequent claim, where an Article III court affirmed the denial of the survivor's prior claim, does not violate the separation of powers principle. *Consolidation Coal Co. v. Maynes*, 739 F.3d 323, 328, 25 BLR 2-509, 2-518-19 (6th Cir. 2014).

The Third Circuit rejected the argument that applying amended Section 932(l) in a survivor's subsequent claim violated due process by depriving employer of the benefit of finality, holding that the argument was merely a variant of employer's res judicata

argument already rejected by the court. *Marmon Coal Co. v. Director, OWCP* [Eckman], 726 F.3d 387, 394 n.7, 25 BLR 2-389, 2-403 n.7 (3d Cir. 2013).

The Fourth Circuit rejected the argument that allowing survivors' subsequent claims to proceed under amended Section 932(l) would circumvent the retroactive time limitations Congress placed in Section 1556(c) of the PPACA to mitigate the financial burden on coal mine operators. The court noted that not all survivors whose prior claims were denied will receive benefits under amended Section 932(l). Survivors whose prior claims were denied must still file a subsequent claim after January 1, 2005, and that claim must be pending on or after March 23, 2010. Thus, the court held, "the limitations continue to meaningfully mitigate the coal mine operators' financial burden." *Union Carbide Corp. v. Richards*, 721 F.3d 307, 317, 25 BLR 2-321, 2-336 (4th Cir. 2013). Additionally, the court noted that the financial burden is further mitigated by the rule that automatic survivor's benefits in a subsequent claim are payable only from the month following the prior denial, rather than from the month of the miner's death. *Richards*, 721 F.3d at 317 n.5, 25 BLR at 2-337 n.5.

#### **IV. Procedural Matters**

##### **A. Streamlined Claims Processing by the District Director**

Since the amendments to the Act were enacted, certain aspects of adjudicatory and regulatory procedure have been streamlined to speed processing of survivors' claims filed pursuant to amended Section 932(l).

The regulation at 20 C.F.R. §725.418 was amended to allow for accelerated processing of survivors' claims governed by Section 932(l). Specifically, the regulation provides that a district director may issue a proposed decision and order at any time during the adjudication of a claim filed by a survivor who is entitled to benefits under amended Section 932(l). 20 C.F.R. §725.418(a)(3). In such cases, the district director may designate the responsible operator in the proposed decision and order without having to first notify the operator of its potential liability pursuant to 20 C.F.R. §725.407. 20 C.F.R. §725.418(a)(3),(d).

##### **B. Subsequent Claims**

The regulation at 20 C.F.R. §725.309 was revised to specify that a claimant in a survivor's subsequent claim need not establish a change in an applicable condition of entitlement if the claimant can establish automatic entitlement to benefits under amended Section 932(l) of the Act. 20 C.F.R. §725.309(c)(1)(i)-(ii).

##### **C. Summary Decision**

The Board held that where a party requests summary judgment pursuant to 20 C.F.R. §725.452, and the administrative law judge determines that there is no genuine issue of material fact concerning claimant's entitlement to benefits under Section 932(l), the administrative law judge need not hold a hearing and may issue a summary decision. Thus, the Board rejected the employer's argument that it was denied due process because the hearing was held prior to the enactment of amended Section 932(l). The Director moved for summary judgment, and there was no genuine issue of material fact concerning claimant's entitlement under Section 932(l). Therefore, the administrative law judge did not need to hold a second hearing. *Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-230 (2011).

#### **V. Determining the Benefits Commencement Date Where a Survivor is Entitled to Benefits Under Amended Section 932(l)**

Amended Section 932(l) is silent as to the appropriate commencement date for the payment of derivative benefits in survivors' claims. However, the regulations provide that a survivor is entitled to benefits beginning with the month of the miner's death. 20 C.F.R. §725.503(c). In addition, in any case in which a subsequent claim is awarded, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6) [formerly 20 C.F.R. §725.309(d)(5)]. The Board and the Circuit Courts of Appeal have addressed how these regulations apply to the payment of benefits under Section 932(l):

#### **Application to 932(l) Cases**

The Board held that, where benefits are awarded in an *initial* survivor's claim under amended Section 932(l), benefits are payable from the month of the miner's death, as provided in 20 C.F.R. §725.503(c). *Dotson v. McCoy Elkhorn Coal Corp.*, 25 BLR 1-13, 1-18 (2011)(en banc). The Sixth Circuit affirmed the Board's holding, reasoning that while Section 1556(c) is silent as to the date for the commencement of benefits, Congress gave no indication that it intended to change the established rule entitling survivors to receive benefits from the date of the miner's death. *McCoy Elkhorn Coal Corp. v. Dotson*, 714 F.3d 945, 946, 25 BLR 2-249, 2-253-54 (6th Cir. 2013), *aff'g* 25 BLR 1-13, 1-18 (2011)(en banc).

Relevant to a survivor's *subsequent* claim under Section 932(l), the Board held that benefits are payable from the month after the month in which the prior denial of survivor's benefits became final, consistent with the language of the regulation formerly at 20 C.F.R. §725.309(d)(5) [now set forth at 20 C.F.R. §725.309(c)(6)], which prohibits the payment of benefits in a subsequent claim for any period prior to the date upon which the order denying the prior claim became final. *Richards v. Union Carbide Corp.*, 25 BLR 1-31, 1-38-39 (2012)(en banc)(McGranery, J., concurring and dissenting)(Boggs, J., dissenting), *aff'd*, 721 F.3d 307, 25 BLR 2-321 (4th Cir. 2013).

In affirming the Board's decision in *Richards*, the Fourth Circuit held that the Board reasonably reconciled 20 C.F.R. §725.503(c) with 20 C.F.R. §725.309(d)(5) [now at 20 C.F.R. §725.309(c)(6)], in holding that benefits on a survivor's subsequent claim are payable only from the month following the month of the prior denial, rather than from the month of the miner's death. *Richards*, 721 F.3d at 317 n.5, 25 BLR at 2-337 n.5.

The Sixth Circuit agreed with the Board's rule for determining the benefits commencement date for survivors' subsequent claims, holding that the Board acted within the scope of its authority when it modified the date for the commencement of benefits to the month after the month in which the prior denial of survivor's benefits became final. *Consolidation Coal Co. v. Maynes*, 739 F.3d 323, 328-29, 25 BLR 2-509, 2-519 (6th Cir. 2014).

In a survivor's subsequent claim where the prior claim was denied by the district director as abandoned, the Board noted that it is necessary to first find the correct date on which the denial of the prior survivor's claim became final. In contrast to administrative law judge decisions, which become final at the expiration of the thirtieth day after the decision is filed with the district director, a district director's decision denying a claim by reason of abandonment becomes final on the date it is issued, where no hearing is requested. 20 C.F.R. §725.409(c). Thus, under the facts of the case, where the district director's denial was issued on March 26, 2001, and claimant did not request a hearing, the Board held that benefits should commence as of April 2001, the month after the month in which the prior denial became final. *Rose v. Trojan Mining & Processing*, 25 BLR 1-91, 1-96 (2012).

Where benefits were awarded under Section 932(l) pursuant to a grant of modification on a survivor's subsequent claim, the Board held that, because the underlying claim was a subsequent claim, benefits were payable from the month after the month in which the order denying the survivor's prior claim became final, consistent with the regulation formerly at 20 C.F.R. §725.309(d)(5) [now set forth at 20 C.F.R. §725.309(c)(6)]. *Surratt v. U.S. Steel Mining Co.*, 25 BLR 1-75, 1-79 (2012).

## **VI. Attorney's Fee**

Affirming an administrative law judge's fee award, the Board held that claimant's counsel was entitled to a fee for necessary work performed to defend the miner's claim award against employer's modification request, which in turn allowed claimant to qualify for derivative entitlement after Section 932(l) was reinstated. The fact that "a fortuitous legislative event" later reinstated derivative entitlement for the survivor's claim had no bearing on whether counsel's services were necessary at the time they were rendered. *Duke v. Cowin & Co.*, 25 BLR 1-55, 1-58 (2012).