

BRB No. 10-0706 BLA

VERNIE DOTSON )  
(Widow of WILLIE DOTSON) )  
 )  
Claimant-Respondent )  
 )  
v. )  
 )  
McCOY ELKHORN COAL )  
CORPORATION )  
 )  
and )  
 )  
JAMES RIVER COAL COMPANY ) DATE ISSUED: 11/16/2011  
 )  
Employer/Carrier- )  
Petitioners )  
 )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Party-in-Interest ) DECISION and ORDER  
 ) EN BANC

Appeal of the Amended Decision and Order Awarding Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

Paul E. Jones and James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Richard A. Seid, Rita Roppolo, and Sean G. Bajkowski (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, McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Amended Decision and Order Awarding Benefits (2007-BLA-5212) of Administrative Law Judge Alice M. Craft rendered on a survivor's claim,<sup>1</sup> filed on January 26, 2006, 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).

Following the hearing in this case, amendments to the Act were enacted, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010). 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).

By Order dated April 12, 2010, the administrative law judge advised the parties of the applicability of the amendments to this claim, and directed the parties to submit position statements addressing why an order awarding benefits should not be entered. All parties responded. The administrative law judge issued her Amended Decision and Order Awarding Benefits on August 24, 2010,<sup>2</sup> finding, *inter alia*, that claimant is an eligible survivor of a miner who was receiving benefits at the time of his death; that claimant filed her survivor's claim after January 1, 2005; that her claim was pending on or after March 23, 2010, the effective date of the amendments; and that employer is the operator responsible for the payment of benefits. Accordingly, the administrative law judge found that claimant was automatically entitled to survivor's benefits pursuant to amended Section 932(l). The administrative law judge's decision, however, did not specify the date from which benefits are payable.

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<sup>1</sup> Claimant is the widow of the miner, who died on August 28, 1998. Director's Exhibit 8. On October 31, 1995, the district director awarded benefits on the miner's claim. Employer requested a hearing, but subsequently withdrew its controversion of the claim, and the claim was remanded for payment. Director's Exhibit 2.

<sup>2</sup> The administrative law judge's original Decision and Order Awarding Benefits, issued on May 24, 2010, failed to specify that benefits were payable by employer.

On appeal, employer challenges the constitutionality of amended Section 932(l), and its application to this survivor's claim. Employer also contends that, if claimant is entitled to an award of benefits under the recent amendments, benefits should not be retroactive to the date of the miner's death, but should be payable as of the date of filing of the survivor's claim. Employer asserts that in no event may benefits be payable earlier than January 1, 2005, the operative filing date for claims under the new legislation. The Director, Office of Workers' Compensation Programs (the Director), responds, contending that benefits should commence in the month and year that the miner died. Claimant responds, agreeing with the Director's position. Employer replies in support of its position.

On July 27, 2011, the Board ordered oral argument *en banc* with respect to the issue of whether benefits are payable in this initial survivor's claim beginning in August 1998, the month during which the miner died, "when claimant did not file her claim for benefits until January 2006, and was ineligible for consideration under amended Section 932(l) prior to March 23, 2010." *Dotson v. McCoy Elkhorn Coal Corp.*, BRB No. 10-0706 BLA (July 27, 2011)(Order)(unpub.). Oral argument was held in Pittsburgh, Pennsylvania on September 15, 2011.

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. 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 initially contends that the operative date for determining eligibility for survivor's benefits pursuant to amended Section 932(l) is the date the miner's claim was filed, not the date the survivor's claim was filed. Employer also argues that amended Section 932(l) is in direct conflict with 30 U.S.C. §§921 and 922, as well as with 20 C.F.R. §725.503 and, therefore, cannot be interpreted to relieve claimant of her burden to prove that the miner's death was due to pneumoconiosis. Additionally, employer asserts that retroactive application of amended Section 932(l) is unconstitutional, because it violates employer's due process rights and constitutes an unlawful taking of employer's property. Employer's Brief at 6-10; Employer's Supplemental Oral Argument Brief (Employer's OA Brief) at 3-5. Employer's arguments lack merit.

The Board has held that the operative date for determining eligibility for survivor's benefits under amended Section 932(l) is the date that the survivor's claim was filed, not the date that the miner's claim was filed. *Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011). For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary. Also, as we did in *Fairman v. Helen Mining Co.*, 24 BLR 1-225 (2011), *appeal docketed*, No. 11-2445 (3d

Cir. May 31, 2011), we find no merit in employer's contention that amended Section 932(l) is rendered unenforceable by earlier, contradictory provisions of the Act. We further reject employer's contention that retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005 constitutes a due process violation and a taking of private property, for the same reasons the Board rejected substantially similar arguments in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011)(Order)(unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). *See also B&G Constr. Co. v. Director, OWCP [Campbell]*, F.3d , BLR , No. 10-4179, 2011 WL 5068092 (3d Cir. Oct. 26, 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Accordingly, we affirm the administrative law judge's finding that claimant is derivatively entitled to survivor's benefits pursuant to amended Section 932(l).

Employer next contends that benefits should be payable from the date of filing of claimant's survivor's claim, but in no event prior to January 1, 2005, the operative filing date for claims under the Section 1556 amendments. Employer points out that, until the effective date of these amendments, any survivor who filed a claim on or after January 1, 1982, the effective date of the Black Lung Benefits Amendments of 1981, had to prove that the miner's death was due to pneumoconiosis. Employer argues that to allow entitlement to derivative benefits dating back to the miner's death in 1998 is tantamount to finding that the miner's death was due to pneumoconiosis during the period from 1981 through January 1, 2005, even though the PPACA was not applicable during that period. Employer asserts that such a "harsh, retroactive application of the law" provides claimant with a "windfall," since claimant did not file her claim until eight years after the miner's death. Oral Argument (OA) Hearing Transcript at 10-12; Employer's Brief at 11. Employer maintains that the provisions of 20 C.F.R. §725.503(c), designating the month and year of the miner's death as the commencement date for survivor's benefits, do not apply in derivative entitlement situations because the regulation cannot be considered outside the context of the statutory scheme for which it was promulgated. Rather, employer argues, the date of filing of the survivor's claim should be utilized as the commencement date for benefits, consistent with the default date for the commencement of miner's benefits under Section 725.503(b), in those cases where the evidence does not establish the month of onset of total disability due to pneumoconiosis. Because Congress limited the automatic continuation of benefits provision to claims filed after January 1, 2005, that are pending on or after March 23, 2010, and expressed no intent to utilize the miner's date of death as the commencement date for benefits, as set out in Section 725.503(c), employer asserts that "fairness" dictates that benefits, if awarded, should commence from one of the following dates: (1) March 23, 2010, the date of enactment of

the amendments;<sup>3</sup> (2) January 30, 2006, the date claimant filed her claim; or (3) at the earliest, January 1, 2005, the date Congress selected as the date after which claims must be filed for consideration under amended Section 932(l). OA Hearing Transcript at 6-11, 23-24; Employer's OA Brief at 5-7.

The Director counters that, while the Act does not specifically address the date from which benefits to a survivor should commence,<sup>4</sup> the Director promulgated the regulation at Section 725.503 over thirty years ago, through express statutory authority. This regulation provides, in pertinent part, that “[b]enefits are payable to a survivor who is entitled beginning with the month of the miner’s death, or January 1, 1974, whichever is later.” 20 C.F.R. §725.503(c); *see* 30 U.S.C. §§932(e)(2), 936(a). The Director asserts that Section 725.503(c) is applicable to claims filed pursuant to amended Section 932(l), arguing that when the PPACA was passed, Congress did not change the Director’s long-standing position that survivor’s benefits commence the month of the miner’s death. The Director maintains that if Congress had intended to limit derivative survivors’ benefits to periods after January 1, 2005, it would have expressly included such a provision in the legislation. The Director also notes that Section 1556(b) is entitled “Continuation of Benefits,” which inferentially conveys the intent by Congress that the amendment was designed to provide benefits continuously to the families of miners who had been receiving benefits at the time of death. The Director contends, therefore, that benefits should commence from August 1998, the month in which the miner died. Director’s Supplemental OA Brief at 6-9; OA Hearing Transcript at 16-21.

Claimant agrees with the position of the Director, and also asserts that the Director’s interpretation of the Act, and any amendments thereto, is entitled to great deference. Claimant’s Supplemental OA Brief at 10-16; OA Hearing Transcript at 12-16.

We agree with the position taken by claimant and the Director, that survivor’s benefits are payable from the month of the miner’s death, as provided in Section 725.503(c). Notably, Section 1556, which reinstates derivative payment of survivor’s benefits pursuant to Section 932(l), for claims filed after January 1, 2005 and pending on

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<sup>3</sup> Employer points out that until March 23, 2010, the effective date of the amendments, this claim was in denial status, because claimant was unable to prove that the miner’s death was due to pneumoconiosis. OA Hearing Transcript at 8. However, employer does not contest that claimant is an “eligible survivor” under amended Section 422(l) of the Act, 30 U.S.C. §932(l).

<sup>4</sup> Section 422(e)(2) of the Act, which addresses benefit commencement dates in general, provides only that, with “Part C” claims, *i.e.* claims filed after December 31, 1973, “[n]o payment of benefits shall be required . . . for any period prior to January 1, 1974.” 30 U.S.C. §932(e)(2).

or after enactment, is silent as to the commencement date for the payment of those benefits. Pub. L. No. 111-148, §1556 (2010). Congress is presumed to know the law when it passes legislation, and it gave no indication from the language of Section 1556 that it intended to change the established rule entitling survivors to receive benefits from the date of the miner's death. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). Such an interpretation is consistent with, and supported by, the decision to choose "Continuation of Benefits" as the heading for Section 1556(b), suggesting an intent by Congress to provide benefits continuously to eligible miners' families after the miner, who had been receiving benefits, dies. *See I.N.S. v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 189-190 (1991). We are not persuaded by employer's argument that such an interpretation provides a "windfall" to claimant, as the Act contains no time limit for the filing of a claim by a survivor of a miner.<sup>5</sup> *See* 20 C.F.R. §725.308(a). Accordingly, we hold that claimant's benefits under amended Section 932(l) shall commence as of August 1998, the month in which the miner died. 20 C.F.R. §725.503(c).

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<sup>5</sup> Prior to the Reform Act of 1977, a survivor was required to file a claim for benefits "within three years of the discovery of total disability due to pneumoconiosis or, in the case of death due to pneumoconiosis, the date of such death." 30 U.S.C. §932(f) (1976).

Accordingly, the administrative law judge's Amended Decision and Order Awarding Benefits is affirmed, with benefits commencing on August 1, 1998.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge