

BRB No. 11-0251 BLA

BERTHA G. MULLINS)	
(Widow of COY MULLINS))	
)	
Claimant-Respondent)	
)	
v.)	
)	
ANR COAL COMPANY, LLC)	DATE ISSUED: 01/11/2012
)	
and)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Order Awarding Survivor's Benefits of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

Bertha G. Mullins, Wise, Virginia, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer/carrier.

Jonathan Rolfe (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 and carrier (“employer”) appeal the Order Awarding Survivor’s Benefits (2010-BLA-5680) of Associate Chief Administrative Law Judge William S. Colwell (the administrative law judge) rendered on a survivor’s claim¹ 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).

On March 23, 2010, 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).

In a Proposed Decision and Order dated May 1, 2009, the district director denied benefits in claimant’s survivor’s claim, finding that the evidence was insufficient to establish that the miner’s death was due to pneumoconiosis. Director’s Exhibit 19. No further action was taken on the claim until April 15, 2010, when claimant filed a timely request for modification.² Director’s Exhibit 21; 20 C.F.R. §725.310. In a Proposed Decision and Order Granting Request for Modification dated May 26, 2010, the district director determined that claimant was entitled to an automatic award of benefits under amended Section 932(l), finding that claimant is an eligible survivor of a miner who was

¹ Claimant is the widow of the miner, who died on August 30, 2008. Director’s Exhibit 9. On October 23, 1990, the Board affirmed an award of benefits by Administrative Law Judge Robert M. Glennon in the living miner’s claim. *Mullins v. Virginia Iron Coal & Coke Co.*, BRB No. 88-2535 BLA (Oct. 23, 1990)(unpub.). After the miner’s death, claimant filed a claim for survivor’s benefits on October 3, 2008. Director’s Exhibit 2.

² Pursuant to 20 C.F.R. §725.310(a), a party may, at any time before one year after the denial of a claim, file a request for modification of the denial of benefits on the grounds that a change in conditions has occurred or because a mistake in a determination of fact was made in the prior decision, including the ultimate fact of entitlement. 20 C.F.R. §725.310; *see Betty B Coal Co. v. Director, OWCP* [Stanley], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

receiving benefits at the time of his death. Director's Exhibit 24. Employer requested a hearing, and the case was transferred to the Office of Administrative Law Judges.

By Order dated October 29, 2010, the administrative law judge advised the parties of the possible applicability of the amendments to this claim, and issued an order directing the parties to address why an order awarding benefits should not be entered. In response, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision, asserting that claimant was entitled to benefits under amended Section 932(*l*). Employer responded, arguing that claimant was not derivatively entitled to benefits.

On November 30, 2010, the administrative law judge determined that the cause of the miner's death was not a material issue under amended Section 932(*l*), and that the issues of relationship and dependency were not contested by employer. Order Awarding Survivor's Benefits at 1-2. Rejecting employer's argument, that the operative date of filing is that of the miner's claim, rather than that of the survivor's claim,³ the administrative law judge found that claimant was automatically entitled to survivor's benefits pursuant to amended Section 932(*l*).

On appeal, employer challenges the constitutionality of amended Section 932(*l*), and its application to this survivor's claim. Employer asserts that it is inappropriate for the Board to consider the administrative law judge's decision at this time, and requests that this case be held in abeyance pending resolution of the constitutional challenges to Public Law No. 111-148 in federal court. Employer also contends that amended Section 932(*l*) does not apply under the facts of this case, as claimant's survivor's claim was denied in 2009 and was not pending on March 23, 2010, the effective date of the PPACA. Lastly, employer asserts that, even if claimant's request for modification revived her claim, such that it was pending on or after the effective date of the amendments, the administrative law judge erred in applying the provisions of amended Section 932(*l*) to modify the denial of benefits into an award, arguing that a change in law is not a proper ground for modification. The Director responds in support of the 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,

³ The administrative law judge noted that employer also asserted various constitutional arguments. Order Awarding Survivor's Benefits at 2.

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).

Initially, as we did 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), we reject employer’s contention that this case must be held in abeyance pending resolution of the legal challenges to Public Law No. 111-148. We further reject employer’s contention that retroactive application of the automatic entitlement provisions of amended Section 932(l) constitutes a due process violation, for the same reasons the Board rejected substantially similar arguments in *Mathews*, 24 BLR at 1-200. *See also Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Lastly, we reject employer’s argument that the recent amendments to Section 932(l) do not apply to a request for modification of the denial of a survivor’s claim. Section 22 of the Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. §922, as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a), permits the reopening and readjudication of a denied survivor’s claim within one year of the order denying benefits, based on a showing of a mistake in a determination of fact, including the ultimate fact of entitlement. *See* 20 C.F.R. §725.310; *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993). The language of Section 1556(c) of the PPACA mandates the application of amended Section 932(l) to all claims filed after January 1, 2005, that are pending on or after March 23, 2010, and provides that a survivor of a miner who was receiving benefits at the time of his or her death is now automatically entitled to survivor’s benefits, without having to establish that the miner’s death was due to pneumoconiosis. Pub. L. No. 111-148, §156(c)(2010); 30 U.S.C. §932(l); *see also Richards v. Union Carbide Corp.*, BLR , BRB Nos. 11-0414 BLA and 11-0414 BLA-A (Jan. 9, 2012). 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 receiving benefits under a final award at the time of his death, we affirm the administrative law judge’s finding that claimant is derivatively entitled to survivor’s benefits pursuant to amended Section 932(l).

⁴ 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*).

Accordingly, the administrative law judge's Order Awarding Survivor's Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge