

BRB No. 11-0627 BLA

RUTH B. SURRATT)	
(Widow of CECIL W. SURRATT))	
)	
Claimant-Respondent)	
)	
v.)	
)	
U.S. STEEL MINING COMPANY, LLC)	DATE ISSUED: 06/18/2012
)	
Employer-Petitioner)	
)	
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.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

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 appeals the Order Awarding Survivor's Benefits (2011-BLA-5113) of Associate Chief Administrative Law Judge William S. Colwell (the administrative law judge) rendered on modification of a subsequent survivor's claim 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, 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), 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 September 24, 2009, the district director denied benefits in claimant's subsequent survivor's claim,¹ finding that claimant failed to establish a change in an applicable condition of entitlement, unrelated to the miner's physical condition. *See* 20 C.F.R. §725.309(d); Director's Exhibit 16. No further action was taken on the claim until April 15, 2010, when claimant filed a timely request for modification.² *See* 20 C.F.R. 725.310; Director's Exhibit 18. In a Proposed Decision and Order dated July 29, 2010, the district director determined that claimant was entitled to an automatic award of benefits under amended Section 932(l), and that benefits should commence as of October 2009, "the month following the date that the most recent denial of benefits became final." Director's Exhibit 21. Employer requested a hearing, and the case was transferred to the Office of Administrative Law Judges.

On April 28, 2011, 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), and that benefits should commence as of May

¹ Claimant is the widow of the miner, who died on September 3, 2006. Director's Exhibit 2. On December 5, 1991, Administrative Law Judge Joan Huddy Rosenzweig awarded benefits in the living miner's claim. No further action was taken with respect to this claim. Director's Exhibit 1. After the miner's death, claimant filed her initial claim for survivor's benefits on September 15, 2006, which was finally denied by the district director on April 11, 2007. Director's Exhibit 2. Claimant filed her present claim for benefits on May 6, 2009. Director's Exhibit 4.

² Pursuant to 20 C.F.R. §725.310(a), a claimant may, at any time before one year after the denial of a claim, file a request for modification on the grounds of a change in conditions or because of a mistake in a determination of fact, including the ultimate fact of entitlement. 20 C.F.R. §725.310(a); *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).

2007, the month after the order denying claimant's prior claim became final. Employer responded, arguing that claimant was not derivatively entitled to benefits.

On May 9, 2011, the administrative law judge determined that the issues of relationship and dependency were not contested by employer. Order Awarding Survivor's Benefits at 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, the administrative law judge found that claimant was automatically entitled to survivor's benefits pursuant to amended Section 932(l). Accepting the Director's assertion that the proper commencement date for benefits is the month after the order denying claimant's prior claim became final, the administrative law judge awarded benefits to commence as of May 2007.

On appeal, employer argues that the retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005 constitutes a violation of its due process rights and an unconstitutional taking of private property. Employer contends that the operative date for determining eligibility pursuant to amended Section 932(l) is the date that the miner's claim was filed, not the date that any survivor's claim was filed. Employer also contends that the administrative law judge erred in applying the provisions of amended Section 932(l) to modify the denial of benefits into an award, as claimant's subsequent 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, if applicable, benefits should commence as of October 2009, the month after the denial of claimant's subsequent survivor's claim.³ Claimant has not filed a brief in this appeal. 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 Order Awarding Survivor's Benefits 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We 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*

³ On March 21, 2012, the Board denied employer's Motion to Hold Appeal in Abeyance pending resolution of the constitutional challenges to Public Law No. 111-148 in federal court. *Surratt v. U.S. Steel Mining Co.*, BRB No. 11-0627 BLA (Mar. 21, 2012)(Order)(unpub.).

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]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Further, 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. *West Virginia CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010). For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary.

Further, 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 subsequent survivor's claim. 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 automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. Pub. L. No. 111-148, §1556(c), 124 Stat. 119 (2010); 30 U.S.C. §932(l). In *Richards v. Union Carbide Corp.*, BLR , BRB Nos. 11-0414 BLA & 11-0414 BLA-A (Jan. 9, 2012)(en banc) (McGranery, J., concurring and dissenting)(Boggs, J., dissenting), *appeal docketed*, No. 12-1294 (4th Cir. Mar. 8, 2012), the Board held that the automatic entitlement provisions of amended Section 932(l) are available to an eligible survivor who files a subsequent claim within the time limitations established in Section 1556 of the PPACA. *Richards*, slip op. at 4-6. Additionally, in *Mullins v. ANR Coal Co.*, BLR , BRB No. 11-0251 BLA (Jan. 11, 2012), *recon. denied* (June 14, 2012)(Order)(unpub.), the Board held that the provisions of amended Section 932(l) apply to a request for modification of the denial of a survivor's claim, noting that 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. *Mullins*, slip op. at 4; *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). Because claimant filed her subsequent survivor's 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).

Lastly, for the reasons set forth in *Richards*, we reject employer's argument that benefits are not payable prior to October 2009, the month after the district director denied claimant's subsequent claim. Subsequent to the issuance of the administrative law judge's Order Awarding Survivor's Benefits in this case, we held that the provisions of 20 C.F.R. §725.309(d)(5) are applicable to bar payment of benefits under amended Section 932(l) in a subsequent survivor's claim "for any period prior to the date upon which the order denying the prior claim became final." *Richards*, slip op. at 7; 20 C.F.R. §725.309(d)(5). While benefits under amended Section 932(l) are payable from the month of the miner's death in a case involving modification of the denial of an initial survivor's claim, based on a mistake in fact, see 20 C.F.R. §725.503(c), (d)(1); see also *Dotson v. McCoy Elkhorn Coal Corp.*, 25 BLR 1-13 (2011), the underlying claim in this case is a subsequent claim. Consequently, as the order denying claimant's prior claim became final in May 2007, at the expiration of the thirtieth day after it was filed in the office of the district director, see 20 C.F.R. §725.479(a), claimant's survivor's benefits under amended Section 932(l) in her subsequent claim properly commence as of June 2007, the month after the month in which the order denying claimant's prior claim became final. See 20 C.F.R. §725.309(d)(5); *Richards*, slip op. at 7-8.

Accordingly, the administrative law judge's Order Awarding Survivor's Benefits is affirmed, as modified to reflect June 2007 as the date from which benefits commence.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge