

BRB No. 12-0001 BLA

SUE W. ROSE)
(Widow of ROGER ROSE))
)
 Claimant-Respondent)
)
 v.)
)
 TROJAN MINING & PROCESSING) DATE ISSUED: 10/24/2012
)
 and)
)
 TRAVELERS INDEMNITY 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.

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

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

Helen H. Cox (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/carrier (employer) appeals the Order Awarding Survivor's Benefits (2011-BLA-5943) of Associate Chief Administrative Law Judge William S. Colwell rendered on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a survivor's subsequent claim filed on March 9, 2011.¹

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 932(l), which provides that the survivor of a miner who was determined to be 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).

On August 12, 2011, the Director, Office of Workers' Compensation Programs (the Director), moved for a summary decision, asserting that, pursuant to amended Section 932(l), claimant was automatically entitled to benefits as a matter of law, and that there was no genuine issue as to any material fact concerning her entitlement. Employer opposed the Director's motion, arguing that claimant was not eligible for derivative survivor's benefits under amended Section 932(l), because her prior claim was finally denied and the subsequent claim was barred pursuant to 20 C.F.R. §725.309(d)(3), and based on the principles of *res judicata*, or claim preclusion. If the claim was not barred, employer argued that the case should be held in abeyance pending review of *Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), by the United States Court of Appeals for the Fourth Circuit. In the alternative, employer argued that the case should be scheduled for a formal hearing to give employer the opportunity to submit evidence of the economic impact created by the amendments, and to support its argument that this legislation affects an unconstitutional taking of property under the Fifth Amendment to the United States Constitution. Claimant did not respond to the Director's motion.

¹ Claimant is the widow of the miner, who died on October 11, 2000. Director's Exhibit 7. Claimant filed an initial survivor's claim on October 30, 2000, which was denied by the district director on March 26, 2001. Director's Exhibit 2.

In his Order Awarding Survivor's Benefits, the administrative law judge initially rejected employer's challenges to the applicability of amended Section 932(l) in this survivor's claim, but noted that employer's constitutional challenges to the PPACA and resulting damages were preserved for purposes of appeal. The administrative law judge found that claimant satisfied the criteria for derivative entitlement pursuant to amended Section 932(l),² and awarded benefits to commence as of April 2005, which the administrative law judge indicated was the month after the month in which the denial of claimant's prior survivor's claim became final.

On appeal, employer challenges the constitutionality of the PPACA and application of amended Section 932(l) to this survivor's claim.³ 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 the survivor's claim was filed. Additionally, employer argues that claimant is not eligible for derivative survivor's benefits, pursuant to amended Section 932(l), because her prior claim was finally denied and her subsequent claim is barred by Section 725.309(d)(3) and fundamental principles of res judicata, or claim preclusion. The Director responds, arguing that the administrative law judge properly awarded benefits under amended Section 932(l). The Director, however, contends that, because the administrative law judge incorrectly identified the year in which the denial of claimant's prior claim became final, the administrative law judge erred in determining that benefits should commence as of April 2005. The Director maintains that the proper date for commencement of benefits is April 2001. Claimant responds, urging affirmance of the administrative law judge's award of benefits and also requests that the date for commencement of benefits be modified.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

² The miner was found entitled to federal black lung benefits at the time of his death pursuant to a claim filed on May 2, 2000, which were awarded subsequent to the miner's death by Administrative Law Judge Thomas M. Burke on March 10, 2005. Director's Exhibit 3.

³ Employer's challenges to the constitutionality of the Patient Protection and Affordable Care Act and the severability of its non-health care provisions are moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012).

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 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. The arguments employer makes are virtually identical to the ones that the Fourth Circuit recently rejected.⁴ *W. Va. 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), *cert. denied*, 568 U.S. (2012); *see also B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011). For the reasons set forth in *Stacy*, we reject employer's arguments.

Employer further contends that, because claimant's prior claim for survivor's benefits was denied and the denial became final, fundamental principles of res judicata, or claim preclusion, set forth in Section 725.309(d)(3), bar her subsequent claim. We disagree. The principles of res judicata addressed in Section 725.309, requiring that a subsequent claim be denied unless a change in an applicable condition of entitlement is established, are not implicated in the context of a survivor's subsequent claim filed within the time limitations set forth under Section 1556 of the PPACA, because entitlement under amended Section 932(l) is not tied to relitigation of the prior finding that the miner's death was not due to pneumoconiosis. *Richards v. Union Carbide Corp.*, 25 BLR 1-31 (2012) (en banc)(McGranery, J., concurring and dissenting)(Boggs, J., dissenting), *appeal docketed*, No. 12-1294 (4th Cir. Mar. 8, 2012). Therefore, contrary to employer's contention, 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. *Id.*

Because claimant filed her subsequent claim after January 1, 2005, her claim was pending after March 23, 2010, and the miner was determined to be eligible to receive benefits 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 932(l), 30 U.S.C. §932(l). Director's Exhibits 1-3, 5.

⁴ We also deny employer's alternate request to remand this case for development of evidence relevant to the economic impact of amended Section 932(l), as employer's argument with regard to the Takings Clause of the Fifth Amendment has been rejected by the United States Court of Appeals for the Fourth Circuit and the Board. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 387, 25 BLR 2-65, 2-75 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *cert. denied*, 568 U.S. (2012); *Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (2010).

Consistent with the Director's argument regarding the date from which benefits are payable, we agree that the administrative law judge erred in determining that benefits should commence as of April 2005.⁵ In *Richards*, the Board addressed the identification of the appropriate date for the commencement of benefits in a subsequent survivor's claim awarded pursuant to amended Section 932(l). *Richards*, 25 BLR at 1-38. The Board determined that, because the PPACA does not authorize the reopening of a previously denied claim, the denial of the prior survivor's claim must be given effect. The Board further reasoned that, in order to do so, the provisions of 20 C.F.R. §725.309(d)(5) must be applied in a subsequent survivor's claim to bar the payment of benefits from any period *prior to the date upon which the denial of the prior claim became final*. *Id.* The Board specifically adopted the position of the Director that benefits on a subsequent claim should commence in the month after the month in which the prior denial became final. *Id.* at 1-39.

In order to determine the proper date for the commencement of benefits in this case, it is necessary to first find the correct date that the denial of claimant's prior survivor's claim became final. The record indicates that claimant's prior survivor's claim was denied *as abandoned* on March 26, 2001. Director's Exhibit 2. Pursuant to 20 C.F.R. §725.409(c), "the denial of a claim by reason of abandonment shall become *effective and final* unless, within 30 days after the denial is issued, the claimant requests a hearing." 20 C.F.R. §725.409(c) (emphasis added). Because claimant did not request a hearing within thirty days of the district director's denial by reason of abandonment, that denial became *effective and final* on March 26, 2001, the date of issuance of the denial.⁶ *Id.* Applying *Richards*, we agree with the Director that benefits in this case should commence in April 2001, the month after the month in which the prior denial became final. Consequently, we modify the administrative law judge's finding to reflect that benefits should commence as of April 2001. *See* 20 C.F.R. §725.309(d)(5); *Richards*, 25 BLR at 1-39.

⁵ The error in this case stemmed from the misstatement of the Director, Office of Workers' Compensation Programs (the Director), in its Motion for Summary Decision, that benefits should commence as of April 2005, and not April 2001, as the Director asserts in this appeal. The administrative law judge relied on the Director's position below and awarded benefits to commence as of April 2005, without further explanation.

⁶ The regulation at 20 C.F.R. §725.409(c) is distinguished from 20 C.F.R. §725.419(d), which provides that a district director's proposed decision and order shall become a final decision and order effective "upon the expiration of the applicable 30-day period" for the claimant to request either revision of the decision or a hearing. *Compare* 20 C.F.R. §725.409(c) *with* §725.419(d).

Accordingly, the administrative law judge's Order Awarding Survivor's Benefits is affirmed, and is modified to reflect April 2001 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