

BRB No. 11-0531 BLA

ETHEL S. KEENE	)	
(Widow of EMORY KEENE)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
(VIRGINIA POCAHONTAS DIVISION)	)	DATE ISSUED: 04/13/2012
	)	
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, Administrative Law Judge, United States Department of Labor.

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

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Paul L. Edenfield (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 (11-BLA-5206) of Administrative Law Judge William S. Colwell (the administrative law judge) rendered on a 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). Claimant filed her survivor's claim on August 10, 2007.<sup>1</sup> Director's Exhibit 2. In a Decision and Order issued on September 10, 2009, Administrative Law Judge Linda S. Chapman denied benefits. Director's Exhibit 58. Claimant timely requested modification pursuant to 20 C.F.R. §725.310. Director's Exhibit 59.

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. The amendments, in pertinent part, revive Section 932(*l*) of the Act, which provides that the eligible 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*). The district director awarded benefits to claimant pursuant to amended Section 932(*l*), and employer requested a hearing. Director's Exhibits 61-63.

While the case was pending before the administrative law judge, the Director, Office of Workers' Compensation Programs (the Director), moved for a summary decision, arguing that there was no genuine issue of material fact concerning whether claimant was automatically entitled to benefits pursuant to amended Section 932(*l*). Employer responded, arguing that amended Section 932(*l*) may not be applied to this case because the miner filed his claim before January 1, 2005. Additionally, employer urged the administrative law judge to delay a ruling until the United States Supreme Court issues a decision resolving the legal challenges to other provisions of Public Law No. 111-148. The Director replied, reiterating his position.

In his Order Awarding Survivor's Benefits dated April 12, 2011, the administrative law judge found that the miner 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 March 23, 2010, and that employer did not dispute that claimant is an eligible survivor of the miner. The administrative law judge therefore determined that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(*l*). Accordingly, the administrative law judge awarded benefits.

---

<sup>1</sup> Claimant is the widow of the miner, who died on July 6, 2007. Director's Exhibit 8. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim. Director's Exhibit 1.

On appeal, employer challenges the administrative law judge's application of amended Section 932(l) to this case, and requests that this case be held in abeyance. Both claimant and the Director respond, urging the Board to affirm the administrative law judge's 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, and in accordance with applicable law.<sup>2</sup> 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).

Employer contends that retroactive application of amended Section 932(l) is unconstitutional, because it violates employer's due process rights, and constitutes an unconstitutional taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 4-12. Employer also argues that the operative date for determining eligibility under Section 932(l) is the date the miner's claim was filed, not the date the survivor's claim was filed. Employer's Brief at 12-19. These arguments have been rejected by the United States Court of Appeals for the Fourth Circuit and, therefore, lack merit. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383-90 (4th Cir. 2011); *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (2010); *see also B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 254-63 (3d Cir. 2011) (rejecting due process and takings challenges to amended Section 932(l)).

Additionally, employer requests that this case be held in abeyance pending the United States Supreme Court's resolution of the legal challenges to Public Law No. 111-148. Employer's Brief at 20-25. Employer's request is denied. *See Stacy*, 671 F.3d at 383 n.2; *see also Stacy*, 24 BLR at 1-215; *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (unpub. Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011).

In this case, claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under amended Section 932(l): That she filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending after March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death. Therefore, we affirm the administrative law judge's determination that claimant is derivatively entitled to benefits pursuant to amended Section 932(l). 30 U.S.C. §932(l).

---

<sup>2</sup> 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 4; *Shupe v. Director, OWCP*, 12 BLR 1-200 (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