

BRB No. 11-0548 BLA

FRANCES A. CARSON)	
(Widow of WILLIAM H. CARSON))	
)	
Claimant-Respondent)	
)	
v.)	
)	
WESTMORELAND COAL COMPANY)	DATE ISSUED: 04/16/2012
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell, Christopher E. Miller and Cameron O. Flynn (Black Lung Legal Clinic, Washington and Lee University School of Law), Lexington, Virginia, for claimant.

George E. Roeder, III (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Sarah M. Hurley (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 Decision and Order Awarding Benefits (2011-BLA-5359) of Administrative Law Judge Thomas M. Burke rendered on a survivor's claim filed

pursuant to the provisions of the Black Lung Benefits Act,¹ 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).

On December 3, 2010, claimant filed a Motion for Summary Judgment, arguing that, under amended Section 932(l), and given the filing date of her claim, she was entitled to benefits based on the award of benefits to her deceased husband.² In response, employer argued that claimant is not automatically entitled to survivor's benefits under amended Section 932(l), because the miner's claim was neither filed prior to January 1, 2005, nor pending on or after March 23, 2010. The Director, Office of Workers' Compensation Programs (the Director), did not file a response to claimant's motion.

In his Decision and Order Awarding Benefits, the administrative law judge rejected employer's argument that amended Section 932(l) was inapplicable because the miner's claim was filed prior to January 1, 2005, and was not pending on or after March 23, 2010. The administrative law judge found that claimant satisfied the criteria for

¹ Claimant is the widow of the miner, who died on December 22, 2005. Director's Exhibit 10. Claimant filed her survivor's claim on January 10, 2006. Director's Exhibit 2. On January 14, 2008, Administrative Law Judge Larry W. Price issued a Decision and Order denying benefits. Director's Exhibit 60. Judge Price's denial was affirmed by the Board, *F.C. [Carson] v. Westmoreland Coal Co.*, BRB No. 08-0339 BLA (Dec. 19, 2008) (unpub.), and the United States Court of Appeals for the Fourth Circuit, *Carson v. Westmoreland Coal Co.*, No. 09-1182 (4th Cir. Mar. 10, 2010). Director's Exhibits 72, 74, 77. Claimant filed a motion for modification on April 15, 2010, alleging a mistake in a determination of fact. Director's Exhibit 75.

² The miner was receiving federal black lung benefits at the time of his death pursuant to a claim filed on November 21, 1998, which was awarded by Administrative Law Judge Edward Terhune Miller on November 30, 2001. The Board affirmed Judge Miller's award of benefits. *Carson v. Westmoreland Coal Co.*, BRB No. 02-0281 BLA (Nov. 8, 2002)(unpub.).

derivative entitlement pursuant to amended Section 932(l), and awarded benefits to commence as of December 2005, the month in which the miner died.

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 also 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. Employer requests that further proceedings or actions related to this claim be held in abeyance, pending the resolution of the constitutional challenges to the PPACA in federal court. Claimant and the Director respond, urging the Board to reject employer's contentions and 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.³ 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).

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 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, BLR (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*, F.3d , BLR , No. 11-1020, 2011 WL 6396510 (4th Cir. Dec. 21, 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 and, consistent with our reasoning in *Mathews*, we reject employer's request to hold this case in abeyance pending resolution of legal challenges to the

³ The record indicates that the miner was employed in the coal mining industry in West Virginia. Accordingly, the law of the United States Court of Appeals for the Fourth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

PPACA.⁴ *See Stacy*, No. 11-1020, 2011 WL 6396510 at *3 n.2; *see also Stacy*, 24 BLR at 1-215; *Mathews*, 24 BLR at 1-201; *Fairman v. Helen Mining Co.*, 24 BLR 1-225 (2011).

Because claimant filed her survivor's claim after January 1, 2005, her claim was pending on or 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 entitled to receive survivor's benefits pursuant to Section 422(l) of the Act, 30 U.S.C. §932(l). Director's Exhibit 2.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁴ We reject employer's assertion that if any portion of the Patient Protection and Affordable Care Act is declared unconstitutional, the amendments to the Black Lung Benefits Act, including amended Section 932(l), must also be declared invalid. *See West Virginia CWP Fund v. Stacy*, F. 3d , BLR , No. 11-1020, 2011 WL 6396510 (4th Cir. Dec. 21, 2011); Employer's Brief at 18-24.