

BRB No. 11-0567 BLA

LORENE MAYNES	)	
(Widow of CLEVING GARFIELD	)	
MAYNES)	)	
	)	
Claimant-Respondent	)	
	)	DATE ISSUED: 04/25/2012
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
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 of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

John L. Grigsby (Appalachian Research and Defense Fund of Kentucky, Inc.), Barbourville, Kentucky, for claimant.

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

Jeffrey S. Goldberg (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 (11-BLA-5513) of Administrative Law

Judge Alice M. Craft awarding benefits 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). This case involves a survivor's subsequent claim filed on December 22, 2010.

Claimant<sup>1</sup> filed her initial claim for survivor's benefits on October 21, 2003. Director's Exhibit 1A. In a Decision and Order dated November 15, 2007, Administrative Law Judge Joseph E. Kane denied benefits because he found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Id.* The Board and the United States Court of Appeals for the Sixth Circuit subsequently affirmed Judge Kane's denial of benefits.<sup>2</sup> *L.M. [Maynes] v. Consolidation Coal Co.*, BRB No. 08-0255 BLA (Oct. 8, 2008) (unpub.), *aff'd*, No. 08-4645 (6th Cir. July 29, 2009) (unpub.).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, were enacted. The amendments, in pertinent part, revive Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that a 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).

Claimant filed this subsequent claim on December 22, 2010. Director's Exhibit 9. The district director awarded benefits to claimant pursuant to amended Section 932(l), and employer requested a hearing. Director's Exhibit 23.

On April 4, 2011, the administrative law judge ordered the parties to show cause why claimant should not be found entitled to benefits pursuant to amended Section 932(l). Employer responded, arguing that amended Section 932(l) should not be applied, and requesting that the case be held in abeyance. Claimant responded that she was automatically entitled to benefits pursuant to amended Section 932(l).

In her Decision and Order, the administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l). Accordingly, the administrative law judge awarded survivor's benefits,

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<sup>1</sup> Claimant is the surviving spouse of the miner, who died on October 4, 2003. Director's Exhibit 18. 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.

<sup>2</sup> Claimant requested modification of her denied 2003 survivor's claim, but subsequently withdrew her request. Director's Exhibit 1A.

commencing as of March 2010, the month in which Congress reinstated Section 932(l) by enacting Public Law No. 111-148.

On appeal, employer challenges the constitutionality of amended Section 932(l), and its application to this claim. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's application of amended Section 932(l) to this case. The Director, however, contends that the appropriate date for the commencement of benefits in this case is October 2009, the month after the month in which the denial of the prior survivor's claim became final.<sup>3</sup>

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>4</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 argues that retroactive application of amended Section 932(l) is unconstitutional, as a violation of employer's due process rights and as an unlawful taking of employer's 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 United States Court of Appeals for the Fourth Circuit recently rejected. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383-89 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010); *see also B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 254-63 (3d Cir. 2011). For the reasons set forth in *Stacy*, we reject employer's arguments. We also reject employer's request for a remand to the administrative law judge so that it can submit evidence on the economic impact of the

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<sup>3</sup> Employer does not challenge the administrative law judge's findings that claimant established 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 on March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death. Therefore, those findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>4</sup> The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 1A. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

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

Employer next 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 20 C.F.R. §725.309 bar her subsequent claim. We disagree. The principles of res judicata addressed in 20 C.F.R. §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 Public Law No. 111-148, because entitlement thereunder is not tied to relitigation of the prior finding that the miner's death was not due to pneumoconiosis. *Richards v. Union Carbide Corp.*, BLR , BRB Nos. 11-0414 BLA & 11-0414 BLA-A, slip op. at 4-6 (Jan. 9, 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. *Id.*

Finally, the Director argues that the administrative law judge erred in setting the benefits commencement date as March 2010. Noting that benefits on a subsequent claim may not commence until the month after the prior denial became final, *see* 20 C.F.R. §725.309(d)(5), the Director argues that claimant is entitled to benefits commencing in October 2009, rather than in March 2010. The Board recently adopted the Director's position, holding that benefits are payable in a subsequent survivor's claim filed within the time limitations set forth in Section 1556 from the month after the month in which the denial of the prior claim became final. *Richards*, slip op. at 7. Here, the decision of the Sixth Circuit affirming the denial of claimant's prior claim became final in September 2009, the month in which the court issued its mandate. *See Youghioghney & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 951-53, 22 BLR 2-46, 2-60-64 (6th Cir. 1999). Consequently, we modify the administrative law judge's determination of the commencement date for benefits to October 2009. *See* 20 C.F.R. §725.309(d)(5).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed, as modified to reflect October 2009 as the date from which benefits commence.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge