

BRB No. 11-0569 BLA

JUNE G. CASTLE	)	
(Widow of MACK D. CASTLE)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
U. S. STEEL MINING COMPANY, LLC	)	DATE ISSUED: 04/27/2012
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell and Daniel K. Evans (Black Lung Legal Clinic, Washington and Lee University School of Law), Lexington, Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, 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 Awarding Benefits (2011-BLA-5657) of Administrative Law Judge Richard A. Morgan rendered on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act,<sup>1</sup> 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 April 13, 2010, while the case was pending before the administrative law judge, claimant filed a Motion for Summary Judgment, arguing that she was entitled to benefits under amended Section 932(l), based on the award of benefits to her deceased husband and the filing date of her claim. In response, employer argued that Section 1556 of the PPACA is not applicable because the Department of Labor has not implemented regulations governing the amendments to Section 932(l), and, thus, it argued that claimant is not relieved of the requirement to establish that the miner's death was due to pneumoconiosis. Additionally, employer argued that claimant is not automatically entitled to survivor's benefits under amended Section 932(l) because the operative filing date is the date of the miner's claim, which was filed before January 1, 2005 and was not pending on March 23, 2010. Employer also argued that, even if the date of the survivor's claim is the operative filing date, the instant case is barred because of the denial of benefits in the survivor's claim, which employer contends became final with the Board's May 19, 2009 Order granting claimant's motion to dismiss her appeal. The Director,

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<sup>1</sup> Claimant is the widow of the miner. The miner filed a claim for benefits on January 30, 2003. Director's Exhibit 1. He died on September 28, 2005, while his case was still pending. Director's Exhibit 11. Claimant filed her survivor's claim in November 2005. Director's Exhibit 3. Both cases were consolidated. Director's Exhibit 1. On March 6, 2009, Administrative Law Judge Daniel L. Leland issued a Decision and Order awarding benefits in the miner's claim but denying benefits in the survivor's claim. Director's Exhibit 47. No party appealed Judge Leland's award of benefits in the miner's claim. Although claimant appealed Judge Leland's denial of survivor's benefits, she subsequently filed a motion to dismiss her appeal, which the Board granted. *Castle v. U.S. Steel Corp.*, BRB No. 09-0504 BLA (May 19, 2009)(unpub. Order); Director's Exhibits 49, 51, 52. Claimant filed a petition for modification in her survivor's claim on February 10, 2010, alleging a mistake in a determination of fact. Director's Exhibit 53.

Office of Workers' Compensation Programs (the Director), did not file a response to claimant's Motion for Summary Judgment.

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 before January 1, 2005, and was not pending on or after March 23, 2010. The administrative law judge therefore found that claimant satisfied the criteria for derivative entitlement pursuant to amended Section 932(l). Accordingly, the administrative law judge awarded benefits to commence as of September 2005, the month in which the miner died.

On appeal, employer challenges the administrative law judge's application of amended Section 932(l) to this case and further requests that this case be held in abeyance. Claimant and the Director respond, urging the Board to reject employer's contentions and 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 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, because the Secretary of Labor has not yet promulgated regulations addressing the amendments contained in Section 1556 of the PPACA, these amendments do not create automatic entitlement in survivor's claims where there was a final award of benefits in the miner's claim pursuant to Section 932(l). Rather, employer argues that the amendments only relieve the eligible survivor of the necessity to file a new claim on her own behalf. Additionally, 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. Employer further argues that, even if claimant's November 22, 2005 filing date was the operative date, this case is still barred because of the denial of benefits in the survivor's claim, which employer argues became final with the Board's May 19, 2009 Order dismissing claimant's appeal.

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<sup>2</sup> The record indicates that the miner was employed in the coal mining industry in West Virginia. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director's Exhibits 1, 5.

Specifically, employer argues that the filing of a request for modification is a separate and distinct proceeding from the finally denied claim and “does not operate to make it subject to the amendments effected by Section 1556 of the PPACA.” Employer’s Brief at 12.

We reject employer’s initial 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 an unconstitutional taking of private property, for the same reasons that 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. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 388-89, BLR (4th Cir. 2011); *aff’g Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (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 PPACA or until the Department of Labor promulgates regulations implementing amended Section 932(l). *See Stacy*, 671 F.3d at 383-90; *see also Stacy*, 24 BLR at 1-215; *Mathews*, 24 BLR at 1-201; *Fairman v. Helen Mining Co.*, 24 BLR 1-225 (2011).

Moreover, we reject employer’s argument that the amendments to Section 932(l) do not apply to a request for modification of the denial of a survivor’s claim. In *Mullins v. ANR Coal Co., LLC*, BLR , BRB No. 11-0251 BLA (Jan. 11, 2012), the Board recently addressed and rejected arguments substantially similar to those raised by employer in this case. In applying amended Section 932(l) to a survivor’s request for modification,<sup>3</sup> the Board held that 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 eligible to receive benefits at the time of his death is now 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)(2010); 30 U.S.C. §932(l); *Mullins*, BRB

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<sup>3</sup> 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. *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).

No. 11-0251, slip op. at 3; *see also Richards v. Union Carbide Corp.*, BLR , BRB Nos. 11-0414 BLA and 11-0414 BLA-A (Jan. 9, 2012).

Consequently, because claimant filed her survivor's claim after January 1, 2005, timely requested modification such that her claim was pending on March 23, 2010, and the miner was found to be eligible to receive benefits at the time of his death by a final award of benefits, 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 Exhibits 3, 53.

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

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