

BRB No. 12-0551 BLA

JOYCE J. CUMMINGS )  
(Widow of BERT R. CUMMINGS) )  
 )  
Claimant-Respondent )  
 )  
v. )  
 )  
ROYAL COAL COMPANY )  
 )  
and )  
 )  
WEST VIRGINIA COAL WORKERS' ) DATE ISSUED: 04/23/2013  
PNEUMOCONIOSIS FUND )  
 )  
Employer/Carrier- )  
Petitioners )  
 )  
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 Lystra A. Harris,  
Administrative Law Judge, United States Department of Labor.

Francesca Tan (Jackson Kelly PLLC), Morgantown, West Virginia, for  
employer/carrier.

Richard A. Seid (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 Decision and Order Awarding Benefits (2012-BLA-05498) of Administrative Law Judge Lystra A. Harris, rendered on a survivor's subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).

Claimant<sup>1</sup> filed her initial claim for survivor's benefits on September 29, 2005. Director's Exhibit 2. The district director denied benefits on June 13, 2006, finding that the evidence did not establish that the miner's death was due to pneumoconiosis. *Id.* Claimant did not pursue the claim further.

Claimant filed this subsequent claim on September 8, 2011. Director's Exhibit 4. The administrative law judge found claimant to be automatically entitled to benefits under amended Section 932(l) of the Act, 30 U.S.C. §932(l),<sup>2</sup> and awarded survivor's benefits commencing as of July 2006, the month after claimant's initial survivor's claim was denied. Decision and Order at 3-4.

On appeal, employer challenges the constitutionality of amended Section 932(l) and its application to this survivor's claim. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), urges affirmance of the award of benefits, but contends that the appropriate date for the commencement of benefits is August 2006, the month after the month in which the denial of the prior survivor's claim became final.

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>3</sup> 33 U.S.C. §921(b)(3), as incorporated by 30

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<sup>1</sup> Claimant is the widow of the miner, who died on August 28, 2005. Director's Exhibits 8, 9. At the time of his death, the miner was receiving federal black lung benefits pursuant to a final award on his lifetime claim. Director's Exhibit 1.

<sup>2</sup> Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this case, Congress revived Section 932(l) of the Act, which provides that a 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), amended by Pub. L. No. 111-148, §1556(b), 124 Stat. 119, 260 (2010).

<sup>3</sup> The miner's most recent coal mine employment was in West Virginia. Director's Exhibit 1. 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, 1-202 (1989) (en banc).

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer argues that retroactively applying amended Section 932(l) is unconstitutional as a violation of due process, and as a taking of employer’s property, in violation of the Fifth Amendment to the United States Constitution.<sup>4</sup> Employer’s Brief at 10-22. Employer also contends that the operative date for determining eligibility for survivor’s benefits under amended Section 932(l) is the filing date of the miner’s claim, not the survivor’s claim. Employer’s Brief at 22-33. The United States Court of Appeals for the Fourth Circuit has rejected all of the same arguments. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383-89, 25 BLR 2-65, 2-74-85 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012); *see also Vision Processing, LLC v. Groves*, 705 F.3d 551, 556-58 (6th Cir. 2013); *B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 247-63, 25 BLR 2-13, 2-44-61 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 849-51, 24 BLR 2-385, 2-397-401 (7th Cir. 2011). For the reasons set forth in *Stacy*, we reject employer’s arguments.

We also reject employer’s assertion that claimant is not an “eligible survivor” within the meaning of amended Section 932(l) because she did not prove that pneumoconiosis caused, or contributed to, the miner’s death. Employer’s Brief at 34-39. Amended Section 932(l) provides benefits to a survivor without requiring proof that the miner’s death was due to pneumoconiosis. *Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-231 (2011); *see also Stacy*, 671 F. 3d at 389-91, 25 BLR at 2-85-88; *Campbell*, 662 F.3d at 249-50, 25 BLR at 2-38-39.

Employer next contends that claimant is ineligible for survivor’s benefits under amended Section 932(l) because her prior claim was finally denied and, in employer’s view, fundamental principles of res judicata or claim preclusion bar her subsequent claim. Employer’s Brief at 39-58. We disagree. The Board recently held that the principles of res judicata addressed in 20 C.F.R. §725.309, requiring that a subsequent claim be denied unless a change 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 under amended Section 932(l) is not tied to relitigation of the prior finding that claimant did not establish that the miner’s death was due to pneumoconiosis. *Richards v. Union Carbide Corp.*, 25 BLR 1-31 (2012) (en

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<sup>4</sup> To the extent employer requests that this case be held in abeyance pending the outcome of challenges to other provisions of the Patient Protection and Affordable Care Act, Public Law No. 111-148, that were not resolved by *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012), its request is denied. Employer’s Brief at 9-10.

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 provision of amended Section 932(l) is available to an eligible survivor who files a subsequent claim within the time limitations established in Section 1556.<sup>5</sup> *Id.*

Finally, employer argues that if claimant is entitled to benefits, those benefits may not commence before September 2011, the month in which she filed this claim. Employer's Brief at 59-63. The Director responds, arguing that claimant is entitled to benefits commencing in August 2006, the month after the month in which the denial of her prior claim became final. The Board has adopted the Director's position, holding that, in a survivor's subsequent claim, filed within the time limitations set forth in Section 1556 of Public Law No. 111-148, derivative benefits are payable from the month after the month in which the denial of the prior survivor's claim became final. *Richards*, 25 BLR at 1-38-39. In this case, the district director's June 2006 denial of claimant's prior claim became final in July 2006. 20 C.F.R. §725.419(d); Director's Exhibit 2. Consequently, we modify the administrative law judge's determination of the benefits commencement date to August 2006. 20 C.F.R. §725.309(d)(5).

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<sup>5</sup> We deny employer's request that this case be held in abeyance pending the Fourth Circuit's decision in *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). Employer's Brief at 39 n.25.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed, as modified to reflect August 2006 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