

BRB No. 11-0754 BLA

CELIA A. SHARP)
(Widow of CECIL R. SHARP))
)
Claimant-Respondent)
)
v.)
)
GAMBLE COALS, INCORPORATED) DATE ISSUED: 08/14/2012
)
and)
)
WEST VIRGINIA COAL WORKERS')
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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 appeals the Decision and Order Awarding Benefits (2011-BLA-5847) of Administrative Law Judge Richard A. Morgan, rendered on a subsequent survivor's 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).¹ Claimant filed her initial claim for survivor's benefits on December 12, 2001, which was denied by Administrative Law Judge Stephen L. Purcell in a Decision and Order issued on May 16, 2006. Director's Exhibit 3. Claimant took no further action with respect to this claim.

On March 23, 2010, amendments to the Act, contained in the Patient Protection and Affordable Care Act (PPACA), were passed, which affect claims filed after January 1, 2005 that were pending on or after March 23, 2010. *See* Section 1556 of the PPACA, Public Law No. 111-148 (2010). In pertinent part, the amendments revived 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.

Claimant filed a subsequent survivor's claim on February 14, 2011. Director's Exhibit 5. The district director issued a Proposed Decision and Order on February 15, 2011, finding that claimant was derivatively entitled to benefits pursuant to amended Section 932(l). Director's Exhibit 14. Employer requested a hearing, and the case was assigned to the administrative law judge. Director's Exhibits 15-17.

On June 7, 2011, prior to the scheduled hearing, the Director, Office of Workers' Compensation Programs (the Director), filed a motion for summary decision, asserting that, pursuant to amended Section 932(l), claimant was automatically entitled to benefits as a matter of law, and that there was no genuine issue as to any material fact concerning her entitlement. Employer opposed the Director's motion and requested that the administrative law judge hold the case in abeyance. The administrative law judge granted the Director's motion for summary decision and awarded survivor's benefits, commencing on June 1, 2006.

On appeal, employer challenges the constitutionality of amended Section 932(l), and its application to the survivor's subsequent claim. Employer also asserts that the

¹ Claimant is the widow of the miner, Cecil R. Sharp, who died on November 7, 2001. Director's Exhibit 7. Administrative Law Judge Julius A. Johnson awarded the miner federal black lung benefits in a decision dated May 22, 1991. Director's Exhibit 2. At the time of his death, therefore, the miner was receiving federal black lung benefits pursuant to his lifetime award. Director's Exhibits 3, 4, 14.

subsequent claim is barred by the principles of res judicata, or claim preclusion, as set forth in 20 C.F.R. §725.309(d)(3). In addition, employer argues that allowing automatic entitlement to benefits in a subsequent survivor's claim under amended Section 932(l) ignores the governing language of 20 C.F.R. §725.2 and sanctions the Director's disregard of the rulemaking requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Employer further maintains that the operative date for determining eligibility for survivor's benefits under amended Section 932(l) is the date that the miner's claim was filed, which was prior to January 1, 2005. Lastly, employer contends that, if claimant is automatically entitled to benefits, then the commencement of benefits should not predate February 14, 2011, the date on which the survivor's subsequent claim was filed.²

The Director responds and urges the Board to affirm the award of benefits. The Director notes, however, that the administrative law judge erred in finding that benefits commence on July 1, 2006. Claimant has not filed a response brief.

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

² Employer also requests that the Board hold this case in abeyance, pending review by the United States Court of Appeals for the Fourth Circuit of the Board's decision in *Stacy v. Olga Coal Corp.*, 24 BLR 1-207 (2010). Employer further notes that challenges to the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010), of which the amendments are a part, may affect the viability of amended Section 932(l). Subsequent to the briefing in this case, the United States Supreme Court upheld the constitutionality of the PPACA, and the Fourth Circuit affirmed the Board's decision in *Stacy. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012); *West Virginia CWP Fund v. Stacy*, 671 F. 3d 378, 25 BLR 2-69 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *petition for cert. filed*, No. 11-1342 (U.S. May 4, 2012). Employer's request that this case be held in abeyance is, therefore, moot. In addition, we deny employer's alternative request to remand this case for development of evidence relevant to the economic impact of amended Section 932(l), as employer's argument with regard to the Takings Clause of the Fifth Amendment has been rejected by the Fourth Circuit and the Board. *Stacy*, 671 F. 3d at 387, 25 BLR at 2-75; *Stacy*, 24 BLR at 1-214.

³ The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

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

As an initial matter, 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 an unlawful 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 West Virginia CWP Fund v. Stacy*, 671 F. 3d 378, 25 BLR 2-69 (4th Cir. 2011), *aff’g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *petition for cert. filed*, No. 11-1342 (U.S. May 4, 2012); *B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-16 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Further, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has affirmed the Board’s holding that 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. *Stacy*, 671 F. at 383 n.2, 25 BLR at 2-74 n.2. For the reasons set forth in *Stacy*, we hold that employer’s arguments to the contrary are without merit. *Id.*

Employer next alleges that the subsequent claim in this case is barred by the general principles of res judicata and 20 C.F.R. §725.309, as claimant’s prior claim for survivor’s benefits was denied and that denial became final. We disagree. The terms of 20 C.F.R. §725.309, which require that a subsequent claim be denied unless a change in an applicable condition of entitlement is established, do not preclude a survivor’s subsequent claim, filed within the time limitations set forth under Section 1556 of the PPACA, as entitlement thereunder is not tied to relitigation of the prior finding that claimant did not prove that the miner’s death was not due to pneumoconiosis. *See Richards v. Union Carbide Corp.*, BLR , BRB Nos. 11-0414 BLA and 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). Contrary to employer’s contention, therefore, 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 of the PPACA. *Id.*

We also reject employer’s argument that the Department of Labor was required to engage in formal rulemaking, under the APA, to amend 20 C.F.R. §725.2(c), which mandates the application of 20 C.F.R. §725.309(d)(3) to all claims filed after January 19, 2001. The Board did not hold in *Richards* that 20 C.F.R. §725.309(d)(3) does not apply to subsequent claims filed after January 1, 2005 and pending on, or after, March 23, 2010. Rather, the Board held, consistent with the Director’s position, that 20 C.F.R. §725.309(d)(3) applies to such claims, but does not bar an award of benefits, as Congress

effectively created the requisite “change” by establishing a new condition of entitlement unrelated to whether the miner’s death was due to pneumoconiosis. *Richards*, slip op. at 6-7. Accordingly, we affirm the administrative law judge’s application of amended Section 932(l) to the subsequent survivor’s claim in this case and further affirm the award of benefits.

Finally, we agree with the Director that the administrative law judge’s designation of June 1, 2006, as the date for the commencement of benefits was in error. In *Richards*, the Board determined that, because Section 1556 of the PPACA does not authorize the reopening of a previously denied claim, the denial of the prior survivor’s claim must be given effect. *Richards*, slip op. at 7-8. The Board further reasoned that, in order to do so, the provisions of 20 C.F.R. §725.309(d)(5) must be applied in a survivor’s subsequent claim to bar the payment of benefits from a date prior to the date upon which the denial of the prior claim became final. *Id.* In the present case, because the denial of claimant’s prior claim became final in June 2006, claimant’s survivor’s benefits properly commence as of July 1, 2006, the first day of the month after the month in which claimant’s prior denial of benefits became final. 20 C.F.R. §§725.309(d)(5), 725.479(a); *see Richards*, slip op. at 7-8; Director’s Exhibit 3.

Accordingly, the administrative law judge’s Decision and Order Awarding Benefits is affirmed, as modified to reflect July 1, 2006, as the date from which benefits commence.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge