

BRB No. 11-0758 BLA

MARTHA E. HENRY )  
(Widow of SAMUEL E. HENRY) )  
 )  
Claimant-Respondent )  
 )  
v. )  
 )  
SLAB FORK COAL COMPANY ) 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 Order Denying Carrier's Motion for Partial Summary Judgment and Awarding Survivor's Benefits of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith, Parkersburg, West Virginia, for claimant.

Kathy L. Snyder and Tiffany B. Davis (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Jonathan Rolfe (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Denying Carrier's Motion for Partial Summary Judgment and Awarding Survivor's Benefits (2011-BLA-6039) of Associate Chief Administrative Law Judge William S. Colwell, rendered on a survivor's claim filed on March 4, 2011,<sup>1</sup> 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).<sup>2</sup> The administrative law judge rejected employer's arguments regarding the applicability of amended Section 422(l), 30 U.S.C. §932(l), to the present claim, and determined that claimant is automatically entitled to benefits, under amended Section 932(l), since the miner was receiving benefits at the time of his death, based on an award issued to him on August 26, 2005.

On appeal, employer challenges the constitutionality of amended Section 932(l), and asserts, in the alternative, that it is not applicable, based on the filing date of the miner's claim. Claimant and the Director, Office of Workers' Compensation, respond, urging affirmance of the award of benefits pursuant to amended Section 932(l). Employer has filed a reply brief, reiterating its arguments, but also requesting that the Board hold the case in abeyance.<sup>3</sup>

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<sup>1</sup> Claimant is the widow of the miner, Samuel E. Henry, who died on November 23, 2009. Director's Exhibits 4, 5.

<sup>2</sup> Section 1556 of the Patient Protection and Affordable Care Act (PPACA) included amendments to the Black Lung Benefits Act (the Act), affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. 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). In pertinent part, the amendments revived Section 422(l) of the Act, 30 U.S.C. §932(l), providing 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.

<sup>3</sup> Employer's request to hold this case in abeyance, pending resolution of the legal challenges to the PPACA, is moot. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012). We deny employer's request to hold this case in abeyance, pending disposition of the petition for certiorari filed in *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Corp.*, 24 BLR 1-207 (2010).

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we reject employer's contention that retroactive application of the automatic entitlement provision of amended Section 932(l), to claims filed after January 1, 2005, constitutes a due process violation. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383-89, 25 BLR 2-65, 2-74-85 (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, 25 BLR 2-16 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). We also deny employer's request to remand the case to the administrative law judge for development of evidence relevant to the economic impact of Section 932(l), since employer's constitutional argument with regard to the Takings Clause of the Fifth Amendment has been rejected by the Board and the United States Court of Appeals for the Fourth Circuit. *See Stacy*, 671 F.3d at 387, 25 BLR at 2-80 (holding that "the mere imposition of an obligation to pay money does not give rise to a claim under the Takings Clause.").

Further, there is no merit to employer's assertion that amended Section 932(l) is not applicable, based on the filing date of the miner's claim. The Fourth Circuit 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. *See Stacy*, 671 F.3d at 388-89, 25 BLR at 2-83-84.

Because claimant filed her survivor's claim after January 1, 2005, her claim was pending on 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 amended Section 422(l) of the Act, 30 U.S.C. §932(l). *See Order Denying Carrier's Motion for Partial Summary Judgment and Awarding Survivor's Benefits at 1-2; Director's Exhibit 1.*

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<sup>4</sup> Because the miner's coal mine employment was in West Virginia, 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); Director's Exhibit 1.

Accordingly, the administrative law judge's Order Denying Carrier's Motion for Partial Summary Judgment and Awarding Survivor's 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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JUDITH S. BOGGS  
Administrative Appeals Judge