

BRB No. 11-0763 BLA

BETTY K. HURLEY	)	
(Widow of ANDREW HURLEY)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KENTUCKY CARBON PROCESSING	)	DATE ISSUED: 08/16/2012
COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Awarding Survivor's Benefits of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Sarah M. Hurley (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 Order Awarding Survivor's Benefits (2011-BLA-5658) of Associate Chief Administrative Law Judge William S. Colwell, rendered on a survivor's claim filed on October 31, 2008, 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>1</sup> Director's Exhibit 2. In a Proposed Decision and Order dated August 31, 2009, the district director denied benefits, finding that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis. Director's Exhibit 11. On March 23, 2010, Congress enacted amendments to the Act, contained in the Patient Protection and Affordable Care Act (PPACA), that affect claims filed after January 1, 2005. The amendments, in pertinent part, revive 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.

On April 14, 2010, claimant filed a timely request for modification of the denial of her claim. Director's Exhibit 13; 20 C.F.R. §725.310. In a Proposed Decision and Order dated July 21, 2010, the district director determined that claimant is an eligible survivor of a miner who was receiving benefits at the time of his death and, therefore, is entitled to an automatic award of benefits under amended Section 932(l). Director's Exhibit 18. Employer contested the award and in a Revised Proposed Decision and Order issued on January 31, 2011, the district director affirmed the award of benefits. Director's Exhibits 22, 24. At employer's request, the case was transferred to the Office of Administrative Law Judges for a hearing. Director's Exhibit 26-28.

On June 23, 2011, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision, asserting that claimant was entitled to benefits under amended Section 932(l). Employer objected to Director's motion and requested that the administrative law judge hold the case in abeyance, pending resolution of the challenges to the constitutionality of the PPACA. The administrative law judge granted the Director's motion for summary decision, and awarded survivor's benefits pursuant to amended Section 932(l), commencing as of September, 2008.

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<sup>1</sup> Claimant is the widow of the miner, Andrew Hurley, who died on September 28, 2008. Director's Exhibit 5. The miner was awarded benefits on a lifetime claim in a Decision and Order issued by Administrative Law Judge Edith Barnett on May 16, 1997. Director's Exhibit 1.

On appeal, employer challenges the constitutionality of amended Section 932(l), and its application to the survivor's claim.<sup>2</sup> Employer 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, that claimant's request for modification is not a claim under the Act, and her claim was denied. Claimant and the Director respond and urge affirmance of the 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 supported by substantial evidence, is rational, and is in accordance with applicable law.<sup>3</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).

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 a taking of private property, for the 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) and *Stacy v. Olga Coal Corp.*, 24 BLR 1-207 (2010), *aff'd sub nom. W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-69 (4th Cir. 2011), *petition for cert. filed*, No. 11-1342 (U.S. May 4, 2012). *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). Furthermore, employer's assertion that amended Section 932(l) is not applicable, based on the filing date of the miner's claim, has no merit. The Board held in *Stacy* 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*, 24 BLR at 1-211.

We also reject employer's argument that amended Section 932(l) does not apply to a request for modification of the denial of a survivor's claim. In *Mullins v. ANR Coal*

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<sup>2</sup> Employer also requests that the Board hold the case in abeyance, pending resolution of the constitutionality of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, and the severability of the non-health care provisions. Subsequent to the briefing in this case, the United States Supreme Court held that the PPACA is constitutional. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012). Therefore, employer's request is moot.

<sup>3</sup> The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner's last coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 1.

*Co., LLC*, BLR , BRB No. 11-0251 BLA (Jan. 11, 2012), *recon. denied* (June 14, 2012) (Order) (unpub.), the Board 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>4</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 No. 11-0251 BLA, 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) (en banc) (McGranery, J., concurring and dissenting) (Boggs, J., dissenting), *appeal docketed*, No. 12-1294 (4th Cir. Mar. 8, 2012). Because claimant filed her claim after January 1, 2005, timely requested modification such that the claim was pending after 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 derivatively entitled to survivor's benefits pursuant to amended Section 932(l).

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<sup>4</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 claim within one year of the order awarding or denying benefits, based on a showing of a mistake in a determination of fact, including the ultimate fact of entitlement. 20 C.F.R. §725.310; *Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-18 (6th Cir. 1994).

Accordingly, the administrative law judge's Order 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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BETTY JEAN HALL  
Administrative Appeals Judge