

BRB No. 11-0801 BLA

SHIRLEY J. NAPIER )  
(Widow of FRANKLIN D. NAPIER) )  
 )  
Claimant-Respondent )  
 )  
v. )  
 )  
POWELLTON COMPANY )  
 )  
and )  
 )  
WEST VIRGINIA COAL WORKERS' ) DATE ISSUED: 08/13/2012  
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.

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

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

Ann Marie Scarpino (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 (10-BLA-5381) of Administrative Law Judge Richard A. Morgan (the administrative law judge) rendered on a survivor's claim<sup>1</sup> 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).

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 June 8, 2010, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision and argued that, under amended Section 932(l), and given the filing date of her claim, claimant was entitled to benefits based on the award of benefits to her deceased husband. Employer filed a Response to Director's Motion for Summary Decision and Motion to Hold Claim in Abeyance or Proceed with a Hearing, and challenged the constitutionality of amended Section 932(l) and its applicability to the instant claim.

The administrative law judge found that claimant is an eligible survivor of the miner, and that claimant meets the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l). Accordingly, the administrative law judge awarded survivor's benefits, commencing as of November 1, 2008.

On appeal, 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

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<sup>1</sup> Claimant is the widow of the miner, Franklin D. Napier, who was receiving federal black lung benefits pursuant to a final award at the time of his death on November 2, 2008. Director's Exhibits 1, 9. Claimant filed her claim for survivor's benefits on May 18, 2009. Director's Exhibit 2.

property. Employer also asserts that the operative date for determining eligibility pursuant to amended Section 932(l) is the date the miner's claim was filed, not the date the survivor's claim was filed. Employer maintains that this case should be held in abeyance pending resolution of these issues by the United States Supreme Court.<sup>2</sup> Lastly, employer avers that claimant is not entitled to benefits because she did not prove that pneumoconiosis caused or contributed to the miner's death, as required under 30 U.S.C. §§921(a) and 922(a)(2). Claimant and the Director respond, urging the Board to affirm the administrative law judge's award of benefits. Employer has filed a reply brief, reiterating its arguments.

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. 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).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this cases arises,<sup>3</sup> has upheld the Board's holding in *Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), 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. *West Virginia CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *pet. for cert. pending*, No. 11-1342. The Fourth Circuit has also rejected employer's argument 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. *Id.* For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary, and we decline to hold this case in abeyance pending resolution of these issues by the United States Supreme Court. *See Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2010)(Order)(unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011); *see also Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011); *B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011). Lastly, as the most recent

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<sup>2</sup> Employer's additional argument, that this case should be held in abeyance pending resolution of the constitutional challenges to the Patient Protection and Affordable Care Act, and the severability of its non-health care provisions, is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012).

<sup>3</sup> As the miner's last coal mine employment occurred in West Virginia, 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); Director's Exhibit 1.

amendment to the Act, amended Section 932(l) overrides any conflicting language contained in 30 U.S.C. §§901, 921(a), and 922(a)(2) that requires a survivor to prove that pneumoconiosis caused the miner's death in order to receive benefits. *See Stacy*, 671 F.3d at 389, 25 BLR at 2-88; *Campbell*, 662 F.3d at 238, 25 BLR at 2-18. Hence, we reject employer's argument in this regard.

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).

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge 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