

BRB No. 11-0829 BLA

VIVIAN ALLISON)	
(Widow of JAMES ALLISON))	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: 08/10/2012
)	
ELK RUN COAL COMPANY)	
)	
Employer-Petitioner)	
)	
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Emily Goldberg-Kraft (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 (11-BLA-5665) of Administrative Law Judge Michael P. Lesniak rendered on a 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). This case involves a survivor's subsequent claim filed on February 22, 2011.

Claimant¹ filed her initial claim for survivor's benefits on January 19, 2007. Director's Exhibit 3. In a Proposed Decision and Order dated September 17, 2007, the district director denied benefits because he found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Id.* Claimant timely requested modification of the denial of benefits, which the district director denied on February 5, 2008. *Id.*

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, were enacted. The amendments, in pertinent part, revive Section 422(l) of the Act, 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. 30 U.S.C. §932(l).

Claimant filed this subsequent claim on February 22, 2011. Director's Exhibit 5. The district director awarded benefits to claimant pursuant to amended Section 932(l), and employer requested a hearing. Director's Exhibits 10, 11.

On July 6, 2011, the Director, Office of Workers' Compensation Programs (the Director), moved for a 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 filed a response in opposition to the Director's motion for a summary decision.

In a Decision and Order dated August 19, 2011, the administrative law judge found that claimant satisfied 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 October 2006, the month in which the miner died.

On appeal, employer challenges the constitutionality of amended Section 932(l), and its application to this survivor's subsequent claim. Employer also challenges the administrative law judge's commencement of benefits determination. The Director responds in support of the administrative law judge's application of amended Section 932(l) to this case. However, the Director contends that the appropriate date for the

¹ Claimant is the surviving spouse of the miner, who died on October 12, 2006. Director's Exhibit 8. The miner was awarded federal black lung benefits on his lifetime claim. Director's Exhibit 3 at 1-7.

commencement of benefits in this case is April 2008, the month after the month in which the denial of the prior survivor's claim became final.²

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

Employer argues that retroactive application of amended Section 932(l) is unconstitutional, as a violation of employer's due process rights and as an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. Employer also contends that the operative date for determining eligibility under amended Section 932(l) is the date the miner's claim was filed, not the date the survivor's claim was filed. The United States Court of Appeals for the Fourth Circuit, however, recently rejected all of these same arguments. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383-89, 25 BLR 2-65, 2-76-85 (4th Cir. 2011), *petition for cert. filed*, May 4, 2012 (No. 11-1342), *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, 254-63 (3d Cir. 2011). For the reasons set forth in *Stacy*, we reject employer's arguments.⁴

Employer next contends that claimant is not eligible for derivative survivor's benefits under amended Section 932(l), because her prior claim was finally denied and her subsequent claim is barred pursuant to fundamental principles of res judicata or claim preclusion. We disagree. The Board recently held that the principles of res judicata

² Employer does not challenge the administrative law judge's determination that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under amended Section 932(l): That she filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending on March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death.

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

⁴ Employer's argument, that further proceedings or actions related to this claim should be held in abeyance pending resolution of the constitutional challenges to the Patient Protection and Affordable Care Act, Public Law No. 111-148, is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012).

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 thereunder is not tied to relitigation of the prior finding that the miner's death was not due to pneumoconiosis. *Richards v. Union Carbide Corp.*, BLR, BRB Nos. 11-0414 BLA & 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). Therefore, contrary to employer's contention, 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. *Id.*

Finally, employer challenges the administrative law judge's commencement of benefits determination, arguing that claimant is entitled to benefits commencing in February 2011, the month in which her subsequent claim was filed. The Director responds that benefits should commence as of April 2008, the month after the month in which the denial of claimant's prior claim became final.⁵ The Board recently adopted the position taken by the Director, holding that derivative benefits are payable in a survivor's subsequent claim filed within the time limitations set forth in Section 1556 of Public Law No. 111-148 from the month after the month in which the denial of the prior claim became final. *Richards*, slip op. at 7. Consequently, we modify the administrative law judge's determination of the commencement date for benefits to April 2008. 20 C.F.R. §725.309(d)(5).

⁵ The decision denying claimant's prior survivor's claim was issued by the district director on February 5, 2008, and became final thirty days later, in March 2008. *See* 20 C.F.R. §725.419(d); Director's Exhibit 3.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed, as modified to reflect April 2008 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