

BRB No. 11-0859 BLA

BILLIE LOU BAILEY )  
(Widow of JIMMY BAILEY) )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 PETER WHITE COAL MINING )  
 CORPORATION )  
 )  
 and )  
 ) DATE ISSUED: 08/22/2012  
 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 Granting Director's Motion for Summary Decision and Order Granting Motion for Reconsideration of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe, Williams, Rutherford & Reynolds), Norton, Virginia, for claimant.

Ashley M. Harman and Francesca Tan (Jackson Kelly, PLLC), Morgantown, West Virginia, for employer/carrier.

Helen H. Cox (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/carrier (employer) appeals the Order Granting Director's Motion for Summary Decision, and the Order Granting Motion for Reconsideration (11-BLA-5302) of Administrative Law Judge Thomas M. Burke 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 September 2, 2010. Director's Exhibit 4.

Claimant<sup>1</sup> filed her initial claim for survivor's benefits on March 20, 2006. Director's Exhibit 2. In a Proposed Decision and Order issued on October 12, 2006, 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). Director's Exhibit 2.

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, were enacted. The amendments, in pertinent part, revive Section 932(l) of the Act, which provides that a survivor of a miner who was determined to be 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. Pub. L. No. 111-148, §1556(b), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §932(l)).

Claimant filed this subsequent claim on September 2, 2010. Director's Exhibit 4. The district director awarded benefits to claimant pursuant to amended Section 932(l), and employer requested a hearing. Director's Exhibits 12, 13, 16.

On April 18, 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.

By Order dated June 27, 2011, the administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended

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<sup>1</sup> Claimant is the surviving spouse of the miner, who died on February 22, 2006. Director's Exhibit 7. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim. Director's Exhibit 1.

Section 932(l). Accordingly, the administrative law judge awarded survivor's benefits, commencing as of February 2006, the month in which the miner died. The Director moved for reconsideration, arguing that February 2006 could not be considered the date for the commencement of benefits, because it preceded the final denial of the prior survivor's claim. The Director urged the administrative law judge to award survivor's benefits as of November 2006, "the month after the order denying the claimant's prior claim became final. . . ." <sup>2</sup> Director's Motion for Reconsideration at 3. The administrative law judge granted reconsideration, and ordered employer to pay benefits commencing as of November 2006.

On appeal, employer challenges the administrative law judge's application of amended Section 932(l) to this case. Employer also challenges the administrative law judge's determination of the commencement date for benefits. Claimant and Director respond, urging 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 rational, supported by substantial evidence, and 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 and 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 property, in violation of the Fifth Amendment to the United States Constitution.<sup>4</sup> 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. Additionally, employer argues that conflicting language contained in other sections of the Act requires a survivor to establish that the miner's death was due to pneumoconiosis, negating the automatic entitlement provision of

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<sup>2</sup> As we will discuss in greater detail below, the month after the order denying claimant's prior claim became final was December 2006, not November 2006.

<sup>3</sup> The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 5. 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).

<sup>4</sup> 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).

amended Section 932(l). Employer's Brief at 7-45. The United States Court of Appeals for the Fourth Circuit, however, recently rejected all of the 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*, U.S.L.W. , (U.S. 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, 25 BLR 2-13, 2-44-61 (3d Cir. 2011). For the reasons set forth in *Stacy*, we reject employer's arguments.

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. Employer's Brief at 45-67. We disagree. The Board recently held that the principles of res judicata 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 under amended Section 932(l) is not tied to relitigation of the prior finding that claimant did not establish that the miner's death was 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 contends that the administrative law judge erred in awarding benefits as of November 2006. Employer argues that the administrative law judge should have found the commencement date of benefits to be September 2010, the month in which claimant filed her subsequent claim. Employer's Brief at 67-72. The Director responds that the month after the month in which the denial of the prior claim became final should be the month for the commencement of benefits. 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. Here, the decision denying claimant's prior survivor's claim was issued by the district director on October 12, 2006, and became final thirty days later, in November 2006. *See* 20 C.F.R. §725.419(d); Director's Exhibit 2. Therefore, claimant is entitled to benefits as of the following month, December 2006. *See Richards*, slip op. at 7. Consequently, we modify the administrative law judge's determination of the commencement date for benefits to December 2006. 20 C.F.R. §725.309(d)(5).

Accordingly, the administrative law judge's Order Granting Director's Motion for Summary Decision and Order Granting Motion for Reconsideration are affirmed, as modified to reflect December 2006 as the date from which benefits commence.

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