

BRB No. 11-0861 BLA

MAXINE TOLER)	
(Widow of JAMES DEWEY TOLER))	
)	
Claimant-Respondent)	
)	
v.)	
)	
EASTERN ASSOCIATED COAL)	DATE ISSUED: 08/13/2012
CORPORATION)	
)	
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 Granting Director's Motion for Summary Decision and Awarding Survivor's Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., 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 Granting Director's Motion for Summary Decision and Awarding Survivor's Benefits (2011-BLA-5549) of Administrative Law Judge Thomas M. Burke, rendered 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). Claimant¹ filed her initial claim for survivor's benefits on August 3, 2005, which the district director denied on April 5, 2006. Director's Exhibit 2. Claimant took no further action on this claim and the denial became final. *Id.*

On March 23, 2010, Congress enacted the Patient Protection and Affordable Care Act (PPACA), which included amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. *See* Section 1556 of the PPACA, Public Law No. 111-148 (2010). In pertinent part, the amendments revived 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.

Claimant filed a subsequent survivor's claim on November 10, 2010. Director's Exhibit 4. In a Proposed Decision and Order awarding benefits dated December 15, 2010, the district director determined that, pursuant to Section 1556 of the PPACA, claimant is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. Director's Exhibit 11. At employer's request, the case was referred to the Office of Administrative Law Judges for a hearing and assigned to the administrative law judge. Director's Exhibit 12.

The Director, Office of Workers' Compensation Programs (the Director), filed a motion for summary decision in which he asserted that claimant is entitled to benefits under amended Section 932(l). The administrative law judge granted the Director's motion pursuant to amended Section 932(l), as claimant filed her claim after January 1, 2005, the claim was pending on or after March 23, 2010, and the miner was receiving benefits pursuant to a claim filed during his lifetime.² Accordingly, the administrative law judge awarded survivor's benefits, commencing on June 1, 2005, the first day of the month in which the miner died.

¹ Claimant is the widow of the miner, James Dewey Toler, who died on June 15, 2005. Director's Exhibit 1.

² In a Decision and Order dated October 3, 1990, Administrative Law Judge W. Ralph Musgrove awarded black lung benefits on a claim filed by the miner on February 24, 1983. Director's Exhibit 1. Pursuant to employer's appeal, the Board affirmed Judge Musgrove's decision. *Toler v. Eastern Associated Coal Corp.*, BRB No. 91-0315 BLA (Aug. 25, 1992) (unpub.). Employer subsequently filed a motion for reconsideration of the Board's decision, which the Board denied. *Toler v. Eastern Associated Coal Corp.*, BRB No. 91-0315 BLA (May 4, 1995) (unpub. Order). Thus, the miner received benefits pursuant to his award until the time of his death.

On appeal, employer challenges the constitutionality of amended Section 932(l) and its application to this survivor's claim. Employer further contends that application of amended Section 932(l) is premature, in light of legal challenges to the PPACA, because there will be no way for employer to recoup improperly paid benefits in the event that the PPACA is ultimately found to be unconstitutional. Employer thus suggests that the Board hold this case in abeyance, pending resolution of the legal challenges to the PPACA. Employer also argues that this subsequent survivor's claim is barred pursuant to 20 C.F.R. §725.309 and the principles of finality and res judicata. Claimant has not responded. The Director has filed a letter brief, urging the Board to reject employer's contentions and affirm the award of survivor's benefits. The Director also contends, however, that benefits should commence as of June 2006, the month after the month in which claimant's prior denial of survivor's benefits became final. Employer has replied and reiterates its initial 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.³ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer argues initially that the retroactive application of amended Section 932(l) violated its right to due process, because it could not predict future liability at the time the miner was awarded benefits. Employer's argument is a variation on the arguments that the Board addressed in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (unpub. Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011), to the effect that retroactive application of amended Section 923(l) constitutes a due process violation because it subjects employer to a financial burden that it could not have foreseen. The Board held in *Mathews*, however, that Congress legitimately exercised its authority to "adjust the burdens and benefits of economic life," in amending Section 932(l) and making it applicable to claims filed after January 1, 2005. *Mathews*, 24 BLR at 1-200, quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 3 BLR 2-36, 2-43 (1975); 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). Therefore, for the reasons set forth in *Mathews*, we reject employer's allegation of a due process violation in this case.

³ The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 1. 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 (1989) (en banc).

Employer's also 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. We reject employer's argument. The Board has held 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 v. Olga Coal Co.*, 24 BLR 1-207 (2010), *aff'd sub nom. West Virginia 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). For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary. We also reject 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 PPACA, as it is moot in light of the United States Supreme Court's decision upholding the constitutionality of the PPACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012).

Employer also alleges that the principles of res judicata expressed in 20 C.F.R. §725.309 bar this subsequent claim, as claimant's prior claim for survivor's benefits was denied and that denial became final. We reject employer's contention. The terms of 20 C.F.R. §725.309, which require that a subsequent claim be denied unless a change in an applicable condition of entitlement is established, do not apply to a survivor's subsequent claim filed within the time limitations set forth under Section 1556 of the PPACA, as 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.*, 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). Contrary to employer's contention, therefore, 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 of the PPACA. *Id.* We, therefore, affirm the administrative law judge's determination that claimant is derivatively entitled to benefits pursuant to amended Section 932(l) of the Act. 30 U.S.C. §932(l).

Lastly, we hold that the Director is correct in alleging that the proper date for the commencement of benefits in this case is June 1, 2006. In *Richards*, the Board determined that, because the PPACA does not authorize the reopening of a previously denied claim, the denial of the prior survivor's claim must be given effect. *Richards*, slip op. at 7-8. The Board further reasoned that, in order to do so, the provisions of 20 C.F.R. §725.309(d)(5) must be applied in a subsequent survivor's claim to bar the payment of benefits from a date prior to the date upon which the denial of the prior claim became final. *Id.* In the present case, the denial of claimant's prior survivor's claim was issued on April 5, 2006, and became final on May 6, 2006. 20 C.F.R. §725.419(d); Director's Exhibit 2. Based upon our decision in *Richards*, therefore, we modify the administrative law judge's designation of June 1, 2005, as the date from which benefits commence, to

June 1, 2006, the first day of the month after the month in which the prior denial of benefits became final. *See* 20 C.F.R. §§725.309(d)(5), 725.419(d).

Accordingly, the administrative law judge's Order Granting Director's Motion for Summary Decision and Awarding Survivor's Benefits is affirmed, as modified to reflect June 1, 2006, 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