

BRB No. 12-0187 BLA

MARTHA S. RUDD)
(Widow of EDWARD RUDD))
)
Claimant-Respondent)
)
v.)
)
LEIVASY MINING CORPORATION) DATE ISSUED: 12/20/2012
)
and)
)
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 Decision and Order Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

William S. Mattingly and Amy Jo Holley (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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Survivor's Benefits (2011-BLA-6274) of Administrative Law Judge Richard A. Morgan, with respect to a survivor's claim filed on June 22, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).¹ The administrative law judge determined that claimant is automatically entitled to survivor's benefits under amended Section 932(l) of the Act, based on the award of benefits in the miner's claim.² Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the constitutionality of amended Section 932(l), and asserts, in the alternative, that it does not apply to the present claim, based on the filing date of the miner's claim. In addition, employer contends that claimant is not an "eligible survivor" as defined by amended Section 932(l). Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, responds, asserting that the administrative law judge properly awarded benefits under amended Section 932(l).³

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.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30

¹ Claimant is the widow of the miner, Edward Rudd, who was receiving benefits at the time of his death on June 2, 2011. Director's Exhibits 3, 6.

² Section 1556 of the Patient Protection and Affordable Care Act (PPACA) included amendments to the Black Lung Benefits Act (the Act), affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). In pertinent part, the amendments revived Section 422(l) of the Act, 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.

³ Employer's request to hold the case in abeyance pending resolution of the constitutional challenges to the Patient Protection and Affordable Care Act is denied. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012).

⁴ The record reflects that 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 (1989) (en banc).

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

Employer asserts that the retroactive application of amended Section 932(l) to this claim constitutes a violation of its due process rights and an unconstitutional taking of private property. Employer also maintains that the operative date for determining eligibility for survivor’s benefits pursuant to amended Section 932(l) is the date that the miner’s claim was filed, not the date that the survivor’s claim was filed.

The constitutional arguments raised by employer are virtually identical to the ones that the United States Court of Appeals for the Fourth Circuit rejected in *W. Va. CWP Fund v. Stacy*, 671 F. 3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012); *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); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). For the reasons set forth in *Stacy*, we reject employer’s arguments. In addition, the court in *Stacy* affirmed the Board’s holding 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. *Stacy*, 671 F.3d at 388-89, 25 BLR at 2-82-83. We hold that there is no merit, therefore, in employer’s contention to the contrary.

Further, employer argues that claimant is not an “eligible survivor” within the meaning of amended Section 932(l), as she did not establish that pneumoconiosis caused or contributed to the miner’s death. However, the Board has previously considered and rejected a virtually identical assertion in *Fairman v. Helen Mining Co.*, 24 BLR 1-225 (2010). Therefore, we reject employer’s contention for the same reasons set forth in *Fairman*.

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 Section 422(l) of the Act, 30 U.S.C. §932(l).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge