

BRB No. 12-0220 BLA

MELVA BEELER)
(Widow of DONALD E. BEELER))
)
 Claimant-Respondent)
)
 v.)
)
 CONSOLIDATION COAL COMPANY)
) DATE ISSUED: 12/05/2012
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Order Awarding Survivor's Benefits of William S. Colwell,
Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

William S. Mattingly (Jackson Kelly PLCC), Morgantown, West Virginia,
for employer.

Michelle S. Gerdano (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
BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Awarding Survivor's Benefits (2011-BLA-6292) of
Administrative Law Judge William S. Colwell, rendered on a survivor's claim filed
pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-

944 (Supp. 2011) (the Act). Claimant¹ filed this claim on June 2, 2011. Director's Exhibit 4.

Congress amended the Act in 2010, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. 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) (codified at 30 U.S.C. §932(l)).

While this case was pending before the administrative law judge, claimant moved for summary judgment, asserting that there was no genuine issue of material fact regarding her entitlement to benefits under Section 932(l). Employer did not file a response. In his Order dated December 22, 2011, the administrative law judge found that the miner was determined to be eligible to receive benefits at the time of his death, that claimant is an eligible survivor of the miner, that claimant filed her survivor's claim after January 1, 2005, and that her claim was pending after March 23, 2010. The administrative law judge therefore determined that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the constitutionality of amended Section 932(l) and its application to this survivor's claim. Employer also argues that the operative date for determining claimant's eligibility for survivor's benefits under amended Section 932(l) is the date the miner's claim was filed, not the date the survivor's claim was filed. Claimant and the Director, Office of Workers' Compensation Programs, have filed response briefs, urging affirmance of the administrative law judge's Order.

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

¹ Claimant is the widow of the miner, who died on October 29, 2008. Director's Exhibit 6. The miner was awarded federal black lung benefits on his lifetime claim in 2006, and the award was affirmed by the Board, and the United States Court of Appeals for the Seventh Circuit. *Consolidation Coal Co. v. Director, OWCP [Beeler]*, 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008).

² The miner's most recent coal mine employment was in Illinois. *Beeler v. Consolidation Coal Co.*, BRB No. 06-0457 BLA, slip op. at 2 n.2 (Feb. 28, 2007)

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

Employer argues on appeal that retroactively applying amended Section 932(l) is unconstitutional as a violation of due process, and as a taking of employer’s property in violation of the Fifth Amendment to the United States Constitution. Employer’s Brief at 14-23. Employer also contends that the operative date for determining eligibility for survivor’s benefits under amended Section 932(l) is the filing date of the miner’s claim, not the survivor’s claim. Employer’s Brief at 23-34. These arguments lack merit. *See Keene v. Consolidation Coal Co.*, 645 F.3d 844, 849-51, 24 BLR 2-385, 2-397-401 (7th Cir. 2011) (holding that retroactively applying 2010 amendments to the Act is not a violation of due process or a taking); *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383-89, 25 BLR 2-65, 2-74-85 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012) (rejecting due process and takings arguments against retroactive application of amended Section 932(l), and rejecting argument that operative date is filing date of the miner’s claim); *see also B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 247-63, 25 BLR 2-13, 2-44-61 (3d Cir. 2011). For the reasons set forth in the cases cited, we reject employer’s arguments.³

In this case, it is uncontested that claimant established each fact necessary to demonstrate entitlement under amended Section 932(l): That the miner was determined to be eligible to receive benefits at the time of his death; that claimant is an eligible survivor of the miner; that she filed her claim after January 1, 2005; and that her claim was pending after March 23, 2010. Order at 1-2. We therefore affirm the administrative law judge’s determination that claimant is entitled to receive benefits pursuant to amended Section 932(l) of the Act. 30 U.S.C. §932(l).

(unpub.). Accordingly, the Board will apply the law of the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

³ Employer also requested that this case be held in abeyance, pending the Supreme Court’s resolution of the constitutional challenges to other provisions of the Patient Protection and Affordable Care Act, Public Law No. 111-148, and the Supreme Court’s ruling on the petition for a writ of certiorari in *Stacy*. Employer’s Brief at 5-13. Those requests are now moot. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (June 28, 2012); *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge