

BRB No. 12-0223 BLA

DOROTHY NELL DUKES)
(Widow of GEORGE DUKES))
)
 Claimant-Respondent)
)
 v.)
)
 HERITAGE COAL COMPANY)
) DATE ISSUED: 12/19/2012
 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 of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Maia S. Fisher (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2011-BLA-6357) of Administrative Law Judge Alice M. Craft awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a survivor's claim filed on June 30, 2011.

On March 23, 2010, amendments to the Act, affecting claims pending on or after January 1, 2005, were enacted. The amendments, in pertinent part, revived 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 receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l).

Claimant¹ filed her survivor's claim on June 30, 2011. Director's Exhibit 11. The district director awarded benefits to claimant pursuant to amended Section 932(l), and employer requested a hearing. Director's Exhibits 13, 15, 16.

On December 12, 2011, the administrative law judge issued an Order to Show Cause why claimant is not entitled to survivor's benefits pursuant to amended Section 932(l). Claimant responded, arguing that she is entitled to survivor's benefits, because her claim falls within the class of survivors' claims affected by the recent amendments to Section 932(l). Neither the Director, Office of Workers' Compensation Programs (the Director), nor employer filed a response to the Order.

In a Decision and Order dated January 11, 2012, 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.

On appeal, employer challenges the constitutionality of amended Section 932(l) and its application to this claim. The Director and claimant respond in support of the administrative law judge's award of benefits pursuant to amended Section 932(l). Employer filed a reply brief, reiterating its contentions on appeal.

The Board's scope of review is defined by statute. The administrative law judge's 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 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹ Claimant is the widow of the miner, who died on June 13, 2011. Director's Exhibit 12. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim. Director's Exhibits 9, 10, 11.

² The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 8. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

Employer argues that retroactive application of amended Section 932(l) is unconstitutional, as a violation of employer's due process rights, in violation of the Fifth Amendment to the United States Constitution.³ 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. Employer's Brief at 4-10. The arguments employer makes are identical to the ones that the United States Court of Appeals for the Fourth Circuit recently rejected. *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); *see also B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 254-59, 25 BLR 2-13, 2-44-54 (3d Cir. 2011). For the reasons set forth in *Stacy*, we reject employer's arguments.

In this case, it is uncontested 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 after March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death. Therefore, we affirm the administrative law judge's determination that claimant is entitled to benefits pursuant to amended Section 932(l). 30 U.S.C. §932(l).

³ Employer's argument, that further proceedings or actions related to this claim should be held in abeyance pending resolution of the constitutional challenges to other provisions of 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).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge