

BRB No. 12-0234 BLA

DEBRA L. YATES	)	
(Widow of BOBBY YATES)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CALICO COAL COMPANY	)	DATE ISSUED: 12/20/2012
	)	
and	)	
	)	
OLD REPUBLIC GENERAL INSURANCE	)	
CORPORATION	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

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

Ann Marie Scarpino (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 (2011-BLA-05229) of Administrative Law Judge Christine L. Kirby, rendered on a survivor's claim filed on January 17, 2006, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).<sup>1</sup> On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010). The amendments, in pertinent part, revive Section 932(*l*), which provides 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. 30 U.S.C. §932(*l*).

On April 14, 2010, claimant filed a request for modification of the denial of her survivor's claim. Director's Exhibit 108. In a Proposed Decision and Order dated June 9, 2010, the district director determined that claimant is an eligible survivor of a miner who was receiving benefits at the time of his death, and therefore, is entitled to an automatic award of benefits under amended Section 932(*l*). Director's Exhibit 109. Employer filed a Motion for Reconsideration and a Petition for Modification of Miner's Award. Director's Exhibit 110. The district director denied employer's motion, and referred the case to the Office of Administrative Law Judges for a hearing scheduled on November 29, 2011. Director's Exhibits 111, 116.

On November 8, 2011, the administrative law judge issued a Notice of Assignment and Order to Show Cause in which she canceled the formal hearing, and ordered the parties to file position statements addressing why an order awarding benefits should not be entered. The Director, Office of Workers' Compensation Programs (the Director), filed a position statement arguing that, because amended Section 932(*l*) applies to claimant, there is no genuine issue of material fact concerning her entitlement, and therefore, benefits should be awarded. Employer filed a position statement arguing that: amended Section 932(*l*) does not apply to this survivor's claim; the PPACA amendments are unconstitutional; this claim is not eligible for modification under these circumstances; and requesting that the claim either be dismissed or held in abeyance pending resolution of the constitutional challenges to the PPACA. Claimant did not file a position statement.

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<sup>1</sup> Claimant is the widow of the miner, who died on December 11, 2005. Director's Exhibit 15. Claimant filed her survivor's claim on January 17, 2006, which was denied by Administrative Law Judge Edward Terhune Miller on December 31, 2009. Director's Exhibits 2, 106. No further action was taken on the claim until claimant filed the current request for modification on June 9, 2010. Director's Exhibit 108.

In her January 25, 2012 Decision and Order, the administrative law judge rejected employer's arguments and found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l). Specifically, the administrative law judge found that the miner was receiving benefits at the time of his death due to a final award,<sup>2</sup> and that the survivor's claim was filed after January 1, 2005, and was pending after March 23, 2010, based on the date of claimant's modification request. Accordingly, the administrative law judge awarded survivor's benefits, commencing December 2005, the month in which the miner died.

On appeal, employer contends that amended Section 932(l) does not apply to claimant's claim because the December 31, 2009 Decision and Order denying benefits by Judge Miller became final, and claimant's subsequent request for modification of that decision does not revive the claim.<sup>3</sup> Employer's Brief at 7-8. Employer also contends that the operative date for determining eligibility 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. *Id.* at 8. Employer further argues that retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005 constitutes a violation of its due process rights and an unconstitutional taking of private property. *Id.* at 9-10. Finally, employer asserts that a change in law is not a proper ground for modification. *Id.* at 11-12. The Director responds, urging the Board to reject employer's contentions and to affirm the administrative law judge's award of benefits. Claimant has not filed a response brief.

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

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<sup>2</sup> The miner was receiving benefits at the time of his death pursuant to a Decision and Order on Remand Awarding Benefits, issued by Administrative Law Judge Alice M. Craft on April 27, 2007, which was affirmed by the Board on July 30, 2008. *See* Miner's Claim Director's Exhibits 115, 126; *B.Y. [Yates] v. Calico Coal Co.*, BRB No. 07-0726 BLA (July 30, 2008) (unpub.), *recon. denied* (Sep. 30, 2009) (unpub. Order).

<sup>3</sup> We 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 Patient Protection and Affordable Care Act, Public Law No. 111-148. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012).

<sup>4</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Miner's Claim Director's Exhibit 37; Survivor's Claim Director's Exhibits 5, 10.

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

As an initial matter, we reject employer’s contention that retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005, constitutes a due process violation and an unlawful taking of private property under the Fifth Amendment of the United States Constitution. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *aff’g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *cert. denied*, 568 U.S. (2012); *B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010). Furthermore, the United States Court of Appeals for the Fourth Circuit has 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, 25 BLR at 2-83. For the reasons set forth in *Stacy*, we reject employer’s arguments to the contrary.

We also reject employer’s argument that amended Section 932(l) does not apply to a request for modification of the denial of a survivor’s claim. In *Mullins v. ANR Coal Co., LLC*, 25 BLR 1-49 (2012), *recon. denied*, BRB No. 11-0251 BLA (June 14, 2012) (Order) (unpub.), the Board addressed and rejected arguments substantially similar to those raised by employer in this case. In applying amended Section 932(l) to a survivor’s request for modification, the Board held that the language of Section 1556(c) of the PPACA mandates the application of amended Section 932(l) to all claims filed after January 1, 2005, that are pending on or after March 23, 2010, and provides that a survivor of a miner who was eligible to receive benefits at the time of his death is now automatically entitled to survivor’s benefits, without having to establish that the miner’s death was due to pneumoconiosis. *Mullins*, 25 BLR at 1-53, *citing* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §§921(c)(4) and 932(l)); *see also Richards v. Union Carbide Corp.*, 25 BLR 1-31 (2012) (en banc) (McGranery, J., concurring and dissenting) (Boggs, J., dissenting), *appeal docketed*, No. 12-1294 (4th Cir. Mar. 8, 2012). Because claimant filed her claim after January 1, 2005, timely requested modification such that the claim was pending after 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 survivor's benefits pursuant to amended Section 932(l).

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

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