

BRB No. 12-0296 BLA

NINA C. THREADGILL	)	
(Widow of JOHN THREADGILL)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DRUMMOND COMPANY,	)	DATE ISSUED: 02/21/2013
INCORPORATED	)	
	)	
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 Awarding Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Abigail P. van Alstyne (Quinn, Connor, Weaver, Davies & Rouco, LLP), Birmingham, Alabama, for claimant.

Will A. Smith (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

Barry H. Joyner (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 Awarding Benefits (2011-BLA-05195) of Administrative Law Judge Ralph A. Romano, rendered on a subsequent survivor's claim filed on August 4, 2010, 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> The administrative law judge determined that claimant is automatically entitled to survivor's benefits under amended Section 932(*l*), based on the award of benefits in the miner's claim.<sup>2</sup> Accordingly, the administrative law judge awarded benefits, commencing July 2007.

On appeal, employer argues that the 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. Employer also contends that the operative date for determining eligibility

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<sup>1</sup> Claimant is the widow of the miner, who died on July 19, 2004. Director's Exhibit 2. The miner was receiving benefits at the time of his death as the result of a Decision and Order – Awarding Benefits issued by Administrative Law Judge Gerald M. Tierney on October 6, 2003. Director's Exhibit 1. Claimant filed her initial claim for survivor's benefits on September 21, 2004, which was finally denied on June 1, 2007 by Administrative Law Judge Robert D. Kaplan because claimant did not establish that the miner's death was due to pneumoconiosis. Director's Exhibit 2.

<sup>2</sup> Section 1556 of the Patient Protection and Affordable Care Act (PPACA) included amendments to the Black Lung Benefits Act (the Act), which affected 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*)). In pertinent part, the amendments revived 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.

pursuant to amended Section 932(l) is the date that the miner's claim was filed, not the date that any survivor's claim was filed. Lastly, employer argues that claimant is not eligible for derivative survivor's benefits under amended Section 932(l), because she is not an "eligible survivor" and because her subsequent claim is barred pursuant to 20 C.F.R. §725.309 and the fundamental principles of res judicata and finality. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging the Board to affirm the administrative law judge's award of benefits. The Director also maintains, however, that the Board should modify the commencement date for benefits to August 2007, the month after the month in which claimant's prior denial of benefits became final.

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>3</sup> 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).

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 a taking of private property, for the same reasons

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<sup>3</sup> The record reflects that the miner's coal mine employment was in Alabama. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

the Board rejected substantially similar arguments in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010). See also *Vision Processing, LLC v. Groves*, F.3d , No. 11-3702, 2013 WL 332082 (6th Cir. Jan. 30, 2013); *B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Further, 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. *W. Va. CWP Fund v. Stacy*, 671 F. 3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012). We also reject employer's contention that claimant's subsequent claim is barred under the doctrine of res judicata, for the reasons set forth in *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). Additionally, we reject employer's argument 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. The terms of amended Section 932(l) relieve a survivor of the burden of establishing that the miner's death was due to pneumoconiosis if the miner was eligible to receive benefits at the time of his death. See *Groves*, slip op. at 6-8; *Stacy*, 671 F.3d at 389-91, 25 BLR at 2-85-88; *Campbell*, 662 F.3d at 247-53, 25 BLR at 2-35-44; *Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-231 (2011).

Because claimant filed her subsequent 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 amended Section 932(l).<sup>4</sup> We agree with the Director, however, that the administrative law judge did not select the correct date for the commencement of benefits. Benefits are payable in a subsequent survivor's claim filed within the time limitations set forth in Section 1556 from the month after the month in which the denial of the prior claim became final. *Richards*, 25 BLR at 1-38-39; *see* 20 C.F.R. §§725.309(d)(5), 725.503(c). As the Decision and Order denying claimant's prior claim was issued on June 5, 2007, and became final on July 5, 2007, *see* 20 C.F.R. §725.479(a), claimant is entitled to benefits beginning August 2007.

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<sup>4</sup> Employer's additional challenges to the constitutionality of the PPACA and the severability of its non-health care provisions are 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, as modified to reflect August 2007 as the date from which benefits commence.

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