

BRB No. 12-0299 BLA

BETTY MILLER)	
(Widow of EUGENE MILLER))	
)	
Claimant-Respondent)	
)	
v.)	
)	
KENTLAND-ELKHORN COAL)	
COMPANY)	DATE ISSUED: 02/07/2013
)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

Jonathan Rolfe (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-5976) of Administrative Law Judge John P. Sellers, III, rendered on a claim filed pursuant to

the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). This case involves a subsequent survivor's claim filed on April 25, 2011. Director's Exhibit 10.

Claimant¹ filed her initial claim for survivor's benefits on May 19, 2006. Director's Exhibit 1-901. In a Proposed Decision and Order issued on December 18, 2006, the district director awarded benefits. Director's Exhibit 93. Employer requested a formal hearing and the claim was transferred to the Office of the Administrative Law Judges on February 27, 2007. Director's Exhibits 94, 100, 102. In a Decision and Order dated September 30, 2009, Administrative Law Judge Kenneth A. Krantz denied benefits in the survivor's claim because he found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Director's Exhibit 3.

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, were enacted. The amendments, in pertinent part, revive Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), 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. 30 U.S.C. §932(*l*).

Claimant filed a subsequent survivor's claim on April 25, 2011. Director's Exhibit 10. On April 26, 2011, the district director issued a Proposed Decision and Order, finding claimant derivatively entitled to benefits pursuant to amended Section 932(*l*). Director's Exhibit 13. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibits 13, 20.

On June 30, 2011, claimant moved for a summary decision, asserting that, pursuant to amended Section 932(*l*), claimant was automatically entitled to benefits as a matter of law, and that there was no genuine issue as to any material fact concerning her entitlement. Employer filed a response in opposition to claimant's motion for a summary decision.

In a Decision and Order Awarding Benefits dated February 27, 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

¹ Claimant is the surviving spouse of the miner, who died on April 29, 2006. Director's Exhibit 1-865. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim. Director's Exhibit 2.

administrative law judge awarded benefits, commencing as of November 2009, the month after the month in which the prior denial became final.

On appeal, employer challenges the administrative law judge's application of amended Section 932(l) to this case. Claimant and the Director, Office of Workers' Compensation Programs, respond in support of the administrative law judge's award of benefits. Employer filed a combined reply 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.² 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer argues that retroactive application of amended Section 932(l) is unconstitutional, as a violation of employer's due process rights and as an unlawful taking of property, in violation of the Fifth Amendment to the United States Constitution.³ The United States Court of Appeals for the Sixth Circuit recently rejected all of the same arguments. *Vision Processing, LLC v. Groves*, No. 11-3702, 2013 WL 332082, at *5-6 (6th Cir. Jan. 30, 2013); *see also W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 388, 25 BLR 2-65, 2-83 (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). For the reasons set forth in *Groves*, we reject employer's arguments.

Employer next contends that claimant is not eligible for derivative survivor's benefits under amended Section 932(l), because her prior claim was finally denied and her subsequent claim is barred pursuant to fundamental principles of res judicata or claim preclusion. We disagree. The Board recently held that the principles of res judicata addressed in 20 C.F.R. §725.309, requiring that a subsequent claim be denied unless a change is established, are not implicated in the context of a survivor's subsequent claim

² The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 11. 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, 1-202 (1989) (en banc).

³ In its reply brief, employer acknowledged that its earlier request, that this case be held in abeyance pending resolution of the constitutional challenges to 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); Employer's Reply Brief at 2.

filed within the time limitations set forth under Section 1556 of Public Law No. 111-148, because entitlement under amended Section 932(l) is not tied to relitigation of the prior finding that claimant did not establish that the miner's death was due to pneumoconiosis. *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). Employer has provided no compelling reason to disturb our prior holding. Therefore, contrary to employer's contention, the automatic entitlement provisions of amended Section 932(l) are available to an eligible survivor who files a subsequent claim within the time limitations established in Section 1556. *Id.*

In this case, the administrative law judge found 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 on or 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 receive benefits pursuant to amended Section 932(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.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge