

BRB No. 12-0326 BLA

CINDY H. HONEYCUTT)
(Widow of HERBERT L. HONEYCUTT))
)
Claimant-Respondent)
)
v.)
)
TAMMY ANNE, INCORPORATED) DATE ISSUED: 02/27/2013
)
and)
)
OLD REPUBLIC INSURANCE COMPANY)
)
Employer/Carrier-)
Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order – Award of Survivor’s Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

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

Emily Goldberg-Kraft (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/carrier (employer) appeals the Decision and Order – Award of Survivor’s Benefits (2012-BLA-5133) of Administrative Law Judge Larry S. Merck, rendered on a survivor’s claim filed on August 26, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (Supp. 2011) (the Act).¹ On August 30, 2011, the district director issued a Proposed Decision and Order awarding benefits pursuant to amended Section 932(l).² Employer requested a hearing and the case was transferred to the Office of Administrative Law Judges. On January 6, 2012, the administrative law judge issued an Order to Show Cause Why Benefits Should Not Be Awarded Under the Automatic Survivor Entitlement Provisions of the Black Lung Benefits Act Without Holding a Hearing. After receipt of the parties’ responses, the administrative law judge issued his Decision and Order dated March 8, 2012, which is the subject of this appeal. The administrative law judge determined that claimant satisfied the eligibility criteria for automatic entitlement pursuant to amended Section 932(l) and awarded benefits accordingly.

On appeal, employer argues that, because the miner’s claim was filed prior to January 1, 2005, amended Section 932(l) does not apply to this survivor’s claim.³

¹ Claimant is the surviving spouse of the miner, Herbert L. Honeycutt, who died on July 10, 2011. Director’s Exhibits 1, 2, 4, 5. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award issued on his lifetime claim by Administrative Law Judge Thomas F. Phalen on November 4, 2009. Director’s Exhibit 3. Judge Phalen’s award was affirmed by the Board on December 21, 2010. *Id.*

² On March 23, 2010, amendments to the Black Lung Benefits Act (the Act) were enacted, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), P.L. No. 111-148 (2010). In pertinent part, the amendments 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 survivor’s benefits without having to establish that the miner’s death was due to pneumoconiosis. 30 U.S.C. §932(l).

³ Employer’s request to hold this case in abeyance pending resolution of the constitutional challenges to the PPACA and the severability of non-health care provisions is moot. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012).

Employer further argues that retroactive application of amended Section 932(l) is a denial of fundamental due process under the United States Constitution. Claimant and the Director, Office of Workers' Compensation Programs, respond, urging affirmance of the award of benefits.

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.⁴ 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 contends that the administrative law judge erred in applying amended Section 932(l) in this case, as the operative date for determining eligibility under amended Section 932(l) is the date the miner's claim was filed, not the date that the survivor's claim was filed. Employer further asserts that retroactive application of amended Section 932(l) is unconstitutional. Subsequent to the filing of employer's brief in this case, the United States Court of Appeals for the Sixth Circuit specifically rejected similar arguments in *Vision Processing, LLC v. Groves*, F.3d , No. 11-3702, 2013 WL 332082 (6th Cir. Jan. 30, 2013). We reject employer's arguments for the reasons set forth in *Groves. Id.*; see also *Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *aff'd sub nom. W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383-89, 25 BLR 2-65, 2-76-85 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012); *B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 244 & n.12, 25 BLR 2-13, 2-28 & n.12 (3d Cir. 2011).

With respect to the administrative law judge's findings under amended Section 932(l), the administrative law judge determined correctly that: claimant filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on March 23, 2010; and the miner was receiving benefits at the time of his death. Decision and Order at 4-5; see Director's Exhibits 3, 4. 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).

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibits 1, 4.

Accordingly, the administrative law judge's Decision and Order – Award of Survivor's Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge