

BRB No. 12-0372 BLA

MARY ALLMAN)	
(Widow of DOY ALLMAN))	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED: 02/05/2013
SEWELL COAL COMPANY)	
)	
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 Thomas A. Burke, Administrative Law Judge, United States Department of Labor.

Ann Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (12-BLA-5051) of Administrative Law Judge Thomas A. Burke 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 August 5, 2011.

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).

On August 12, 2011, the district director issued a Proposed Decision and Order, wherein she found that claimant¹ was derivatively entitled to benefits pursuant to amended Section 932(l). At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing.

On December 2, 2011, the Director, Office of Workers' Compensation Programs (the Director), 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 the Director's motion for a summary decision.

In a Decision and Order dated March 14, 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, commencing as of July 2011, the month of the miner's death.

On appeal, employer challenges the administrative law judge's application of amended Section 932(l) to this case. Claimant has not filed a response brief. The Director responds in support of the administrative law judge's 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 supported by substantial evidence, is rational, and is in accordance with applicable law.² 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363 (1965).

¹ Claimant is the widow of the miner, who died on July 21, 2011. Director's Exhibit 4. 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 1.

² The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

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 employer's property, in violation of the Fifth Amendment to the United States Constitution. 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. The arguments employer makes are virtually 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, 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); *see also Vision Processing, LLC v. Groves*, No. 11-3702, 2013 WL 332082, at *5-6 (6th Cir. Jan. 30, 2013); *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 *Stacy*, we reject employer's arguments.³

Employer also contends that claimant is not an "eligible survivor" within the meaning of amended Section 932(l) because she did not prove that pneumoconiosis caused, or contributed to, the miner's death. Contrary to employer's contention, the automatic entitlement provisions of amended Section 932(l) provide benefits to a survivor without the requirement that she prove that the miner's death was due to pneumoconiosis. *Campbell*, 662 F.3d at 249, 25 BLR at 2-37; *Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-231 (2011). Thus, we reject employer's assertion that claimant is not an "eligible survivor" within the meaning of amended Section 932(l).

In this case, 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 derivatively entitled to benefits pursuant to amended Section 932(l). 30 U.S.C. §932(l).

³ Employer's argument, that this claim could be affected by 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

BETTY JEAN HALL
Administrative Appeals Judge