

BRB No. 12-0386 BLA

PAULINE THACKER)
(Widow of DOCK THACKER, JR.))
)
 Claimant-Respondent)
)
 v.)
)
 CANADA COAL COMPANY,) DATE ISSUED: 02/28/2013
 INCORPORATED)
)
 and)
)
 KENTUCKY COAL PRODUCERS SELF-)
 INSURANCE FUND)
)
 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.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer/carrier.

Rita Roppolo (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, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/Carrier (employer) appeals the Decision and Order – Award of Survivor’s Benefits (2012-BLA-5229) of Administrative Law Judge Larry S. Merck, rendered on a survivor’s claim filed on August 18, 2011,¹ pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). 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, Pub. L. No. 111-148 (2010). Relevant to this claim, the amendments revive Section 932(l) of the Act, 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). The administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l). Specifically, the administrative law judge found claimant is the survivor of the miner, who was receiving federal black lung benefits at the time of his death,² and that the survivor’s claim was filed after January 1, 2005, and was pending after March 23, 2010. Accordingly, the administrative law judge awarded survivor’s benefits, commencing July 2011, the month in which the miner died.

On appeal, employer asserts that retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005 results in a violation of employer’s right to due process of law under the United States Constitution.³ Employer further 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. The Director, Office of Workers’ Compensation Programs (the Director), responds, urging the Board to affirm the administrative law judge’s award of benefits.

¹ Claimant is the widow of the miner, who died on July 29, 2011. Director’s Exhibit 9.

² The administrative law judge found that the miner was receiving benefits at the time of his death pursuant to a Decision and Order Awarding Benefits, issued by Administrative Law Judge Samuel J. Smith on March 10, 1992, which was affirmed by the Board on December 30, 1993. *See* Decision and Order at 4; Director’s Exhibits 1-230, 1-60; *Thacker v. Canada Coal Co.*, BRB No. 92-2105 BLA (Dec. 30, 1993) (unpub.).

³ In conjunction with employer’s Petition for Review and Brief, employer filed a Motion to Hold Appeal in Abeyance, which was denied by the Board. *See Thacker v. Canada Coal Co.*, BRB No. 12-0386 BLA (Aug. 27, 2012) (Order) (unpub.).

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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Subsequent to the filing of employer's brief in this case, the United States Court of Appeals for the Sixth Circuit rejected constitutional challenges to the application of amended Section 932(l), identical to those raised by employer in this appeal. *Vision Processing, LLC v. Groves*, F.3d , No. 11-3702, 2013 WL 332082 (6th Cir. Jan. 30, 2013). Specifically, the Sixth Circuit in *Groves* rejected the argument advanced by employer that retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005, results in a violation of due process. *See Groves*, slip op. at 7-9. For the reasons articulated in *Groves*, we reject employer's arguments to the contrary. *Id*; *see Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010); *see also 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). Furthermore, we reject employer's argument that the operative date for determining eligibility for survivor's benefits under amended Section 932(l) is the date that the miner's claim was filed. The Sixth Circuit held in *Groves* 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. *See Groves*, slip op. at 4-7.

Because claimant filed her claim after January 1, 2005, it 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).

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, 1-202 (1989) (en banc); Director's Exhibit 1-789.

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

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge