

BRB No. 09-0527 BLA

PATRICIA G. SHEPHERD)
(Widow of CHARLES D. SHEPHERD))
)
 Claimant-Respondent)
)
 v.)
)
 ARNOLD’S WELDING AND) DATE ISSUED: 01/31/2011
 FABRICATION, INCORPORATED)
)
 and)
)
 WEST VIRGINIA COAL WORKERS’)
 PNEUMOCONIOSIS 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 on Remand – Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Francesca Tan (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Helen H. Cox (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 on Remand – Awarding Benefits (2006-BLA-5814) of Administrative Law Judge Richard A. Morgan (the administrative law judge) rendered on a survivor’s claim filed on July 21, 2005, 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)) (the Act).¹ This is the second time that this case has been before the Board. In his initial Decision and Order, dated August 2, 2007, the administrative law judge found that the miner worked in qualifying coal mine employment for nineteen years and adjudicated the survivor’s claim pursuant to 20 C.F.R. Part 718.² Applying the doctrine of collateral estoppel, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), based upon the findings in the miner’s claim. The administrative law judge further found, however, that the evidence was insufficient to establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, the Board vacated the denial of benefits and remanded the case for the administrative law judge to reconsider whether claimant established that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *P.G.S. [Shepherd] v. Arnold’s Welding and Fabrication, Inc.*, BRB Nos. 07-0967 BLA and 07-0967 BLA-A (Aug. 28, 2008) (unpub.) In the Decision and Order that is the subject of this appeal, the administrative law judge found that the medical evidence was sufficient to establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

¹ The miner filed a claim for benefits on December 1, 1994. In an Order of Remand dated March 28, 1996, Administrative Law Judge James Guill noted that employer had withdrawn its controversion to all issues and agreed to pay benefits. Director’s Exhibit 1. Accordingly, Judge Guill remanded the case to the district director for appropriate proceedings and, on April 19, 1996, the district director issued an order directing employer to commence benefits payments. *Id.* The miner received benefits until his death on June 27, 2005. 2007 Decision and Order at 2-3; Director’s Exhibit 8. Claimant, the miner’s widow, filed her claim for survivor’s benefits on July 21, 2005. Claimant’s Exhibit 2.

² The record reflects 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 (1989) (*en banc*).

Employer argues that the administrative law judge erred in his weighing of the medical opinions pursuant to 20 C.F.R. §718.205(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a letter stating that he will not file a substantive brief unless requested to do so by the Board.

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 an eligible 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 the burden of reestablishing entitlement.³ 30 U.S.C. §932(*l*). By Order dated March 30, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of these amendments.

In its response, employer argues that the retroactive application of the automatic entitlement provisions of Section 932(*l*) to claims filed after January 1, 2005, constitutes a violation of its due process rights.⁴ Employer also maintains that claimant is not

³ As it existed prior to March 23, 2010, Section 422(*l*) provided that:

In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner, except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981, [*sic*].

30 U.S.C. §932(*l*). On March 23, 2010, Public Law No. 111-148 amended Section 422(*l*) as follows: “(b) Continuation of Benefits – Section 432(*l*) of the Black Lung Benefits Act (30 U.S.C. §932(*l*)) is amended by striking ‘except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981’.” Pub. L. No. 111-148, §1556(b), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §932(*l*)). Section 1556 of Public Law No. 111-148 further provides that “[t]he amendments made by this section shall apply with respect to claims filed under part B or part C of the Black Lung Benefits Act (30 U.S.C. §921 et seq., 931 et seq.) after January 1, 2005, that are pending on or after the date of enactment of this Act.” Pub. L. No. 111-148, §1556(c).

⁴ Employer filed a total of four briefs regarding the application of the amendments to the Act. Claimant and the Director, Office of Workers' Compensation Programs, each filed a brief in response to the Board's initial Order and two briefs addressing the arguments raised by employer.

automatically entitled to survivor's benefits based on the recent amendment to Section 932(l) because, under the plain language of that provision, the operative date for determining eligibility for survivor's benefits is the date on which the miner's claim was filed, not the date of filing of the survivor's claim. Employer further contends that, because the miner filed his claim before January 1, 2005, and his claim was not pending on or after March 23, 2010, Section 932(l) does not apply to the survivor's claim. Employer also requests that this case be held in abeyance until sixty days after the Department of Labor issues guidelines or promulgates regulations implementing the amended version of Section 932(l).

In her response, claimant asserts that Section 932(l) mandates an award of benefits in her claim. Claimant further urges the Board to reject employer's due process argument and its contention that the filing date relevant to her derivative entitlement to benefits is the date on which the miner's claim was filed. The Director also responds, agreeing with claimant that she is entitled to benefits, as the miner was receiving benefits pursuant to a final award on his claim at the time of his death, claimant filed her survivor's claim after January 1, 2005, and her claim was pending on March 23, 2010. In addition, the Director urges the Board to reject employer's arguments concerning the alleged due process violation and the identification of the filing date relevant to the availability of derivative entitlement under Section 932(l).

We hold that the contentions raised by employer regarding the applicability of Section 932(l) are without merit. Employer's argument, that the retroactive application of Section 932(l) represents an unconstitutional taking, is identical to the argument that the Board rejected in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-198-200 (2010) (pending on recon.). See *Stacy v. Olga Coal Co.*, 24 BLR 1- , BRB No. 10-0113 BLA, slip op. at 8 (Dec. 22, 2010). In addition, the Board recently addressed contentions identical to those raised by employer regarding the relevant filing date under Section 932(l) in *Stacy*.⁵ The Board held that the operative date for determining eligibility for survivors' benefits under Section 932(l) is the date that the survivor's claim was filed, not the date that the miner's claim was filed. The Board specifically held that, under Section 932(l), an eligible survivor who files a claim after January 1, 2005, that is pending on or after the March 23, 2010 effective date of the Section 1556 amendments, is entitled to benefits based solely on the miner's lifetime award, without having to prove that the miner died due to pneumoconiosis. *Stacy*, slip op. at 7; see 30 U.S.C. §932(l). In the present case, therefore, claimant is derivatively entitled to survivor's benefits pursuant to Section 932(l) of the Act, as she filed her survivor's claim after January 1, 2005, the

⁵ The employer in *Stacy v. Olga Coal Co.*, 24 BLR 1- , BRB No. 10-0113 BLA (Dec. 22, 2010), has filed an appeal with the United States Court of Appeals for the Fourth Circuit.

claim was pending on March 23, 2010 and the miner was receiving benefits under a final award at the time of his death.⁶ *Mathews*, 24 BLR at 1-201; *Stacy*, slip op. at 7.

We also reject employer's request that this case be held in abeyance until sixty days after the Department of Labor issues guidelines or promulgates regulations implementing Section 932(l). As the Board noted in *Mathews*, the mandatory language of Section 932(l) supports the conclusion that the provision is self-executing and, therefore, there is no need to hold this case in abeyance pending the promulgation of new regulations. *Mathews*, 24 BLR at 1-201.

In light of our disposition of this case, we need not address employer's challenges to the administrative law judge's findings regarding the merits of claimant's entitlement, pursuant to 20 C.F.R. §718.205(c), as there is no longer an issue of material fact regarding the elements of entitlement in her survivor's claim.

⁶ The administrative law judge acknowledged, and it is undisputed, that claimant is an eligible survivor of the miner. *See* 2007 Decision and Order at 2; Director's Exhibit 2.

Accordingly, because claimant is derivatively entitled to benefits under the recent amendments to the Act, this case is remanded to the district director for the entry of an appropriate order.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge