

BRB Nos. 10-0161 BLA and
10-0161 BLA-A

RUBY E. HARMON)	
(Widow of TRACY L. HARMON))	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
WHITESVILLE A & S COAL COMPANY)	
)	
and)	
)	DATE ISSUED: 01/19/2011
WEST VIRGINIA COAL WORKERS')	
PNEUMOCONIOSIS FUND)	
)	
Employer/Carrier-)	
Respondents)	
Cross-Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Daniel L. Leland,
Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for
employer/carrier.

Paul L. Edenfield (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals and employer cross-appeals the Decision and Order – Denying Benefits (2008-BLA-5437) of Administrative Law Judge Daniel L. Leland, with respect to a survivor’s claim filed on June 18, 2007, 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). After crediting the miner with 16.75 years of coal mine employment, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that the doctrine of collateral estoppel precluded employer from contesting the existence of pneumoconiosis in the survivor’s claim. However, the administrative law judge found that the evidence of record was insufficient to establish that the miner’s death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that the evidence was insufficient to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c). Employer responds, urging the Board to affirm the denial of benefits. In addition, in its cross-appeal, employer argues that the administrative law judge erred in applying the doctrine of collateral estoppel to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a), and in discrediting the opinions of Drs. Spagnolo and Farney at 20 C.F.R. §718.205(c). In reply, claimant asserts that the administrative law judge’s application of collateral estoppel at 20 C.F.R. §718.202(a)(4), and his discrediting of the opinions of Drs. Spagnolo and Farney at 20 C.F.R. §718.205(c) should be affirmed. The Director, Office of Workers’ Compensation Programs (the Director), has declined to file a response brief relevant to the merits of entitlement.

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 receiving benefits at the time of his or her death is automatically entitled to survivor’s benefits

¹ Claimant is the widow of the miner, Tracy L. Harmon, who died on May 20, 2007. Director’s Exhibit 9. At the time of his death, the miner was receiving federal black lung benefits pursuant to a final award by the district director on November 17, 2003, on his lifetime claim, which employer did not contest. Director’s Exhibit 1.

without having to establish that the miner's death was due to pneumoconiosis.² 30 U.S.C. §932(l).

On May 10, 2010, claimant filed a Motion for Remand, requesting that this case be remanded to the district director for an award of survivor's benefits to be entered under the automatic entitlement provision. The Director responds, agreeing with claimant that the recent amendment to Section 422(l) of the Act, 30 U.S.C. §932(l), mandates an award of benefits, regardless of whether claimant is able to prove that the miner had pneumoconiosis, or that his death was due to pneumoconiosis. The Director specifically notes that the miner was receiving benefits pursuant to a final award on his claim at the time of his death, that claimant filed her survivor's claim after January 1, 2005, and that her claim was pending on March 23, 2010. The Director requests that the Board vacate the administrative law judge's denial of benefits and enter an order directing employer to pay survivor's benefits. Employer responds, asserting, *inter alia*, that the retroactive application of the recent amendments is unconstitutional, and arguing that this case should be held in abeyance until sixty days after the Department of Labor issues guidelines or promulgates regulations implementing 30 U.S.C. §932(l), as amended and made applicable by Section 1556 of Public Law No. 111-148.

On September 14, 2010, employer filed a Second Supplemental Brief, requesting that the Board accept and consider its additional brief. *See* 20 C.F.R. §802.215. In its

² As it existed prior to March 23, 2010, Section 932(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 932(l) as follows: "(b) Continuation of Benefits – Section 422(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 provides further 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).

Supplemental Brief, employer argues that claimant is not automatically entitled to survivor's benefits based on the recent amendment to Section 422(l) of the Act, 30 U.S.C. §932(l), because, under the plain language of Section 932(l), as amended by Section 1556 of Public Law No. 111-148, the operative date for determining eligibility for survivor's benefits is the date the miner's claim was filed, not the date the survivor's claim was filed. Employer contends that, because the miner filed his claim before January 1, 2005, and his claim was not pending on or after March 23, 2010, the amendment to Section 932(l) does not apply to claimant's survivor's claim. Employer further asserts that the Director's position is not entitled to deference, because his reliance on the filing date of the survivor's claim as the operative filing date under Section 932(l), is inconsistent with the plain language of the Act and with his previous position in briefs filed with the United States Supreme Court and the United States Court of Appeals for the Third Circuit.

Claimant responds, arguing that the Board should decline to accept employer's additional brief, as employer did not file a motion asking the Board to accept its second supplemental brief or raise any arguments as to why its supplemental brief should be accepted. Further, claimant asserts that in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193 (2010)(pending on recon.), the Board rejected employer's argument that the date of the filing of the miner's claim is the operative date for determining whether Section 1556 applies to the survivor's claim.

In the interest of justice and judicial economy, we grant employer's request that we consider the arguments raised in its second supplemental brief. See 20 C.F.R. §802.215. The Board recently addressed arguments identical to those raised by employer regarding Section 1556 and amended Section 932(l) in *Stacy v. Olga Coal Co.*, BLR , BRB No. 10-0113 BLA (Dec. 22, 2010).³ In *Stacy*, the Board held that the operative date for determining eligibility for survivors' 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. The Board specifically held that, under amended 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).

Thus, because claimant filed her claim after January 1, 2005, the claim was pending on March 23, 2010, and the miner was receiving benefits under a final award at the time of his death, claimant is derivatively entitled to survivor's benefits pursuant to Section 932(l). *Mathews*, 24 BLR at 1-200; *Stacy*, slip op. at 7. In addition, we reject the

³ The employer in *Stacy v. Olga Coal Co.*, BLR , BRB No. 10-0113 BLA (Dec. 22, 2010) has filed an appeal with the Fourth Circuit.

arguments raised by employer in its initial response to claimant's Motion to Remand regarding the constitutionality of the amendments, as applied to this case. The arguments made by employer are identical to the ones that the Board rejected in *Mathews*. We, therefore, reject them here for the reasons set forth in that case. *Mathews*, 24 BLR at 1-198-200; *see Stacy*, slip op. at 8.

Further, as we did in *Mathews*, we 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 amended Section 932(l). As we noted in *Mathews*, the mandatory language of amended 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.

Consequently, claimant is derivatively entitled to benefits pursuant to amended Section 422(l) of the Act, 30 U.S.C. §932(l), as she filed her survivor's claim after January 1, 2005, the claim was pending on March 23, 2010, and the miner was eligible to receive benefits at the time of his death.⁴

⁴ In light of our disposition of this case, we need not address employer's challenge to the administrative law judge's findings regarding the merits of entitlement. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984).

Accordingly, because claimant is derivatively entitled to benefits in this case, we remand it to the district director for the entry of an award of benefits.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge