

BRB No. 11-0320 BLA

GWENDOLYN FORD	)	
(Widow of JAMES FORD)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 01/26/2012
	)	
Employer-Respondent	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Awarding Survivor's Benefits of William S. Colwell,  
Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell (Washington and Lee University Legal Clinic),  
Lexington, Virginia, for claimant.

Kathy L. Snyder and Amy J. Holley (Jackson Kelly PLLC), Morgantown,  
West Virginia, for employer.

Michelle S. Gerdano (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 Order Awarding Survivor's Benefits (2011-BLA-5008) of Administrative Law Judge William S. Colwell (the administrative law judge), with respect to a subsequent claim<sup>1</sup> filed 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). In response to claimant's Motion for Summary Judgment, the administrative law judge issued an Order advising the parties of the potential applicability of the Patient Protection and Affordable Care Act (PPACA) to the claim and directing them to submit position statements addressing this issue.<sup>2</sup> All parties responded to the Order. Claimant and the Director, Office of Workers' Compensation Programs (the Director), maintained that claimant was entitled to benefits pursuant to amended Section 422(l), 30 U.S.C. §932(l). Employer contended that application of amended Section 932(l) would not be appropriate in this case.

In his subsequent Decision and Order, the administrative law judge found that, pursuant to amended Section 932(l), claimant is automatically entitled to benefits based on the award of benefits in the miner's claim. Accordingly, the administrative law judge awarded benefits and determined that they should commence as of September 2002, the month in which the miner died.

On appeal, employer challenges the constitutionality of amended Section 932(l), and its application to this subsequent survivor's claim. In addition, employer contends that any benefits awarded should not commence prior to the date of the filing of the subsequent claim. The Director responds and asserts that amended Section 932(l) is applicable, and that benefits should commence as of July 2006, the month after the month

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<sup>1</sup> Claimant is the widow of the miner, James Ford, who was receiving black lung benefits at the time of his death based on a May 20, 1993 award of benefits. Claimant filed her initial claim for survivor's benefits on October 3, 2002, which was ultimately denied on May 1, 2006, by Administrative Law Judge Michael P. Lesniak. Director's Exhibit 1. Claimant filed her present claim on May 3, 2010. Director's Exhibit 3.

<sup>2</sup> The Patient Protection and Affordable Care Act (PPACA) included amendments to the Act, affecting claims filed after January 1, 2005, which were pending on or after March 23, 2010. *See* Section 1556 of the PPACA, Public Law No. 111-148 (2010). In pertinent part, the amendments revive Section 422(l) of the Act, 30 U.S.C. §932(l), providing 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.

in which claimant's prior denial of benefits became final.<sup>3</sup> Claimant responds, agreeing with the Director's position. Employer filed a combined reply brief in support of its position.

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.<sup>4</sup> 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).

Employer initially asserts that the retroactive application of amended Section 932(l) to this claim constitutes a violation of its due process rights and an unconstitutional taking of private property. Employer also maintains that the operative date for determining eligibility for survivor's benefits pursuant to amended Section 932(l) is the date the miner's claim was filed, not the date the survivor's claim was filed. Finally, employer requests that further proceedings or actions related to this claim be held in abeyance, pending resolution of the constitutional challenges to the PPACA in federal court.

We reject employer's contention that retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005, constitutes a due process violation and a taking of private property, for the same reasons the Board rejected substantially similar arguments in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order) (unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). *See also B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, BLR (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Further, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has affirmed the Board's holding that the operative date for determining eligibility for survivor's benefits under amended Section 932(l) is the date that the

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<sup>3</sup> On September 9, 2011, the Director, Office of Workers' Compensation Programs, filed a motion requesting that the Board allow him to substitute an amended response brief for the response brief that he filed on August 8, 2001. The Board granted this motion and struck the August 8, 2011 response brief. *Ford v. Island Creek Coal Co.*, BRB No. 11-0320 BLA (Oct. 26, 2011)(unpub. Order).

<sup>4</sup> The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 4. 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).

survivor's claim was filed, not the date that the miner's claim was filed. *West Virginia CWP Fund v. Stacy*, F. 3d , BLR , No. 11-1020, 2011 WL 6396510 (4th Cir. Dec. 21, 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010). For the reasons set forth in our decision in *Stacy*, we reject employer's arguments to the contrary and, consistent with our reasoning in *Mathews*, we also reject employer's request to hold this case in abeyance pending resolution of the legal challenges to the PPACA.

Employer next contends that claimant is not eligible for derivative survivor's benefits under amended Section 932(l), because her prior claim was finally denied and, by operation of the doctrine of res judicata, her subsequent claim is barred. Employer asserts that the "new method of demonstrating entitlement to survivor's benefits" set forth in amended Section 932(l) does not create a "new cause of action" that is outside the scope of res judicata. Employer's Reply Brief at 4, citing Director's Brief at 6. Rather, employer argues, the PPACA only amended the conditions of entitlement for a pre-existing cause of action, i.e., a claim for survivor's benefits. Employer alleges that, because the original survivor's claim and the subsequent survivor's claim arise out of an identical "transaction" or "common nucleus of operative facts" relating to the death of the miner, the subsequent survivor's claim is barred by res judicata.

Employer also contends that neither a "change in the law" nor a "public policy" exception defeats the preclusive effect of the final judgment in claimant's initial survivor's claim, as her subsequent claim is not based on any new factual circumstances that have arisen since the denial of her prior claim. Employer's Reply Brief at 9-15. Further, employer asserts that, unlike prior amendments to the Act, the PPACA does not contain a Congressional mandate to override the res judicata effect of previously denied claims. Moreover, employer maintains that 20 C.F.R. §725.309(d)(3) bars an award of benefits in the subsequent survivor's claim, as claimant has failed to establish a change in at least one condition unrelated to the miner's physical condition at the time of his death. Lastly, employer argues that allowing automatic entitlement to benefits in a subsequent survivor's claim under amended Section 932(l) renders meaningless the time limitations established by Congress in Section 1556; nullifies the prior final decision denying entitlement; ignores the governing language of 20 C.F.R. §725.2 and the applicable provisions at 20 C.F.R. §725.309(d)(3); and sanctions the Director's disregard of the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

In response, the Director contends that nothing in Section 1556 of the PPACA prohibits application of its provisions to subsequent claims. The Director argues that, by its terms, amended Section 932(l) is applicable when any claim, including a subsequent survivor's claim, meets the filing date and pendency requirements established under Section 1556. The Director asserts that the automatic entitlement provisions of amended

Section 932(l) create a “change” in an applicable condition of entitlement under 20 C.F.R. §725.309(d) by establishing “a new condition of entitlement that is wholly independent of the miner’s cause of death.” Director’s Brief at 7. In addition, the Director maintains that, because the subsequent survivor’s claim is an assertion of rights under the PPACA that did not exist at the time of the denial of the prior claim, the res judicata concepts contained in Section 725.309(d) are not implicated, as the survivor’s entitlement is not related to the finding in the prior claim that the miner’s death was not due to pneumoconiosis. Claimant substantially agrees with the Director’s position, and asserts that the Director’s interpretation is consistent with the plain language and intent of the amendments.

In *Richards v. Union Carbide Corp.*, BLR , BRB Nos. 11-0414 BLA and 11-0414 BLA-A (Jan. 9, 2012)(en banc)(McGranery, J., concurring and dissenting, Boggs, J., dissenting), the Board recently addressed and rejected arguments substantially similar to those raised by employer in this case. In *Richards*, the majority of the Board agreed with the Director’s position, that Section 932(l) of the Act, as amended by Section 1556 of the PPACA, permits the application of amended Section 932(l) to all claims filed after January 1, 2005, that are pending on or after March 23, 2010. The majority further held that, by restoring the derivative entitlement provisions of Section 932(l), Congress effectively created a “change” that established a new condition of entitlement unrelated to whether the miner died due to pneumoconiosis. The majority determined, therefore, that amended Section 932(l) provides a basis for establishing a change in an applicable condition of entitlement at Section 725.309(d) in a subsequent survivor’s claim. Accordingly, we reject employer’s arguments concerning res judicata in the present case for the reasons set forth in *Richards*.

Finally, employer contends that the administrative law judge erred in selecting September 1, 2002, as the date from which benefits commence. Employer maintains that the Board should hold that benefits are not payable prior to the date on which claimant filed her subsequent claim. Employer reasons that, because the recent amendments apply only with respect to claims filed after January 1, 2005, that are pending on or after March 23, 2010, and because claimant’s subsequent claim was the only pending claim meeting those requirements, the appropriate date for the commencement of benefits is the filing date of the subsequent claim, as an earlier date would render meaningless the retroactive limitations set by Congress.

The Director also contends that the administrative law judge did not select the proper date for the commencement of benefits. The Director alleges, however, that benefits should commence in July 2006, the month after the month in which the denial of claimant’s prior claim became final. In support of the Director’s position, he notes, *inter alia*, that Section 1556 is silent as to the appropriate commencement date for automatic entitlement to benefits and that Section 725.309(d)(5) prohibits the payment of benefits in

a subsequent claim for any period prior to the date upon which the order denying the prior claim became final. Claimant concurs with the Director's position, that Section 725.309(d)(5) is applicable to this case, but asserts that benefits should commence as of the month in which claimant's prior denial became final.

In *Richards*, the Board recently addressed the identification of the appropriate date for the commencement of benefits in a subsequent survivor's claim awarded pursuant to amended Section 932(l). The Board determined that, because the PPACA does not authorize the reopening of a previously denied claim, the denial of the prior survivor's claim must be given effect. *Richards*, slip op. at 7-8. The Board further reasoned that, in order to do so, the provisions of Section 725.309(d)(5) must be applied in a subsequent survivor's claim to bar the payment of benefits from a date prior to the date upon which the denial of the prior claim became final. *Id.* Based upon our decision in *Richards*, we hold that, in the present case, the benefits awarded under amended Section 932(l) in claimant's subsequent survivor's claim commence as of July 2006, the first day of the month after the month in which claimant's prior denial of benefits became final.

Accordingly, the administrative law judge's Order Awarding Survivor's Benefits is affirmed, as modified to reflect July 2006 as the date from which benefits commence.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge