

BRB No. 11-0353 BLA

GENEVA ARRINGTON)	
(Widow of WALTER ARRINGTON))	
)	
Claimant-Respondent)	
)	
v.)	
)	
BIG BEAR MINING COMPANY)	DATE ISSUED: 01/11/2012
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Summary Decision-Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

Ann B. 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Summary Decision-Award of Benefits (2010-BLA-5766) of Administrative Law Judge Michael P. Lesniak, rendered on a survivor's claim filed on March 18, 2010, 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 On March 23, 2010, amendments to the Act, included in the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, were enacted. The amendments, in pertinent part, changed the entitlement criteria for certain claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this survivor's claim, the amendments revive Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that a 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.²

On November 26, 2010, while this case was pending before the administrative law judge, claimant filed a motion for summary judgment, asserting that she is entitled to benefits, pursuant to amended Section 932(l), because her husband was receiving federal black lung benefits at the time of his death. The Director, Office of Workers' Compensation Programs (the Director), responded to the motion and agreed that there is no genuine issue as to any material fact concerning whether claimant is entitled to benefits pursuant to amended Section 932(l). Employer, however, argued that claimant's

¹ Claimant is the surviving spouse of the miner, Walter Arrington, who died on February 16, 2010. Director's Exhibit 13.

² 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 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).

motion should be denied because the requirements of amended Section 932(l) are not satisfied in this case, based on the filing date of the miner's claim.

The administrative law judge found that claimant is the survivor of the miner, "who was receiving benefits at the time of his death pursuant to a claim he filed during his lifetime, which became final on May 12, 1989." Summary Decision – Awarding Benefits at 2; Director's Exhibit 3. The administrative law judge further determined that claimant satisfied the requirements for automatic entitlement, set forth in amended Section 932(l), as claimant filed her claim after January 1, 2005. *Id.* Thus, the administrative law judge awarded survivor's benefits, commencing February 2010, the month in which the miner died. *Id.*

On appeal, employer asserts that retroactive application of the amendments is unconstitutional and that amended Section 932(l) is not applicable to this case, based on the filing date of the miner's claim. Employer also requests that this case be held in abeyance until the constitutional challenges to the PPACA are finally decided. *See Florida v. U.S. Dept. of HHS*, 648 F.3d 1235 (11th Cir. 2011), *cert. granted* 2011 WL 5515164 (U.S. Nov. 14, 2011) (No. 11-398). Claimant and the Director respond, urging the Board to reject employer's arguments and affirm the award of benefits.

The Board's scope of review is defined by statute. The administrative law judge's order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.³ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer asserts that retroactive application of amended Section 932(l) violates employer's due process rights and constitutes an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. We disagree. Employer's arguments in this appeal are virtually identical to the ones that the Board rejected in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-198-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (unpub. Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). Thus, we reject them here for the reasons set forth in that decision. *Id.*; *see also Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *aff'd per curiam*, *West Virginia CWP Fund v. Stacy*, F. 3d , BLR , No. 11-1020, 2011 WL 6396510 (4th Cir. Dec. 21, 2011).

We also reject employer's contention that the operative date for determining eligibility pursuant to amended Section 932(l) is the date of filing of the miner's claim.

³ The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 7. 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*).

In *Stacy*, the United States Court of Appeals for the Fourth Circuit recently 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 survivor's claim was filed and not the date that the miner's claim was filed. *Stacy*, 2011 WL 6396510. Furthermore, we deny employer's request to hold this case in abeyance pending resolution of the legal challenges to the PPACA, Public Law No. 111-148.⁴ *See Mathews*, 24 BLR at 1-201.

We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant filed her survivor's claim after January 1, 2005, that her claim was pending on March 23, 2010, and that, at the time of his death, the miner was receiving benefits, based on an award of benefits that became final on May 12, 1989. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Summary Decision-Awarding Benefits at 2. Thus, we affirm the administrative law judge's finding that claimant is entitled to benefits pursuant to amended Section 932(l).

⁴ We reject employer's assertion that if any portion of the Patient Protection and Affordable Care Act is declared unconstitutional, the amendments to the Black Lung Benefits Act, including amended Section 932(l), must also be declared invalid. *See West Virginia CWP Fund v. Stacy*, F.3d , 2011WL 6396510 (4th Cir. Dec. 21, 2011).

Accordingly, the administrative law judge's Summary Decision-Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge