

BRB Nos. 12-0263 BLA  
and 12-0263 BLA-A

BELLE HAMILTON	)	
(Widow of MORGAN E. HAMILTON)	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	DATE ISSUED: 01/28/2013
	)	
A & E COAL COMPANY,	)	
INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Petitioners	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

W. William Prochot (Greenberg Traurig, 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals, and claimant cross-appeals, the Decision and Order (11-BLA-5671) of Administrative Law Judge Richard A. Morgan awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). This case involves a subsequent survivor's claim filed on January 24, 2011.

Claimant<sup>1</sup> filed her initial claim for survivor's benefits on October 27, 2004. In a Decision and Order dated May 25, 2007, the administrative law judge denied benefits because he found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Id.* Pursuant to claimant's appeal, the Board affirmed the administrative law judge's denial of benefits. *B.H. [Hamilton] v. A & E Coal Co.*, BRB Nos. 07-0778 BLA and 07-0778 BLA/A (July 9, 2008) (unpub.). Claimant filed a timely request for modification on June 3, 2009.

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 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. 30 U.S.C. §932(l).

By letter dated December 3, 2010, claimant requested that the district director allow her to withdraw her pending request for modification of the denial of her 2004 survivor's claim. Director's Exhibit 4. On December 17, 2010, the district director granted claimant's request, and informed claimant that her request for modification was withdrawn. *Id.* The district director, therefore, advised claimant that her 2004 survivor's claim was considered administratively closed. *Id.*

Claimant filed a subsequent survivor's claim on January 24, 2011. Director's Exhibit 6. On January 27, 2011, the district director issued a Proposed Decision and Order, wherein she found that claimant was derivatively entitled to benefits pursuant to amended Section 932(l). Director's Exhibit 10. The district director subsequently denied employer's request for revision of the Proposed Decision and Order. Director's Exhibits

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<sup>1</sup> Claimant is the surviving spouse of the miner, who died on October 9, 2004. Director's Exhibit 9.

11, 13. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing.

On January 17, 2012, employer moved for a summary decision, asserting that claimant's subsequent survivor's claim should be denied as a matter of law. Employer alternatively requested that the case be held in abeyance pending the United States Supreme Court's ruling on the constitutionality of the Patient Protection and Affordable Care Act (PPACA).

Claimant and the Director, Office of Workers' Compensation Programs (the Director), each subsequently filed motions for a summary decision, asserting that, pursuant to amended Section 932(*l*), claimant was automatically entitled to benefits as a matter of law, and that there was no genuine issue as to any material fact concerning her entitlement.

In a Decision and Order dated February 2, 2012, the administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(*l*). Accordingly, the administrative law judge awarded survivor's benefits, commencing as of August 2008.

On appeal, employer challenges the constitutionality of amended Section 932(*l*), and its application to this subsequent survivor's claim. Employer also challenges the administrative law judge's determination regarding the onset date of benefits, contending that any benefits awarded should not precede the filing date of the subsequent claim. Claimant and the Director each respond in support of the administrative law judge's application of amended Section 932(*l*) to this case. However, the Director contends that the appropriate onset date for benefits in this case is October 2008, the month after the month in which the denial of the prior survivor's claim became final. In a response brief, employer reiterates its previous contentions. Claimant has also filed a cross-appeal, asserting that the appropriate onset date for benefits in this case is October 2004, the month in which the miner died. In response, employer and the Director reiterate their respective positions regarding the appropriate onset date for benefits in this case.<sup>2</sup>

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<sup>2</sup> Employer does not challenge that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under amended Section 932(*l*): That she filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending on March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death.

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. 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 contends that the operative date for determining eligibility under amended Section 932(l) is the date the miner's claim was filed, not the date the survivor's claim was filed. Employer's argument is virtually identical to the one that the United States Court of Appeals for the Fourth Circuit rejected in *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 388, 25 BLR 2-65, 2-83 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *cert. denied*, 568 U.S. (2012); *see also B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011). For the reasons set forth in *Stacy*, we reject employer's argument.

Employer's argument, that this claim could be affected by constitutional challenges to the PPACA, is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012).

Employer contends that claimant is not eligible for derivative survivor's benefits under amended Section 932(l), because her prior claim was finally denied and her subsequent claim is barred pursuant to fundamental principles of res judicata or claim preclusion. We disagree. The Board recently held that the principles of res judicata addressed in 20 C.F.R. §725.309, requiring that a subsequent claim be denied unless a change is established, are not implicated in the context of a subsequent survivor's claim filed within the time limitations set forth under Section 1556 of the PPACA, because entitlement thereunder is not tied to relitigation of the prior finding that the miner's death was not due to pneumoconiosis. *Richards v. Union Carbide Corp.*, 25 BLR 1-31 (2012) (en banc) (McGranery, J., concurring and dissenting) (Boggs, J., dissenting), *appeal docketed*, No. 12-1294 (4th Cir. Mar. 8, 2012). The Board, therefore, held that the automatic entitlement provisions of amended Section 932(l) are available to an eligible survivor who files a subsequent claim within the time limitations established in Section 1556. *Id.*

Finally, employer contends that the administrative law judge erred in setting the commencement date for benefits as August 2008. Employer asserts that an award of benefits in this case should commence no earlier than January 2011, the month that claimant filed her subsequent claim. Claimant asserts that the appropriate onset date for benefits is October 2004, the month in which the miner died.<sup>3</sup> The Director also

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<sup>3</sup> Claimant's argument is based on her belief that the district director allowed her to withdraw her previous 2004 survivor's claim. Contrary to claimant's argument, the

disagrees with the administrative law judge's commencement of benefits determination, arguing that claimant is entitled to benefits commencing in October 2008, the month after the month in which the denial of the prior claim became final.<sup>4</sup> The Board has adopted the position taken by the Director, holding that derivative benefits are payable in a subsequent survivor's claim filed within the time limitations set forth in Section 1556 from the month after the month in which the denial of the prior claim became final. *See Richards*, 25 BLR at 1-38-39. Consequently, we modify the administrative law judge's onset determination to October 2008. 20 C.F.R. §725.309(d)(5).

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district director did not grant claimant's request to withdraw her prior survivor's claim. Director's Exhibit 4. Rather, the district director permissibly granted claimant's request that she be allowed to withdraw her pending modification request of her denied 2004 survivor's claim. *See W.C. [Cornett] v. Whitaker Coal Corp.*, 24 BLR 1-20, 1-27 (2008); Director's Exhibit 4. Moreover, because claimant's 2004 survivor's claim had already been adjudicated, the district director did not have the authority to grant claimant's request to withdraw the claim. *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193, 1-199-200 (2002)(en banc); *Lester v. Peabody Coal Co.*, 22 BLR 1-183, 1-190-91 (2002) (en banc).

<sup>4</sup> The Board's Decision and Order, affirming the administrative law judge's denial of claimant's 2004 survivor's claim, was issued on July 9, 2008, and became final sixty days later, in September 2008. *See* 20 C.F.R. §802.406.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed, as modified to reflect October 2008 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