

BRB No. 10-0659 BLA

GLADIOLA EVANS	)	
(Widow of CLAUDE EVANS)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BUFFALO MINING COMPANY	)	DATE ISSUED: 07/26/2011
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2009-BLA-05710) of Administrative Law Judge John P. Sellers, III, on a survivor's claim filed on September 17, 2008, 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).<sup>1</sup> On April 10, 2009, the district director issued a proposed decision and order denying benefits. By letter dated May 4, 2009, claimant rejected the district director's determination and requested a hearing before the Office of Administrative Law Judges (OALJ). The claim was referred to the OALJ on June 30, 2009.

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, became effective. The amendments, in pertinent part, revive Section 422(l) of the Act, 30 U.S.C. §932(l), which provides 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. 30 U.S.C. §932(l).

On June 4, 2010, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for 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 entitlement. On June 11, 2010, the administrative law judge issued an Order to Show Cause why the current claim did not qualify for automatic entitlement under the Act. In response, employer argued that the automatic entitlement provision did not apply because the date of the miner's claim controlled whether the provision was applicable. In addition, employer asserted that the retroactive application of Section 1556 of Public Law No. 111-148 is unconstitutional and conflicts with other provisions of the Act. By Order dated July 2, 2010, the administrative law judge rejected employer's arguments and advised the parties that, because there were no genuine issues of material fact or questions of law precluding an automatic award of benefits, no hearing was necessary. The administrative law judge also admitted into evidence the Director's Exhibits and noted that employer's challenges to the constitutionality of the Act would be preserved for appellate purposes. Accordingly, the administrative law judge granted the Director's motion and awarded survivor's benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 932(l) to this case. Both the Director and claimant respond, urging affirmance of the administrative law judge's award of benefits.<sup>2</sup>

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<sup>1</sup> Claimant is the widow of the miner, Claude Evans, who died on August 12, 2008. Director's Exhibits 2, 10-3. The miner was receiving benefits at the time of his death. Director's Exhibit 1-59.

<sup>2</sup> We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant filed her survivor's claim after January 1, 2005, and that her

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.<sup>3</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer argues that the date of the miner's claim should initiate application of Section 932(l) and that, further, the provision is unenforceable because it creates irreconcilable inconsistencies in the Act. Employer also asserts that the Department of Labor is barred from applying amended Section 932(l), as the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (2010), of which the amendments were a part, was declared unconstitutional in a United States District Court. Employer's Reply Brief at 3, *citing Florida v. U.S. Dep't of Health & Human Servs.*, --- F.Supp. 2d ---, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011). Employer maintains that this ruling was the functional equivalent of an injunction against the application of the PPACA in its entirety. Finally, employer contends that under the circumstances of this case, liability should transfer to the Black Lung Disability Trust Fund.

We reject employer's contention regarding the operative filing date for determining eligibility pursuant to amended Section 932(l). The Board has 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. *Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011). The Board specifically held that 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. *Id.*; *see* 30 U.S.C. §932(l).

In addition, we reject employer's assertion that amended Section 932(l) is rendered unenforceable by language in Sections 411(a) and 412(a)(2) of the Act, 30 U.S.C. §§921(a), 922(a)(2). Those two sections provide, in relevant part, that benefits are to be paid at the applicable rate to a survivor when a miner was totally disabled due to pneumoconiosis at the time of his death, "except with respect to a claim filed under part

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claim was pending on March 23, 2010. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order Awarding Benefits at 4.

<sup>3</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

C of this subchapter on or after the effective date of the Black Lung Benefits Amendments of 1981. . . .” 30 U.S.C. §§921(a), 922(a)(2). As the Board recently held in *Fairman v. Helen Mining Co.*, 24 BLR 1- , BRB No. 10-0494 BLA (Apr. 29, 2011), Section 932(l), as amended, is not rendered inapplicable by the language in Sections 921(a) and 922(a)(2). In Section 1556, Congress specifically amended Section 932(l) by striking its former language stating that the provision could not apply to claims filed on or after the effective date of the Black Lung Benefits Amendments of 1981, and mandated that the amendment “shall apply with respect to claims,” such as this one, “filed under . . . Part C . . . after January 1, 2005, that are pending on or after the date of enactment of this Act.” Pub. L. No. 111-148, §1556(c), 124 Stat. 119 (2010) (emphasis added). Thus, such survivors’ claims filed after January 1, 2005, in which the survivor has derivative entitlement, are not subject to the language that employer highlights in 30 U.S.C. §§921(a), 922(a)(2), to the extent that it may be inconsistent with Section 932(l). *Fairman*, BRB No. 10-0494 BLA, slip op. at 4.

Furthermore, we reject employer’s contention that the ruling of the United States District Court in Florida was equivalent to an injunction barring application of amended Section 932(l). Although the Florida decision struck down the PPACA in its entirety, the ruling was stayed when the federal government filed its appeal in the United States Court of Appeals for the Eleventh Circuit. *See Florida v. U.S. Dep’t of Health & Human Servs.*, --- F.Supp. 2d ---, 2011 WL 723117 (N.D. Fla. Mar. 31, 2011), *clarifying* --- F.Supp. 2d ---, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011), appeal docketed, No. 11-11021-HH (11th Cir. Mar. 9, 2011).

Finally, we hold that there is no merit in employer’s additional argument that liability for benefits should transfer to the Black Lung Disability Trust Fund, as the application of amended Section 932(l) is unconstitutional. The constitutional violations alleged by employer are identical to the ones that the Board rejected in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (unpub. Order), appeal docketed No. 11-1620 (4th Cir. June 13, 2011). We, therefore, reject them here for the reasons set forth in that decision and affirm the administrative law judge’s determination that claimant is derivatively entitled to benefits pursuant to amended Section 422(l) of the Act. *Id.* at 1-200; *see also Stacy*, 24 BLR at 1-214.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

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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REGINA C. McGRANERY  
Administrative Appeals Judge