

BRB No. 11-0124 BLA

SYLVIA HUNNELL)
(Widow of ERNEST HUNNELL))
)
Claimant-Respondent)
)
v.)
)
EL BOW MINING, INCORPORATED)
)
and)
)
WEST VIRGINIA COAL WORKERS') DATE ISSUED: 07/27/2011
PNEUMOCONIOSIS FUND)
)
Employer/Carrier-)
Petitioners)
)
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.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for
employer/carrier.

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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Order Awarding Survivor's Benefits (2010-BLA-5758) of Administrative Law Judge William S. Colwell rendered on a claim 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). Claimant filed her survivor's claim on January 15, 2010.¹ Director's Exhibit 6.

On March 23, 2010, amendments to the Act were enacted, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010. The amendments, in pertinent part, revive Section 932(*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 August 20, 2010, the Director, Office of Workers' Compensation Programs (the Director), moved for a summary decision in this case, pursuant to amended Section 932(*l*), as claimant filed her claim after January 1, 2005, her claim was pending after March 23, 2010, and the miner was receiving benefits at the time of his death. Employer responded, asserting that claimant is not automatically entitled to receive survivor's benefits pursuant to amended Section 932(*l*) because the miner's claim was filed before January 1, 2005, and was not pending on or after March 23, 2010.

In an order dated September 30, 2010, the administrative law judge found that the miner was receiving benefits at the time of his death, that claimant filed her survivor's claim after January 1, 2005, her claim was pending, and that she was an eligible survivor of the miner. Accordingly, the administrative law judge found that claimant was automatically entitled to survivor's benefits pursuant to amended Section 932(*l*).

On appeal, employer challenges the administrative law judge's application of amended Section 932(*l*) to this case. Claimant has not filed a response brief. The Director responds, urging affirmance of the administrative law judge's award of benefits. Employer filed a reply brief, reiterating its contentions.

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,

¹ Claimant is the widow of the miner, who died on November 4, 2009. Director's Exhibit 20. At the time of his death, the miner was receiving federal black lung benefits pursuant to a March 30, 1992 award on his lifetime claim by an administrative law judge. Director's Exhibit 3.

and in accordance with applicable law.² 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 asserts that retroactive application of amended Section 932(l) is unconstitutional, as it 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. Employer’s Brief at 5-10. Employer also contends that the operative date for determining eligibility pursuant to amended Section 932(l) is the date that the miner’s claim was filed, not the date that the survivor’s claim was filed. Employer’s Brief at 12-24. Further, employer asserts that this case should be held in abeyance pending resolution of the constitutional challenges to Public Law No. 111-148 in federal court. Employer’s Reply Brief at 2-10. Employer’s arguments lack merit.

Initially, we reject employer’s contentions that retroactive application of the automatic entitlement provision of amended Section 932(l) to claims filed after January 1, 2005 constitutes a due process violation and a taking of private property. The Board rejected identical 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 Keene v. Consolidation Coal Co.*, F.3d , 2011 WL 1886106 (7th Cir. 2011). We, therefore, reject them here for the reasons set forth in that case. Further, the Board recently held 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, not the date that the miner’s claim was filed. *Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011). For the reasons set forth in *Stacy*, we reject employer’s arguments to the contrary. Finally, we deny employer’s request that this case be held in abeyance pending resolution of the legal challenges to Public Law No. 111-148. *See Mathews*, 24 BLR at 1-201.

Consequently, we affirm the administrative law judge’s determination that claimant is derivatively entitled to benefits pursuant to amended Section 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 determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(l); Pub. L. No. 111-148, §1556(b), (c).

² The record indicates 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, 1-202 (1989)(*en banc*).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge