

BRB No. 11-0678 BLA

LOUISE WILSON)
(Widow of RUEY WILSON))
)
Claimant-Respondent)
)
v.)
)
OK COAL COMPANY) DATE ISSUED: 07/23/2012
)
Employer-Petitioner)
)
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 and the Order on Reconsideration of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

Joseph Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

Paul L. Edenfield (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 Judges, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Awarding Survivor's Benefits and the Order on Reconsideration (2011-BLA-5097) of Associate Chief Administrative Law Judge

William S. Colwell, rendered on a subsequent survivor's claim filed on July 28, 2010,¹ 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). On March 23, 2010, amendments to the Act, contained in the Patient Protection and Affordable Care Act (PPACA), were passed, which affect claims filed after January 1, 2005 that 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. See 30 U.S.C. §932(l). In considering the claim, the district director issued a Proposed Decision and Order awarding benefits on August 17, 2010, finding that claimant was derivatively entitled to benefits pursuant to amended Section 932(l). Director's Exhibit 7. Employer requested a hearing, and the case was assigned to the administrative law judge. Director's Exhibits 9, 11.

On January 13, 2011, prior to the scheduled hearing, 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 her entitlement. Employer responded, arguing, *inter alia*, that amended Section 932(l) was unconstitutional. Employer requested that the administrative law judge hold the case in abeyance or, in the alternative, provide employer an opportunity to submit evidence in support of its constitutional challenges to amended Section 932(l). The administrative law judge issued an Order Awarding Survivor's Benefits on March 2, 2011, wherein he granted the Director's motion for summary decision and awarded survivor's benefits commencing as of July 1990, the month in which the miner died.

The record indicates that employer subsequently filed a motion for reconsideration on April 6, 2011, challenging the administrative law judge's determination as to when benefits should commence. In his Order on Reconsideration dated June 7, 2011, the administrative law judge agreed with employer that since this case involves a subsequent survivor's claim, the regulation at 20 C.F.R. §725.309(d) applies to preclude an award of benefits for any period prior to the date upon which the denial of claimant's prior claim became final. The administrative law judge concluded that since the denial of claimant's

¹ Claimant is the widow of the miner, Ruey Wilson, who died on July 16, 1990. Director's Exhibits 3, 5. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim. Director's Exhibit 1. The record before the Board does not include copies of any prior claims filed by claimant, but the parties do not dispute that this case involves a subsequent survivor's claim.

prior claim became final during February 2002,² benefits should commence as of February 2002.

On appeal, employer challenges the constitutionality of amended Section 932(l), and its application to this subsequent survivor's claim. Employer requests that the Board remand the case to the administrative law judge in order to give employer the opportunity to present additional evidence relevant to its constitutional arguments. Employer argues that the subsequent claim is barred by the principles of res judicata, or claim preclusion, and 20 C.F.R. §725.309(d)(3). Employer maintains that the operative date for determining eligibility for survivor's benefits under amended Section 932(l) is the date that the miner's claim was filed, not the date that the survivor's claim was filed.³

Both claimant and the Director have responded to employer's appeal and argue that amended Section 932(l) is applicable to this subsequent survivor's claim. The Director, however, argues that, contrary to the administrative law judge's finding, benefits should commence in April 2002. Employer has also filed a reply brief reiterating its argument that this subsequent survivor's claim is barred.

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,

² The administrative law judge obtained this date from a copy of a Proposed Decision and Order issued by the district director on January 23, 2002, with regard to a survivor's claim filed by claimant. The Director, Office of Workers' Compensation Programs, attached a copy of this Proposed Decision and Order to the Motion for Summary Decision. The parties do not challenge, on appeal, that claimant filed a prior claim, which was denied on January 23, 2002.

³ Employer further notes that challenges to the constitutionality of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010), of which the amendments are a part, affect the viability of amended Section 932(l). Employer also requests that the Board hold this case in abeyance, pending review by the United States Court of Appeals of the Fourth Circuit of the Board's decision in *Stacy v. Olga Coal Corp.*, 24 BLR 1-207 (2010). Because, subsequent to the briefing in this case, the United States Supreme Court upheld the constitutionality of the PPACA, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012), and the United States Court of Appeals for the Fourth Circuit affirmed the Board's decision in *Stacy, West Virginia CWP Fund v. Stacy*, 671 F. 3d 378, 25 BLR 2-69 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), these arguments are moot.

and in accordance with applicable law.⁴ 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).

As an initial matter, 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 an unlawful 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, 25 BLR 2-16 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011).⁵ 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 survivor’s claim was filed, not the date that the miner’s claim was filed. *West Virginia CWP Fund v. Stacy*, 671 F. 3d 378, 383 n.2, 25 BLR 2-69, 2-74 n.2 (4th Cir. 2011), *aff’g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010). For the reasons set forth by the Board in *Stacy*, we hold that employer’s arguments to the contrary are without merit.

Employer next alleges that the principles of res judicata expressed in 20 C.F.R. §725.309 bar this subsequent claim, as claimant’s prior claim for survivor’s benefits was denied and that denial became final. We disagree. The terms of 20 C.F.R. §725.309, which require that a subsequent claim be denied unless a change in an applicable condition of entitlement is established, do not apply to a survivor’s subsequent claim filed within the time limitations set forth under Section 1556 of the PPACA, as entitlement thereunder is not tied to relitigation of the prior finding that the miner’s death was not due to pneumoconiosis. *See Richards v. Union Carbide Corp.*, BLR , BRB Nos. 11-0414 BLA and 11-0414 BLA-A, slip op. at 4-6 (Jan. 9, 2012) (en banc) (McGranery, J., concurring and dissenting) (Boggs, J., dissenting), *appeal docketed*, No. 12-1294 (4th

⁴ Because the miner’s coal mine employment was in Virginia, this case arises within the jurisdiction of the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director’s Exhibit 1.

⁵ We also decline to remand this case for development of evidence relevant to the economic impact of amended Section 932(l), since employer’s constitutional argument with regard to the Takings Clause of the Fifth Amendment has been rejected by the Board and the Fourth Circuit. *Stacy*, 671 F. 3d at 383 n.2, 25 BLR at 2-74 n.2; *Stacy*, 24 BLR at 1-207.

Cir. Mar. 8, 2012). Contrary to employer's contention, therefore, 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 of the PPACA. *Id.* Accordingly, we reject employer's argument that this subsequent survivor's claim is barred by application of the doctrine of res judicata and application of 20 C.F.R. §725.309(d)(3), for the reasons set forth in *Richards*. *Id.*

Finally, the Director contends that the administrative law judge erred in determining that benefits should commence as of February 2002. The Director argues that, while the administrative law judge "correctly concluded that the time of the earlier denial was the appropriate benchmark" for determining when benefits should commence, he did not properly consider that the "district director's denial of benefits on the prior claim, although issued *in February 2002*, did not become final until March 2002, one month after the denial decision was issued." Director's Brief at 9 (emphasis added), *citing* 20 C.F.R. §725.419(c). Thus, the Director maintains that benefits should commence as of April 2002.

We disagree. The administrative law judge correctly concluded that, since the district director issued his denial of claimant's prior claim on January 23, 2002, it became final on February 23, 2002, thirty days after the issuance of the decision in accordance with 20 C.F.R. §725.419(c).⁶ Subsequent to the administrative law judge's decision, however, the Board held, in *Richards*, 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. *Richards*, slip op. at 7-8. Thus, we are unable to affirm the administrative law judge's award of benefits as of February 2002, the month in which the denial became final. Rather, based on the facts of this case and pursuant to *Richards*, we hold that derivative survivor's benefits properly commence as of March 2002, the month after the month in which claimant's prior denial of benefits became final. *See* 20 C.F.R. §§725.309(d)(5), 802.406.

⁶ The Director misstated in his analysis that the month of the issuance of the district director's decision was February 2002. Director's Brief at 9.

Accordingly, the administrative law judge's Order Awarding Survivor's Benefits and Order on Reconsideration are affirmed, as modified to reflect March 2002, as the month from which benefits commence.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge