

BRB No. 10-0512 BLA

JANET M. MILLER)
(Widow of IVON D. MILLER))
)
 Claimant-Respondent)
)
 v.)
)
 ROCKVILLE MINING COMPANY)
)
 and)
)
 WEST VIRGINIA COAL WORKERS') DATE ISSUED: 06/15/2011
 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 Summary Decision Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Barry H. Joyner (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 Summary Decision Awarding Benefits (07-BLA-5841) of Administrative Law Judge Michael P. Lesniak rendered on a survivor's 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 claim on July 31, 2006.¹ Director's Exhibit 2.

The administrative law judge held a hearing on January 5, 2010. On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, were enacted. Those amendments, in pertinent part, revived Section 932(l) of the Act, 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); Pub. L. No. 111-148, §1556(b),(c).

On April 2, 2010, the administrative law judge ordered the parties to show cause why an order awarding survivor's benefits should not be entered. In response, employer argued that retroactive application of Section 1556 of Public Law No. 111-148 is unconstitutional, conflicts with other provisions of the Act, and violates the Administrative Procedure Act (APA), 5 U.S.C. §§554, 556, 557, as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Employer urged the administrative law judge to hold the case in abeyance until certain legal challenges to Public Law No. 111-148 are resolved, and the Department of Labor promulgates implementing regulations. The Director, Office of Workers' Compensation Programs (the Director), moved that an award of benefits be entered pursuant to amended Section 932(l), as claimant filed her claim after January 1, 2005, her claim was pending, and the miner was receiving benefits at the time of his death. Claimant agreed with the Director that she is automatically entitled to benefits under amended Section 932(l).

In a decision dated May 7, 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. The administrative law judge therefore found that claimant satisfied the eligibility criteria for automatic entitlement to benefits under amended Section 932(l). Accordingly, he awarded survivor's benefits under Section 932(l). Summary Decision at 2-3.

¹ Claimant is the widow of the miner, who died on June 30, 2006. Director's Exhibit 9. At the time of his death, the miner was receiving federal black lung benefits pursuant to a final award on his lifetime claim. *Miller v. Rockville Mining Co. Inc.*, BRB Nos. 01-0757 BLA and 01-0757 BLA-A (May 14, 2002) (unpub.); Administrative Law Judge's Exhibit 1.

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, 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 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 14-20. 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 5-8. Further, employer asserts that this case should be held in abeyance until sixty days after the Department of Labor issues guidelines or promulgates regulations implementing 30 U.S.C. §932(l), as amended, and made applicable by Section 1556 of Public Law No. 111-148. Employer's Brief at 22. Employer also argues that, because the constitutionality of Public Law No. 111-148 was challenged in a lawsuit filed in the United States District Court for the Northern District of Florida, this case should be held in abeyance. *Id.* Employer's arguments lack merit.

As the administrative law judge correctly noted, the recent amendment reviving Section §932(l) of the Act applies to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Pub. Law. No. 111-148, §1556(c); Summary Decision at 1. In a recent case, the Board 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.*, BLR , BRB No. 10-0113 BLA, slip op. at 7 (Dec. 22, 2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011). Specifically, the Board held that, under amended Section 932(l), 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 receive benefits based solely on the miner's lifetime award, without having to prove that the miner died due to pneumoconiosis. *Stacy*, slip op. at 7; *see* 30 U.S.C. §932(l). Therefore, because claimant filed her survivor's claim after January 1, 2005, her claim was pending on March 23, 2010, and the miner was awarded benefits on his claim, we hold that the administrative law judge properly found that Section 932(l) applies to this case. *Stacy*, slip op. at 7.

We also reject employer's arguments regarding the constitutionality of the amendments, as applied to this case. The arguments made by employer are identical to the ones that the Board rejected in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-198-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order) (unpub.). We, therefore, reject them here for the reasons set forth in that case. *Mathews*, 24 BLR at 1-198-200; *see also Stacy*, slip op. at 8. Thus, claimant is derivatively entitled to survivor's benefits pursuant to 30 U.S.C. §932(l). Therefore, as amended Section 932(l) does not afford employer the opportunity to defend the claim once derivative entitlement has been established, employer's request that the case be remanded with instructions for the record to be reopened, is denied.

Further, as we did in *Mathews*, we reject employer's request that this case be held in abeyance until sixty days after the Department of Labor issues guidelines or promulgates regulations implementing amended Section 932(l). As we noted in *Mathews*, the mandatory language of amended Section 932(l) supports the conclusion that the provision is self-executing, and, therefore, that there is no need to hold this case in abeyance pending the promulgation of new regulations. *Mathews*, 24 BLR at 1-201. Finally, employer's request, that this case be held in abeyance pending resolution of the legal challenge to Public Law No. 111-148, is also denied. *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).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge