

BRB No. 10-0572 BLA

LODEMA M. RAY	)	
(Widow of ROBERT L. RAY)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KENELLIS ENERGIES, INCORPORATED	)	DATE ISSUED: 06/08/2011
	)	
and	)	
	)	
ARROWPOINT CAPITAL	)	
	)	
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 of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

John C. Morton (Morton Law LLC), Henderson, Kentucky, for employer.

Jeffrey S. Goldberg (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, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Summary Decision (2009-BLA-5068) of Administrative Law Judge Paul C. Johnson, Jr., awarding benefits 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). This case involves a survivor's claim filed on March 10, 2008.<sup>1</sup>

The administrative law judge held a hearing on October 7, 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.<sup>2</sup> 30 U.S.C. §932(l).

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<sup>1</sup> Claimant is the surviving spouse of the miner, who died on February 13, 2008. Director's Exhibit 9. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim. *See Kennellis Energies v. Director, OWCP [Ray]*, 333 F.3d 822, 22 BLR 2-591 (7th Cir. 2003).

<sup>2</sup> As it existed prior to March 23, 2010, Section 422(l) provided that:

In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner, except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981, [*sic*].

30 U.S.C. §932(l). On March 23, 2010, Public Law No. 111-148 amended Section 422(l) as follows: “(b) Continuation of Benefits – Section 422(l) of the Black Lung Benefits Act (30 U.S.C. §932(l)) is amended by striking ‘except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981’.” Pub. L. No. 111-148, §1556(b), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §932(l)). Section 1556 of Public Law No. 111-148 provides further that “[t]he amendments made by this section shall apply with respect to claims filed under part B or part C of the Black Lung Benefits Act (30 U.S.C. 921 et seq., 931 et seq.) after January 1, 2005, that are pending on or after the date of enactment of this Act.” Pub. L. No. 111-148, §1556(c).

On April 1, 2010, the administrative law judge ordered the parties to file position statements addressing whether an order awarding benefits should be entered in the survivor's claim pursuant to amended Section 932(l). Claimant responded by moving for a summary decision, asserting that, pursuant to amended Section 932(l), she was automatically entitled to benefits as a matter of law. The Director, Office of Workers' Compensation Programs (the Director), responded in support of claimant's motion for a summary decision. Employer disagreed, arguing, *inter alia*, that Public Law No. 111-148 creates a rebuttable presumption that a miner's death was due to pneumoconiosis, not automatic entitlement to survivor's benefits regardless of the cause of the miner's death.

In a Summary Decision dated May 26, 2010, the administrative law judge noted that the miner was receiving benefits at the time of his death, that claimant filed her survivor's claim on March 10, 2008, and that she is an eligible survivor of the miner. The administrative law judge, therefore, found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 932(l) to this case. Claimant and the Director respond, urging affirmance of the administrative law judge's award of benefits. In a reply brief, employer reiterates its previous 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'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer argues that amended Section 932(l) creates a rebuttable presumption of death due to pneumoconiosis, rather than automatic entitlement to survivor's benefits regardless of the cause of the miner's death. Employer contends that amended Section 932(l) merely eliminates the need for a survivor to file a claim after the miner's death, but does not revive the Act's pre-1981 form allowing automatic entitlement to benefits, since amended Section 932(l) conflicts with other sections of the Act that limit the categories of eligible beneficiaries.

Contrary to employer's contention, amended Section 932(l) is not rendered ambiguous and unenforceable by earlier, contradictory provisions of the Act. As noted by the Director:

“Where provisions in [] two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one .

. . .” *U.S. v. Posadas*, 296 U.S. 497, 503 (1936). *See also* 1A Norman A. Singer, SUTHERLAND STATUTORY CONSTRUCTION §22.22 (7th ed. 2010) (“Repeal by implication occurs when an act not purporting to repeal any prior act is wholly or partially inconsistent with a prior statute . . . The latest declaration of the legislature prevails. The inconsistent provisions of the prior statute . . . are treated as repealed.”); *Chrysler Credit Corp. v. Burton*, 599 F. Supp. 1313 (M.D. N.C. 1984) (“If two acts of a legislature are applicable to the same subject, their provisions are to be reconciled if this can be done by fair and reasonable intendment; if, however, they are repugnant to one another, the last one enacted shall prevail.”).

Director’s Brief at 10. In view of the foregoing, amended Section 932(l), as the most recent enactment, controls in this case. Any contradictory provisions of the Act, that limit derivative entitlement only to claims filed before January 1982, are treated as repealed for claims filed after January 1, 2005 that are governed by amended Section 932(l).

Moreover, although employer correctly states that survivors are not required to file claims under amended Section 932(l), employer incorrectly concludes that amended Section 932(l) merely creates a rebuttable presumption that the miner died due to pneumoconiosis. 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 benefits based solely on the miner’s lifetime award, without having to prove that the miner died due to pneumoconiosis. *See* 30 U.S.C. §932(l); *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).

We also find no merit in employer’s assertion that automatic entitlement “is so unreasonable as to be . . . purely arbitrary,” and, therefore, a violation of the Fifth Amendment Due Process Clause. Employer’s Brief at 14. The Board has rejected this argument, holding that amended Section 932(l) does not violate the Fifth Amendment Due Process Clause. *See Stacy*, slip. op. at 8; *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 employer’s argument for the reasons stated in *Mathews* and *Stacy*.

Finally, employer contends that, because amended Section 932(l) treats coal mine operators differently, by requiring only those operators that employed miners who filed successful claims to pay survivor’s benefits, amended Section 932(l) violates the Equal

Protection Clause set forth in the Fourteenth Amendment<sup>3</sup> to the United States Constitution. However, as the Director accurately states:

“[E]qual protection is not a license for courts to judge the wisdom, fairness or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonable conceivable basis for the classification.” *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Moreover, “Congress need not articulate a legitimate purpose for imposing its legislation retroactively, [although] such a purpose must be rationally conceivable.” *Id.*, 508 U.S. at 315. Finally, a party challenging a classification as suspect has “the burden ‘to negate every conceivable basis which might support it’ . . . Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.” *Id.*, quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973).

Director’s Brief at 12-13.

Amended Section 932(l) does not burden a fundamental right or create a “suspect classification.” Thus, the regulation need only have a rational basis in order to withstand employer’s constitutional challenge. *See Schweiker v. Wilson*, 450 U.S. 221, 234 (1981). As the Board has recognized, amended Section 932(l) has a rational purpose, namely, to compensate the survivors of deceased miners “for the effects of disabilities bred in the past.” *Mathews*, 24 BLR at 1-197. Consequently, we reject employer’s equal protection challenge to amended Section 932(l).

In this case, 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. Therefore, we affirm the administrative law judge’s determination that claimant is derivatively entitled to benefits pursuant to amended Section 422(l) of the Act, 30 U.S.C. §932(l).

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<sup>3</sup> Employer references the Fourteenth Amendment, which, by its terms, applies to the States. However, the United States Supreme Court has held the federal government to essentially the same standard, under the Due Process Clause of the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954).

Accordingly, the administrative law judge's Summary Decision awarding benefits is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge