

BRB No. 10-0584 BLA

JOSEPHINE A. ZANONI)
(Widow of RUDOLPH P. ZANONI))
)
 Claimant-Respondent)
)
 v.)
)
 HIYSOTA FUEL COMPANY) DATE ISSUED: 06/09/2011
)
 and)
)
 LIBERTY MUTUAL INSURANCE)
 COMPANY)
)
 Employer/Carrier-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Summary Decision - Awarding Benefits and the Order Denying Employer's Motion for Reconsideration of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

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

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 Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Summary Decision - Awarding Benefits and the Order Denying Employer's Motion for Reconsideration (09-BLA-5344) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) rendered on a survivor's claim¹ 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).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. 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 April 5, 2010, the administrative law judge issued an Order to Show Cause Why an Order Awarding Benefits Should Not Be Entered. In response, claimant, the miner's widow, asserted that she was automatically entitled to benefits based on the award of benefits to her husband during his lifetime. Employer responded, requesting that the case be held in abeyance until various legal challenges were resolved and implementing regulations were promulgated. The Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision, arguing that, under amended Section 932(l), and given the filing date of her claim, claimant was entitled to benefits based on the award to her deceased husband.²

The administrative law judge found that claimant is an eligible survivor of the miner, and because employer had not challenged the issues of relationship and dependency, claimant met the eligibility requirements for application of amended Section 932(l), as she filed her survivor's claim for benefits after January 1, 2005, the claim was pending on March 23, 2010, the effective date of the amendments, and the miner was

¹ Claimant, Josephine A. Zanoni, is the widow of the miner, who died on November 7, 2007. Director's Exhibit 16. Claimant filed her claim for survivor's benefits on March 28, 2008. Director's Exhibit 2.

² At the time of his death, the miner was receiving federal black lung benefits pursuant to a final award issued by Administrative Law Judge Daniel A. Sarno on March 9, 1988. The Board affirmed the award of benefits on appeal. *Zanoni v. Hiysota Fuel Co.*, BRB No. 88-1432 BLA (Apr. 25, 1990) (unpub.).

receiving benefits at the time of his death. Accordingly, the administrative law judge found claimant entitled to survivor's benefits, commencing as of November 1, 2007. Subsequently, employer requested reconsideration, and the administrative law judge denied employer's request.

On appeal, employer argues that the retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005 constitutes a violation of its due process rights and a taking of private property. Employer also asserts that, assuming *arguendo* that retroactive application is permissible, the operative date for determining eligibility pursuant to amended Section 932(l) should be the date of filing of the miner's claim. Alternatively, employer requests that further proceedings or actions related to this claim be held in abeyance, pending the promulgation of implementing regulations and resolution of the constitutional challenges to Public Law No. 111-148 in federal court. Claimant and the Director each responded, urging affirmance of the award of benefits.

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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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 a taking of private property, for the same reasons 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.); *see also Keene v. Consolidation Coal Co.*, F.3d , 2011 WL 1886106 (7th Cir. 2011). Likewise, the Board recently 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). For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary. Further, as we did in *Mathews*, we reject employer's request that this case be held in abeyance pending either promulgation of implementing regulations or resolution of the legal challenges to Public Law No. 111-148. *See Mathews*, 24 BLR at 1-201; *Fairman v. Helen Mining Co.*, BLR , BRB No. 10-0494 BLA (Apr. 29, 2011).

Because claimant filed her survivor's claim after January 1, 2005, her claim was pending on March 23, 2010, and the miner was receiving benefits under a final award at the time of his death, we affirm the administrative law judge's finding that claimant is

entitled to receive survivor's benefits pursuant to Section 422(l) of the Act, 30 U.S.C. §932(l).

Accordingly, the administrative law judge's Summary Decision - Awarding Benefits and the Order Denying Employer's Motion for Reconsideration of Decision and Order Awarding Benefits are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge