

BRB No. 10-0594 BLA

ANNA J. BOLLING
(Widow of ROBERT C. BOLLING)

Claimant-Respondent

v.

ARCH ON THE NORTH FORK,
INCORPORATED

and

UNDERWRITERS SAFETY & CLAIMS,
INCORPORATED

Employer/Carrier-
Petitioners

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR

Party-in-Interest

DATE ISSUED: 06/13/2011

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of John P. Sellers, III,
Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., 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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (09-BLA-5477) of Administrative Law Judge John P. Sellers, III, 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 survivor's claim on June 12, 2008.¹

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, were enacted. Those amendments, in pertinent part, revived 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. 30 U.S.C. §932(l).

The administrative law judge held a hearing on May 12, 2010,² and issued his Decision and Order Awarding Benefits on June 11, 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 after January 1, 2005, her claim was pending, and there was no dispute that she was an eligible survivor of the miner. The administrative law judge therefore found that claimant met the eligibility criteria for automatic entitlement to benefits under

¹ Claimant is the widow of the miner, who died on December 31, 2007. 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. Decision and Order at 2; *Bolling v. Arch on the North Fork, Inc.*, BRB No. 95-2007 BLA/S (May 19, 1997)(unpub.), *aff'd*, No. 97-3694 (6th Cir. Apr. 30, 1998).

² Before the hearing, the parties filed several motions, which we need not set forth in detail. Briefly, claimant moved for remand to the district director for the payment of benefits under Section 932(l), employer moved for remand to the district director so that it could submit evidence to respond to the change in the law, and the Director, Office of Workers' Compensation Programs (the Director), moved for a summary decision awarding benefits under Section 932(l) and canceling the hearing. By holding a hearing and issuing a Decision and Order awarding benefits under Section 932(l), the administrative law judge rendered those prehearing motions moot.

amended Section 932(l). Accordingly, he awarded survivor's benefits under Section 932(l).

On appeal, employer challenges the administrative law judge's application of amended Section 932(l) to this case. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the administrative law judge's 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer 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 4-6. Employer further asserts that retroactive application of amended Section 932(l) is unconstitutional, as it violates employer's due process rights. Employer's Brief at 7-9.

As the administrative law judge correctly noted, the recent amendment reviving Section 422(l) of the Act, 30 U.S.C. §932(l), applies to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Pub. Law. No. 111-148, §1556(c). 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). 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, the administrative law judge properly found that Section 932(l) applies to this case.³ *Stacy*, slip op. at 7.

³ Employer's reliance upon the Board's decision in *Smith v. Camco Mining, Inc.*, 13 BLR 1-17 (1989), to support its argument that the filing date of the miner's claim determines whether claimant is eligible for benefits under amended Section 932(l), is misplaced. In *Smith*, the Board held that, although the miner's claim had been initially awarded by the district director and was in payment status at the time of his death,

We also reject employer's arguments regarding the constitutionality of the amendment to Section 932(*l*), as applied to this case. The arguments employer makes 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.

Consequently, we affirm the administrative law judge's determination that claimant is derivatively entitled to benefits pursuant to amended Section 422(*l*), 30 U.S.C. §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.

because the administrative law judge later denied the miner's claim, the widow could not obtain derivative entitlement, but had to satisfy her burden of establishing that the miner's death was due to pneumoconiosis. *Smith*, 13 BLR at 1-19. The Board further held that the administrative law judge, however, reasonably permitted the widow to benefit from the pre-January 1, 1982 filing date of the miner's claim in finding that the widow was entitled to the presumption set forth at 20 C.F.R. §718.303, in order to establish her entitlement to benefits. *Id.* The Board's decision in *Smith* did not address the recent statutory language amending the Act, and is not relevant to the issue of the availability of derivative entitlement currently before the Board.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge