

BRB No. 10-0648 BLA

LOIS STEWART )  
(Widow of BILLY J. STEWART) )  
 )  
 Claimant-Respondent )  
 )  
 v. ) DATE ISSUED: 06/28/2011  
 )  
 REGAL COALS, DIVISION OF REGAL )  
 CORPORATION )  
 )  
 and )  
 )  
 METLIFE INSURANCE COMPANY OF )  
 CONNECTICUT C/O TRAVELERS )  
 INSURANCE COMPANY )  
 )  
 Employer/Carrier- )  
 Petitioners )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

John L. Grigsby (Appalachian Research and Defense Fund of Kentucky, Inc.), Barbourville, Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (08-BLA-5083) of Administrative Law Judge Joseph E. Kane 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 December 18, 2006.<sup>1</sup>

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 May 4, 2010, the administrative law judge ordered the parties to show cause, within thirty days, why an order awarding survivor's benefits should not be entered. *See* 20 C.F.R. §725.452(d). In response, claimant moved that an award of benefits be entered pursuant to amended Section 932(l), as she filed her claim after January 1, 2005, her claim was pending, and the miner was receiving benefits at the time of his death. Employer responded that amended Section 932(l) did not apply, because the miner's claim was filed before January 1, 2005.<sup>2</sup>

In a decision dated July 13, 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 met the eligibility criteria for automatic entitlement to benefits under amended Section 932(l). Accordingly, he awarded survivor's benefits under Section 932(l). Decision and Order at

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<sup>1</sup> Claimant is the widow of the miner, who died on September 8, 2006. Decision and Order at 2. At the time of his death, the miner was receiving federal black lung benefits pursuant to a final award on his lifetime claim. *Stewart v. Regal Coals, Div. of Regal Corp.*, BRB No. 05-0953 BLA (June 12, 2006)(unpub.).

<sup>2</sup> Employer preserved for appeal its assertion that retroactive application of amended 30 U.S.C. §932(l) is unconstitutional.

2-3.

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, respond, 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'Keeffe v. Smith, Hinchman and 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 13-15; Reply Brief at 4-5. Employer further asserts that amended Section 932(l) cannot apply, because it conflicts with other sections of the Act. Employer's Brief at 15-17; Reply Brief at 5. Additionally, employer argues that retroactive application of amended Section 932(l) is unconstitutional, as it violates employer's due process rights. Employer's Brief at 15, 17; Reply Brief at 5-6. Employer's contentions 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). 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 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); Decision and Order at 2-3. 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.<sup>3</sup> *Stacy*, slip op. at 7.

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<sup>3</sup> 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

Contrary to employer's additional contention, amended Section 932(l) is not rendered ambiguous and unenforceable by earlier, contradictory provisions of the Act. Employer relies on two sections of the Act governing the payment of benefits. These sections provide, in relevant part, that benefits are to be paid at the applicable rate to a survivor where a miner was totally disabled due to pneumoconiosis at the time of his death, "except with respect to a claim filed under part C of this subchapter on or after the effective date of the Black Lung Benefits Amendments of 1981. . . ." 30 U.S.C. §§921(a), 922(a)(2). From this language, employer concludes that, in all survivors' claims filed after January 1, 1982, "the miner's death due to pneumoconiosis must be established." Employer's Brief at 16. Contrary to employer's analysis, in Section 1556, Congress amended Section 932(l) by striking its former language stating that the provision could not apply to claims filed on or after the effective date of the Black Lung Benefits Amendments of 1981, and mandated that the amendment "*shall apply* with respect to claims," such as this one, "filed under . . . Part C . . . after January 1, 2005, that are pending on or after the date of enactment of this Act." Pub. L. No. 111-148, §1556(c), 124 Stat. 119 (2010)(emphasis added). Thus, survivors' claims filed after January 1, 2005, in which the survivor has derivative entitlement, are not subject to the inconsistent language that employer highlights in 30 U.S.C. §§921(a), 922(a)(2).<sup>4</sup>

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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, 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.

<sup>4</sup> 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.*

*Fairman v. Helen Mining Co.*, BLR , BRB No. 10-0494 BLA, slip op. at 4 (Apr. 29, 2011).

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. And since we reject employer's argument that its due process rights are violated, we reject its argument that liability for benefits must transfer to the Black Lung Disability Trust Fund.

We deny employer's request that this case be held in abeyance pending resolution of legal challenges to Public Law No. 111-148. *See Mathews*, 24 BLR at 1-201. Further, we deny employer's request that this case be remanded for a formal hearing. The administrative law judge properly determined, after notice to the parties and thirty days to respond, that a hearing was unnecessary, as claimant is entitled to benefits as a matter of law. *See* 20 C.F.R. §725.452(d); *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69, 1-72 (2000).

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).

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*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 9-10 in *Fairman v. Helen Mining Co.*, BLR , BRB No. 10-0494 BLA (Apr. 29, 2011) (attached to Director's Brief in this case). In view of the foregoing, amended Section 932(l), as the most recent enactment, controls in this case.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge