

BRB No. 11-0634 BLA

MARY ELLEN MORGAN)	
(Widow of DON MORGAN))	
)	
Claimant-Respondent)	
)	
v.)	
)	
PEABODY COAL COMPANY)	DATE ISSUED: 06/15/2012
)	
Employer-Petitioner)	
)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Helen H. Cox (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 appeals the Decision and Order Awarding Benefits (2011-BLA-5508) of Administrative Law Judge Richard A. Morgan, rendered on a survivor's subsequent

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). Claimant filed her initial claim for survivor's benefits on May 5, 2004, which was denied by Administrative Law Judge Richard T. Stansell-Gamm on the ground that claimant failed to establish that the miner's death was due to pneumoconiosis. Director's Exhibit 2. The Board affirmed the denial of benefits. *N.E.M. [Morgan] v. Peabody Coal Co.*, BRB No. 08-0239 BLA (Oct. 23, 2008)(unpub.).

On March 23, 2010, Congress adopted the Patient Protection and Affordable Care Act (PPACA), which included amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. *See* Section 1556 of the PPACA, Public Law No. 111-148 (2010). In pertinent part, the amendments revive Section 422(l) of the Act, 30 U.S.C. §932(l), providing 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.

Claimant filed her present subsequent claim on July 26, 2010. Director's Exhibit 4. In a Proposed Decision and Order awarding benefits dated December 21, 2010, the district director determined that, pursuant to amended Section 932(l), claimant is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis, based on the award of benefits issued on the miner's lifetime claim. Director's Exhibit 14. At employer's request, the case was transferred to the Office of Administrative Law Judges for a hearing and assigned to Administrative Law Judge Richard A. Morgan (the administrative law judge).

The Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision, arguing that there is no genuine issue as to any material fact concerning whether claimant is entitled to benefits under the Act, as amended by the PPACA. Employer responded, arguing that the Director's motion should be denied. Employer challenged the constitutionality of amended Section 932(l), and its application to this subsequent claim, and requested that the administrative law judge hold the case in abeyance, pending resolution of the constitutionality of the PPACA and the severability of the non-health care provisions.

¹ Claimant is the widow of the miner, Don Morgan. The miner filed a claim for benefits on October 22, 1987. Director's Exhibit 1. Administrative Law Judge Daniel L. Leland's award of benefits was ultimately affirmed by the United States Court of Appeals for the Fourth Circuit. *Peabody Coal Co. v. Morgan*, No. 03-278 (4th Cir. June 9, 2004). The miner was receiving benefits pursuant to this award until the time of his death on January 29, 2004. Director's Exhibit 8.

The administrative law judge rejected employer's arguments and found that claimant is automatically entitled to survivor's benefits, based on the miner's lifetime award of benefits and the recent amendments to Section 932(l). Accordingly, the administrative law judge awarded survivor's benefits, commencing as of November 1, 2008.

On appeal, employer challenges the constitutionality of amended Section 932(l), and its application to the survivor's subsequent claim, and requests that the Board hold the case in abeyance, pending resolution of the constitutionality of the PPACA and the severability of the non-health care provisions. Employer also asserts that the subsequent claim is barred pursuant to 20 C.F.R. §725.309(d)(3) and the principle of res judicata, and that adjudicating this subsequent claim violates the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), and employer's constitutional right to due process. Employer further contends that the operative date for determining eligibility for survivor's benefits under amended Section 932(l) is the filing date of the miner's claim, which was prior to January 1, 2005.

The Director responds and argues that the administrative law judge acted properly in applying amended Section 932(l). The Director further contends, however, that benefits should commence as of January 1, 2009, the month after the month in which claimant's prior denial of benefits became final, rather than November 1, 2008. Claimant did not file a response brief.

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.² 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).

As an initial matter, 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 an unlawful taking of private property, for the same reasons the Board rejected substantially similar 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.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). *See also B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, BLR (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24

² The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

BLR 2-385 (7th Cir. 2011). Further, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has affirmed the Board's holding that the operative date for determining eligibility for survivor's 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. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, BLR (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010).

Employer next contends that the automatic entitlement provision at amended Section 932(l) "is, in effect, an irrebuttable presumption that a miner's death is influenced by pneumoconiosis." Employer's Brief at 8. Employer maintains that the creation of such a presumption conflicts with 30 U.S.C. §901(a), which provides that the Act is intended to compensate survivors of miners who died due to black lung disease. Employer further asserts that "[i]n order to pass constitutional muster, an irrebuttable presumption must be explicit and the fact presumed must bear a rational connection to the fact proved." *Id.* Employer also contends that amended Section 932(l) is flawed because Congress took no scientific testimony to determine whether the alleged irrebuttable presumption passed constitutional muster or is scientifically valid. *Id.* at 9. The Director asserts, in response, that the Board should reject employer's arguments for the reasons identified by the United States Court of Appeals for the Third Circuit in *Campbell*.

We agree with the position asserted by the Director. In *Campbell*, the court held that amended Section 932(l) does not create an irrebuttable presumption, stating: "[B]y eliminating the need for a widow to show causation between the miner's pneumoconiosis and his death, Congress simply has set forth as substantive law a provision that the survivor of a miner receiving benefits is entitled to survivors' benefits regardless of the absence of causation between the miner's pneumoconiosis and his death." *Campbell*, 662 F.2d at 254. The court determined that this "represents a legislative choice to compensate a miner's dependents for the suffering they endured due to the miner's pneumoconiosis or as a means to provide a miner with peace of mind that his dependents will continue to receive benefits after his death." *Id.* at 258. The court declined to "override Congress' implicit determination that the choice was reasonable." *Id.* The court further found that amended Section 932(l) is consistent with Section 901(a), which provides that the Act is intended to "ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis." *Id.* at 258, *quoting* 30 U.S.C. §901(a). The court concluded that, to the extent that amended Section 932(l) conflicts with Section 901(a), the more specific terms of Section 1556(b) prevail. *Id.* at 258.

We are persuaded that the reasoning in *Campbell* represents the proper disposition of employer's argument that amended Section 932(l) creates an irrebuttable presumption in violation of the Constitution and the Act. Accordingly, we reject employer's contentions in this regard. Having disposed of employer's allegations concerning the validity of the recent amendments to the Act, we also deny employer's request to hold

this case in abeyance, pending resolution of the litigation related to the PPACA. *See Stacy*, 671 F.3d at 383 n.2; *Mathews*, 24 BLR at 1-201.

Employer next contends that, based upon the denial of claimant's initial survivor's claim, she is ineligible for derivative survivor's benefits under amended Section 932(l), by operation of 20 C.F.R. §725.309(d)(3), and by the doctrine of res judicata. However, in *Richards v. Union Carbide Corp.*, BLR , BRB Nos. 11-0414 BLA and 11-0414 BLA-A (Jan. 9, 2012) (en banc) (McGranery, J., concurring and dissenting, Boggs, J., dissenting), *appeal docketed*, No. 12-1294 (4th Cir. Mar. 8, 2012), the Board addressed and rejected arguments substantially similar to those raised by employer in this case. In *Richards*, the Board agreed with the Director's position, that Section 932(l) of the Act, as amended by Section 1556 of the PPACA, permits the application of amended Section 932(l) to all claims filed after January 1, 2005, that are pending on or after March 23, 2010. The Board further held that, by restoring the derivative entitlement provisions of Section 932(l), Congress effectively created a "change" that established a new condition of entitlement unrelated to whether the miner died due to pneumoconiosis. The Board determined, therefore, that amended Section 932(l) provides a basis for establishing a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d) in a survivor's subsequent claim. Accordingly, we reject employer's arguments that the subsequent claim is barred by 20 C.F.R. §725.309(d) and principles of res judicata, for the reasons set forth in *Richards*.

Finally, we hold that the administrative law judge's designation of November 1, 2008, as the proper date for the commencement of benefits was in error. In *Richards*, the Board addressed the identification of the appropriate date for the commencement of benefits in a survivor's subsequent claim, awarded pursuant to amended Section 932(l). The Board determined that, because Section 1556 of the PPACA does not authorize the reopening of a previously denied claim, the denial of the prior survivor's claim must be given effect. *Richards*, slip op. at 7-8. The Board further reasoned that, in order to do so, the provisions of 20 C.F.R. §725.309(d)(5) must be applied in a survivor's subsequent claim to bar the payment of benefits from a date prior to the date upon which the denial of the prior claim became final. *Id.* In the present case, we hold that because the Board's affirmance of the denial of claimant's prior claim became final on December 22, 2008, claimant's survivor's benefits properly commence as of January 1, 2009, the first day of the month after the month in which claimant's prior denial of benefits became final. 20 C.F.R. §§725.309(d)(5), 802.406; *see Richards*, slip op. at 7-8.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed, as modified to reflect January 1, 2009 as the date from which benefits commence.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge