

BRB No. 11-0639 BLA

ANN B. KOLICK)
(Widow of JOSEPH E. KOLICK))
)
Claimant-Respondent)
)
v.)
)
GATEWAY COAL COMPANY) DATE ISSUED: 06/18/2012
)
Employer-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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

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

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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Summary Decision Awarding Benefits (2010-BLA-5933) of Administrative Law Judge Michael P. Lesniak, 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 this survivor's claim on

February 26, 2009.¹ Director's Exhibit 2. In a Proposed Decision and Order dated May 21, 2009, the district director denied the claim by reason of abandonment. Director's Exhibit 16. On March 23, 2010, amendments to the Act, contained in the Patient Protection and Affordable Care Act (PPACA), were enacted that affect claims filed after January 1, 2005. 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. 30 U.S.C. §932(*l*).

On May 5, 2010, claimant filed a timely request for modification.² Director's Exhibit 17; 20 C.F.R. §725.310. In a Proposed Decision and Order dated July 23, 2010, the district director determined that claimant is an eligible survivor of a miner who was receiving benefits at the time of his death and, therefore, is entitled to an automatic award of benefits under amended Section 932(*l*). Director's Exhibit 23. At employer's request, the case was transferred to the Office of Administrative Law Judges and a hearing was scheduled for March 15, 2011. Director's Exhibit 24.

On February 17, 2011, employer filed a motion to cancel the hearing and hold the case in abeyance pending resolution of the constitutional challenges to the PPACA. In the alternative, employer requested that the administrative law judge issue a briefing schedule and decide the case on the record. The Director, Office of Workers' Compensation Programs (the Director), and claimant responded in opposition to employer's request to hold the case in abeyance. Claimant, however, stated that she did not object to employer's alternative request for a briefing order and a decision on the record.

On March 4, 2011, the administrative law judge denied employer's request to hold the case in abeyance, cancelled the scheduled hearing and issued a briefing order. Following the receipt of closing argument briefs, the administrative law judge issued a Summary Decision Awarding Benefits on May 11, 2011. The administrative law judge

¹ Claimant is the widow of the miner, Joseph E. Kolick, who died on February 11, 2009. Director's Exhibits 9, 10.

² The regulation at 20 C.F.R. §725.310(a) provides that "[u]pon his or her own initiative, or upon the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the district director may, at any time . . . before one year after the denial of a claim, reconsider the terms of an award or denial of benefits." 20 C.F.R. §725.310(a); see *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

found that claimant satisfied the requirements for automatic entitlement because she is an eligible survivor of the miner, her claim was filed after January 1, 2005, and the miner was receiving benefits at the time of his death, based on an award of benefits issued on his lifetime claim, which became final on December 21, 2007. Summary Decision at 1-2. Accordingly, the administrative law judge awarded benefits, commencing February 1, 2009, the first day of the month during which the miner died. *Id.* at 3.

On appeal, employer challenges the constitutionality of amended Section 932(l), and its application to this subsequent survivor's 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 provisions. Employer also asserts that retroactive application of amended Section 932(l) to this claim is unconstitutional because it results in a violation of employer's right to due process. Employer further argues that amended Section 932(l) does not apply under the facts of this case, as claimant's survivor's claim was denied in 2009 and was not pending on March 23, 2010, the effective date of the amendments. Additionally, employer maintains that, even if claimant's request for modification revived her claim, such that it was pending on or after March 23, 2010, the administrative law judge erred in applying the provisions of amended Section 932(l) to modify the denial of benefits into an award, as a change in law is not a proper ground for modification. Claimant has not filed a response brief. The Director responds, urging affirmance of the award pursuant to amended Section 932(l). Employer has also filed a reply brief, arguing, *inter alia*, that Section 932(l) is not applicable because the operative date for determining eligibility for survivor's benefits, pursuant to amended Section 932(l), is the date the miner's claim was filed, not the date the survivor's claim was filed.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.³ 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).

Initially we reject employer's assertion that if any portion of the PPACA is declared unconstitutional, the amendments to the Black Lung Benefits Act contained therein, which include amended Section 932(l), must also be declared invalid. *See West Virginia CWP Fund v. Stacy*, 671 F. 3d 378, 383 n.2 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010). Moreover, for the reasons set forth in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), *recon. denied*, BRB No. 09-

³ Because the miner's coal mine employment was in West Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 2.

0666 BLA (Apr. 14, 2011) (Order) (unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011), we decline to hold this case in abeyance.

We also 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, for the same reasons the Board rejected substantially similar arguments in *Mathews*, 24 BLR at 1-200 (2010); *see also Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Additionally, based on the reasoning set forth in *B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233 (3d Cir. 2011), we reject employer's contention that amended Section 932(l) creates an irrebuttable presumption in violation of the United States Constitution and the Act. *See Wright v. Eastern Associated Coal Co.*, BLR , BRB No. 11-0613 BLA (May 29, 2012).

Furthermore, there is no merit to employer's assertion that Section 932(l) is not applicable, based on the filing date of the miner's claim. 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. *See Stacy*, 671 F. 3d at 388-89.

Finally, we reject employer's argument that the recent amendments to Section 932(l) do not apply to a request for modification of the denial of a survivor's claim. Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a), permits the reopening and readjudication of a denied survivor's claim within one year of the order denying benefits, based on a showing of a mistake in a determination of fact, including the ultimate fact of entitlement. *See 20 C.F.R. §725.310; Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *Mullins v. ANR Coal Co.*, BLA , BRB. No. 11-0251 BLA (Jan. 11, 2012). The language of Section 1556(c) of the PPACA mandates the application of amended Section 932(l) to all claims filed after January 1, 2005, that are pending on or after March 23, 2010, and provides that a survivor of a miner who was receiving benefits at the time of his or her death is now automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. Pub. L. No. 111-148, §156(c) (2010); 30 U.S.C. §932(l); *see also Richards v. Union Carbide Corp.*, BLR , BRB Nos. 11-0414 BLA and 11-0414 BLA-A (Jan. 9, 2012). Because claimant filed her survivor's claim after January 1, 2005, and timely requested modification, such that her claim was pending after 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 derivatively entitled to survivor's benefits pursuant to amended Section 932(l).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge