

BRB No. 11-0674 BLA

DONIS L. PERRY)
(Widow of FORREST PERRY))
)
 Claimant-Respondent)
)
 v.)
)
 UPSHUR COAL COMPANY)
)
 and) DATE ISSUED: 06/25/2012
)
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS FUND)
)
 Employer/Carrier-)
 Petitioners)
)
 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.

Francesca Tan (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Jonathan Rolfe (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (carrier) appeals the Summary Decision Awarding Benefits (11-BLA-5533) 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. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010). 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 May 17, 2011, 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 of benefits to her deceased husband.² Carrier filed a Response in Opposition to the Director's Motion for Summary Decision, and challenged the constitutionality of amended Section 932(l) and its applicability to the instant claim.

The administrative law judge found that claimant is an eligible survivor of the miner, and that 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 receiving benefits at the time of his death. Accordingly, the administrative law judge found claimant entitled to survivor's benefits, commencing as of December 1, 2010.

On appeal, carrier 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. Carrier also asserts that the operative date for determining eligibility pursuant to amended Section 932(l) is the date of filing of the miner's claim. Carrier requests that further

¹ Claimant is the widow of the miner, who died on December 4, 2010. Director's Exhibit 4. She filed her claim for survivor's benefits on December 21, 2010. Director's Exhibit 2.

² At the time of his death, the miner was receiving federal black lung benefits pursuant to an award issued by Administrative Law Judge Gerald Tierney, which he affirmed on reconsideration on November 28, 1994. Director's Exhibit 1.

proceedings or actions related to this claim be held in abeyance, pending the promulgation of implementing regulations and the resolution of the constitutional challenges to the PPACA in federal court. In addition, carrier requests that the case be remanded to the administrative law judge to permit carrier to submit evidence of the damages it sustained as a result of the enactment of the PPACA. Claimant has not filed a brief in response to carrier's appeal. The Director responds, urging the Board to affirm 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this cases arises,³ recently upheld the Board's holding in *Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), 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. *West Virginia CWP Fund v. Stacy*, 671 F.3d 378, 388-9, 25 BLR 2-69, 2-82-5 (4th Cir. 2011). For the reasons set forth in *Stacy*, we reject carrier's arguments to the contrary. We further reject carrier'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 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 Stacy*, 671 F.3d at 383-88, 25 BLR at 2-74-82; *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011); *B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011). Similarly, we decline to remand this case to the administrative law judge to allow carrier to present evidence of damages incurred, in order to prove that amended Section 932(l) resulted in an unconstitutional taking of private property under the Fifth Amendment. In *Stacy*, the court held that "the mere imposition of an obligation to pay money does not give rise to a claim under the Takings Clause," noting that "amended §932(l) only requires [the employer] to pay money, it does not burden an identifiable property interest." *Stacy*, 671 F.3d at 387, 25 BLR at 2-80-1; *see Fairman v. Helen Mining Co.*, 24 BLR 1-225 (2011). For the reasons set forth in *Stacy*, we reject carrier's arguments to the contrary and, consistent with our reasoning in

³ As the miner's last coal mine employment occurred in West Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1.

Mathews, we reject carrier's request to hold this case in abeyance pending the resolution of legal challenges to the PPACA. *See Stacy*, 671 F.3d at 383-4 n.2, 25 BLR at 2-74 n.2; *see also Stacy*, 24 BLR at 1-215; *Mathews*, 24 BLR at 1-201; *Fairman*, 24 BLR at 1-229.

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 is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge