

BRB No. 11-0685 BLA

THERESA C. ZUKUS	)	
(Widow of CHARLES ZUKUS)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KOCHER COAL COMPANY	)	DATE ISSUED: 06/25/2012
	)	
and	)	
	)	
LACKAWANNA CASUALTY 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 Granting Summary Decision of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Helen Koschoff, Wilburton, Pennsylvania, for claimant.

Maureen E. Herron, Wilkes-Barre, Pennsylvania, for employer/carrier.

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/carrier (employer) appeals the Decision and Order Granting Summary Decision (2009-BLA-5543) of Administrative Law Judge Ralph A. Romano rendered on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act,<sup>1</sup> 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).

By Order dated April 7, 2010, the administrative law judge requested briefing from the parties as to the applicability of amended Section 422(l) of the Act, 30 U.S.C. §932(l), to this case. In response, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision, asserting that there is no genuine issue as to any material fact regarding whether claimant is automatically entitled to benefits, based on the recent amendments to the Act contained in the PPACA. Claimant concurred with, and joined in, the Director's Motion for Summary Decision. Employer responded, disagreeing with the Director's motion and urging the administrative law judge to deny the Motion for Summary Decision. Additionally, on May 7, 2010, employer submitted a response to the administrative law judge's April 7, 2010 Order, asserting that amended Section 932(l) is not applicable in this case because the doctrines of collateral estoppel and res judicata prevent relitigation of the denial of benefits in the survivor's claim. Employer also challenged the retroactive application of amended Section 932(l) as a violation of its due process rights.

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<sup>1</sup> Claimant is the widow of the miner, who died on January 16, 2006. Director's Exhibit 10. Claimant filed her survivor's claim on February 8, 2006. Director's Exhibit 2. On December 14, 2007, Administrative Law Judge Janice K. Bullard issued a Decision and Order denying benefits. Director's Exhibit 38. On July 8, 2008, while her appeal was pending before the Board, claimant filed a Motion to Remand, requesting that the Board remand the case to the district director to allow claimant the opportunity to pursue modification proceedings. Director's Exhibit 48. By Order dated August 1, 2008, the Board granted claimant's Motion to Remand. *Zukus v. Kocher Coal Co.*, BRB No. 08-0300 BLA (Aug. 1, 2008)(unpub. Order); Director's Exhibit 49.

In his Decision and Order Granting Summary Decision, the administrative law judge found that there was no genuine issue of material fact regarding whether claimant satisfied the criteria for derivative entitlement pursuant to amended Section 932(l), finding that the miner was receiving benefits at the time of his death due to a final award and that claimant met the relationship and dependency criteria.<sup>2</sup> Accordingly, the administrative law judge granted the Director's Motion for Summary Decision and awarded benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 932(l) to this case. The Director responds, urging the Board to reject employer's contentions and to affirm the administrative law judge's award of benefits. Claimant concurs with the assertions raised in the Director's response.

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.<sup>3</sup> 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 doctrines of collateral estoppel and res judicata prevent application of amended Section 932(l) in this claim, which is based on claimant's request for modification of the denial of her survivor's claim. Specifically, employer argues that, in order for modification to be granted in a survivor's claim, it must be shown that there is a mistake in a determination of fact in the prior decision and, herein, the record does not support a finding of a mistake in a determination of fact in Administrative Law Judge Janice K. Bullard's Decision and Order denying benefits. Employer's Brief at 4-7. Employer also contends that the retroactive application of the

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<sup>2</sup> The miner was receiving federal black lung benefits at the time of his death pursuant to a claim filed on July 30, 1984, which was awarded by Administrative Law Judge James J. Butler on September 30, 1988. Director's Exhibit 1. By Order dated November 26, 1990, the Board denied a joint motion by the parties to amend Judge Butler's award of benefits, but remanded the case to the administrative law judge for further consideration. *Zukus v. Kocher Coal Co.*, BRB No. 88-3485 BLA (Nov. 26, 1990)(unpub. Order). Judge Butler issued an amended Decision and Order on July 3, 1991, amending the date from which benefits commence. Director's Exhibit 1.

<sup>3</sup> The record indicates that the miner was employed in the coal mining industry in Pennsylvania. This case, therefore, arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director's Exhibit 3.

automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005 constitutes a violation of its due process rights and an unconstitutional taking of private property. Additionally, 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 also contends that the administrative law judge erred in granting the motion for summary decision, arguing that the record does not contain updated evidence regarding whether claimant is an eligible survivor and, therefore, the administrative law judge improperly concluded that there was no genuine issue of material fact. Employer's Brief at 9.

Initially, we reject employer's argument that the amendments to Section 932(l) do not apply to a request for modification of the denial of a survivor's claim. In *Mullins v. ANR Coal Co., LLC*, BLR , BRB No. 11-0251 BLA (Jan. 11, 2012), *recon. denied* (June 14, 2012) (Order) (unpub.), the Board addressed and rejected arguments substantially similar to those raised by employer in this case. In applying amended Section 932(l) to a survivor's request for modification,<sup>4</sup> the Board held that 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 eligible to receive benefits at the time of his 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, §1556(c)(2010); 30 U.S.C. §932(l); *Mullins*, BRB No. 11-0251 BLA, slip op. at 3; *see also 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).

Moreover, 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 unconstitutional taking of private property, for the same reasons that 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, 25 BLR 2-13 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d

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<sup>4</sup> Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Black Lung Benefits 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. 20 C.F.R. §725.310; *see Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-62 (3d Cir. 1995).

844, 24 BLR 2-385 (7th Cir. 2011). Further, 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, 388-89, 25 BLR 2-65, 2-85-86 (4th Cir. 2011); *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (2010).

Lastly, we reject employer's contention that the administrative law judge erred in finding that there was no genuine issue of material fact. The administrative law judge reasonably relied upon the evidence set forth in the formal record, which showed that the claimant was married to the miner and resided with the miner at the time of his death. Decision and Order at 3; *see* Hearing Transcript at 12-13; Director's Exhibit 2. The administrative law judge also found that the evidence indicated that claimant has not remarried since the miner's death. *Id.* Therefore, while stating that the evidence relied on by the administrative law judge regarding claimant's status as an eligible survivor is more than four years old, employer does not specifically state that the evidence is inaccurate, or otherwise establish that a genuine issue of material fact exists. 20 C.F.R. §725.452(c); Employer's Brief at 9. The administrative law judge thus rationally concluded that there was no genuine issue of material fact regarding claimant's entitlement to benefits under amended Section 932(l). Therefore, the administrative law judge did not abuse his discretion in determining that no hearing was required. 20 C.F.R. §725.452; *Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-230 (2011); *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69, 1-72 (2000).

As claimant filed her survivor's claim after January 1, 2005, timely requested modification such that her claim was pending on March 23, 2010, and the miner was found to be eligible to receive benefits at the time of his death by a final award of benefits, *see* n.2, *supra*, we affirm the administrative law judge's finding that claimant is derivatively entitled to survivor's benefits pursuant to amended Section 932(l). *See Mullins*, BRB No. 11-0251 BLA, slip op. at 3.

Accordingly, the administrative law judge's Decision and Order Granting Summary Decision 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