

BRB No. 11-0689 BLA

BETTY KIDD)	
(Widow of BUREN RICHARD KIDD))	
)	
Claimant-Respondent)	
)	
v.)	
)	
WESTMORELAND COAL COMPANY)	DATE ISSUED: 06/27/2012
)	
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.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Ashley M. Harman (Jackson Kelley PLLC), Morgantown, West Virginia, 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 appeals the Summary Decision Awarding Benefits (2011-BLA-5695) of Administrative Law Judge Michael P. Lesniak, 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 20, 2002, which was denied by Administrative Law Judge Paul H. Teitler on the grounds that claimant failed to establish the existence of pneumoconiosis and that the miner's death was due to pneumoconiosis. Director's Exhibit 3. The Board affirmed the denial of benefits. *B.K. [Kidd] v. Westmoreland Coal Co.*, BRB No. 07-0620 BLA (Apr. 15, 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 January 26, 2011. Director's Exhibit 5. In a Proposed Decision and Order awarding benefits, 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 12. At employer's request, the case was transferred to the Office of Administrative Law Judges for a hearing and assigned to Administrative Law Judge Michael P. Lesniak (the administrative law judge).

¹ Claimant is the widow of the miner, Buren Richard Kidd. The miner filed a claim for benefits on April 1, 1980, which the district director denied on the ground that the miner failed to establish total disability due to pneumoconiosis. Director's Exhibit 1. On September 9, 1985, the miner filed a duplicate claim. *Id.* Administrative Law Judge John S. Patton awarded benefits on this claim and the United States Court of Appeals for the Fourth Circuit ultimately affirmed his decision. *Westmoreland Coal Co. v. Kidd*, No. 92-1272 (4th Cir. December 2, 1992); Director's Exhibit 2. The miner was receiving benefits pursuant to this award until the time of his death on May 3, 2002. Director's Exhibit 8.

Employer filed a Motion to Dismiss Subsequent Survivor's Claim or, in the Alternative, Motion for Partial Summary Judgment, in which it argued that the subsequent claim is barred pursuant to 20 C.F.R. §725.309(d)(3); that the amendments to Section 932(l), as contained in the PPACA, are invalid; and 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, Office of Workers' Compensation Programs (the Director), responded and maintained that the operative date for determining eligibility should be based on the date of filing of the survivor's subsequent claim. The Director also 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 contended, in response, that the administrative law judge should reject the Director's motion and challenged the constitutionality of amended Section 932(l), as well as its application to this subsequent claim. Employer further 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.

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 May 1, 2008.

On appeal, in its initial and reply briefs, 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), the principles of *res judicata* and *stare decisis*, and further asserts 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), as well as 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, and that if claimant is automatically entitled to benefits, then the benefits should not commence prior to the date on which the survivor's claim was filed.

Claimant and the Director respond and maintain that the administrative law judge acted properly in applying amended Section 932(l) and request the Board to reject employer's arguments and affirm the award of benefits. The Director further contends, however, that benefits should commence as of July 2008, the month after the month in which claimant's prior denial of benefits became final.

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, 25 BLR 2-16 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 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, 25 BLR 2-69 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010).

We also reject employer's contention 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 doctrines of res judicata and *stare decisis*. 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

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 United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

employer's arguments that the subsequent claim is barred by 20 C.F.R. §725.309(d) and the principles of res judicata and *stare decisis*, for the reasons set forth in *Richards*.

Finally, we hold that the administrative law judge's designation of May 1, 2008, as the 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 June 14, 2008, claimant's survivor's benefits properly commence as of July 1, 2008, 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 Summary Decision Awarding Benefits is affirmed, as modified to reflect July 1, 2008 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