

BRB No. 11-0705 BLA

MARGARET BISHOP )  
(Widow of CHARLES BISHOP) )  
 )  
Claimant-Respondent )  
 )  
v. )  
 )  
UNION CARBIDE CORPORATION ) DATE ISSUED: 06/25/2012  
 )  
Employer-Petitioner )  
 )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Party-in-Interest ) DECISION and ORDER

Appeal of the Order Granting Director's Motion for Summary Decision and Awarding Survivor's Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Douglas A. Smoot (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Rita Roppolo (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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Granting Director's Motion for Summary Decision and Awarding Survivor's Benefits (2011-BLA-5783) of Administrative Law Judge Thomas M. Burke, rendered on a 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).

On March 23, 2010, amendments to the Act, contained in the Patient Protection and Affordable Care Act (PPACA), were passed, which affect 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 entitled to receive survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. *See* 30 U.S.C. §932(*l*).

Claimant filed her claim for survivor's benefits on July 8, 2010.<sup>1</sup> Director's Exhibit 3. In a Proposed Decision and Order, dated July 27, 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 derivatively entitled to survivor's benefits under amended Section 932(*l*). Director's Exhibit 8. Employer requested a hearing and the case was transferred to the Office of Administrative Law Judges. Director's Exhibit 9.

On June 7, 2011, the Director, Office of Workers' Compensation Programs (the Director), filed a motion for summary decision, asserting that, pursuant to amended Section 932(*l*), claimant was automatically entitled to benefits as a matter of law, and that there was no genuine issue as to any material fact concerning her entitlement. Employer responded, arguing that amended Section 932(*l*) should not be applied, and requesting that the Director's motion be denied.

On July 7, 2011, the administrative law judge issued an Order Granting Director's Motion for Summary Decision and Awarding Survivor's Benefits, overruling employer's objections to application of amended Section 932(*l*) in this case, and finding that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(*l*). Accordingly, the administrative law judge awarded benefits, commencing on June 1, 2010, the first day of the month in which the miner died.

On appeal, employer challenges the constitutionality of amended Section 932(*l*), and its application to this survivor's claim. Employer requests that the Board hold this case in abeyance, pending resolution of the constitutional challenges to the PPACA and pending review by the United States Court of Appeals of the Fourth Circuit of the

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<sup>1</sup> Claimant is the widow of the miner, Charles Bishop, who died on June 2, 2010. Director's Exhibit 7. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim, issued on September 25, 1996 and affirmed by the Board on August 25, 1997. Director's Exhibit 1.

Board's decision in *Stacy v. Olga Coal Corp.*, 24 BLR 1-207 (2010).<sup>2</sup> Employer further argues that the operative date for determining eligibility for survivor's benefits under amended Section 932(l) is the date that the miner's claim was filed, not the date that the survivor's claim was filed.

The Director responds, urging the Board to reject employer's arguments regarding the constitutionality of amended Section 932(l), and its application to this subsequent claim. The Director contends that the award of benefits should be affirmed. Claimant has not filed a response brief.

The Board's scope of review is defined by statute. The administrative law judge's decision 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'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, amended Section 932(l) must also be declared invalid. *See West Virginia CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2, 25 BLR 2-69, 2-74 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. 09-0666 BLA (Apr. 14, 2011) (Order) (unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011), we decline to hold this case in abeyance, pending resolution of the legal challenges to the PPACA.

We also reject employer's contention that retroactive application of the automatic entitlement provision of amended Section 932(l), to claims filed after January 1, 2005, constitutes a due process violation. *See Stacy*, 671 F.3d at 383-86, 25 BLR at 2-74-79; *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, we deny employer's request that we remand this case to the administrative law judge for development of evidence regarding the economic impact of the amendments in order to establish that an unconstitutional taking has occurred. *See*

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<sup>2</sup> Subsequent to the briefing in this case, the United States Court of Appeals for the Fourth Circuit affirmed the Board's decision. *See 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).

<sup>3</sup> 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).

*Stacy*, 671 F.3d at 387, 25 BLR at 2-80 (holding that “. . . the mere imposition of an obligation to pay money does not give rise to a claim under the Takings Clause”).

Finally, there is no merit to employer’s assertion that amended Section 932(l) is not applicable, based on the filing date of the miner’s claim. The Fourth Circuit 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, 25 BLR at 2-83-84.

Because claimant filed her survivor’s claim after January 1, 2005, her claim was pending on or 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 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 Order Granting Director’s Motion for Summary Decision and Awarding Survivor’s Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge