

BRB No. 11-0741 BLA

KAREN PARKER)
(Widow of CURTIS PARKER))
)
 Claimant-Respondent)
)
 v.)
)
 MOUNTAIN LAUREL RESOURCES) DATE ISSUED: 06/27/2012
 COMPANY)
)
 and)
)
 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 Decision and Order of Michael P. Lesniak,
Administrative Law Judge, United States Department of Labor.

Francesca Tan and William S. Mattingly (Jackson Kelly PLLC),
Morgantown, West Virginia, for carrier.

Ann Marie Scarpino (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 (carrier) appeals the Decision and Order (2011-BLA-5717) of Administrative Law Judge Michael P. Lesniak awarding benefits on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act,¹ 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 June 8, 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 In response, carrier argued that the Director's motion should be denied because the case should be held in abeyance pending the final determination of the constitutionality of the PPACA and amended Section 932(l). Carrier also argued that claimant is not automatically entitled to survivor's benefits under amended Section 932(l) because the miner's claim was neither filed prior to January 1, 2005, nor was it pending on or after March 23, 2010. Further, carrier argued that the Director's position on this issue is not entitled to deference because it is contrary to the plain language of the statute. Claimant did not file a response to the Director's motion.

In his Decision and Order Awarding Benefits, the administrative law judge found that claimant satisfied the criteria for derivative entitlement pursuant to amended Section

¹ Claimant is the widow of the miner, who died on December 3, 2010. Director's Exhibit 6. She filed her survivor's claim on January 11, 2011. Director's Exhibit 3.

² The miner filed a claim on September 8, 1987. Director's Exhibit 1. On April 14, 1989, Administrative Law Judge John C. Holmes issued a Decision and Order awarding benefits. *Id.* Because it was not challenged, the award of benefits became final. Therefore, the miner was receiving federal black lung benefits at the time of his death.

932(l), and awarded benefits to commence as of December 1, 2010, the month in which the miner died.

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 an unconstitutional taking of private property. Carrier also 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. Lastly, carrier requests that further proceedings or actions related to this claim be held in abeyance, pending the resolution of the constitutional challenges to the PPACA in federal court. The Director responds, urging the Board to reject carrier's contentions and affirm the administrative law judge's award of benefits. Claimant has not filed a brief in this appeal.

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.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).

We 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 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 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. *West Virginia CWP Fund v. Stacy*, 671 F.3d 378, 388-9, 25 BLR 2-69, 2-82-5 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010). For the reasons set forth in *Stacy*, we reject carrier's arguments to the contrary and, consistent with our reasoning in *Mathews*, we reject carrier's request to hold this case in

³ The record indicates that the miner was employed in the coal mining industry in West Virginia. Director's Exhibit 1. Accordingly, the law of the United States Court of Appeals for the Fourth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

abeyance pending resolution of legal challenges to the PPACA.⁴ *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 v. Helen Mining Co.*, 24 BLR 1-225, 1-229 (2011).

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). Director's Exhibits 1, 3.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁴ We reject carrier's assertion that if any portion of the Patient Protection and Affordable Care Act is declared unconstitutional, the amendments to the Black Lung Benefits Act, including amended Section 932(l), must also be declared invalid. *See West Virginia 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); Carrier's Brief at 25-32.