

BRB No. 11-0433 BLA

BETTY A. BAILEY)	
(Widow of ELLIS J. BAILEY))	
)	
Claimant-Respondent)	
)	
v.)	
)	
CLINCHFIELD COAL COMPANY)	DATE ISSUED: 03/12/2012
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Order Awarding Survivor's Benefits of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Barry H. Joyner (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Awarding Survivor's Benefits (11-BLA-5092) of Associate Chief Administrative Law Judge William S. Colwell (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 January 12, 2011, the administrative law judge issued an Order Directing Submission of Position Statements for the parties to address whether an order awarding benefits should be granted in this case. In response, employer requested that the case be held in abeyance until various legal challenges were resolved and implementing regulations were promulgated or, in the alternative, that a formal hearing be held to permit employer to submit evidence of damages incurred as a result of amended Section 932(l). The Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Judgment and argued 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

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 February 1, 2010.

¹ Claimant, Betty A. Bailey, is the widow of the miner, who died on February 12, 2010. Director's Exhibit 6. Claimant filed her claim for survivor's benefits on March 7, 2010. Director's Exhibit 3.

² At the time of his death, the miner was receiving federal black lung benefits pursuant to an award issued by Administrative Law Judge Lawrence E. Gray, which was affirmed by the Board on April 28, 1994. *Bailey v. Director, OWCP*, BRB No. 92-1199 BLA (Apr. 28, 1994) (unpub.); Director's Exhibit 2.

On appeal, employer 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. Employer 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. Employer requests that further proceedings or actions related to this claim be held in abeyance, pending the promulgation of implementing regulations and resolution of the constitutional challenges to the PPACA in federal court. In addition, employer avers that the administrative law judge erred in denying its request to schedule a formal hearing for employer to submit evidence of the damages it sustained as a result of the enactment of the PPACA. Claimant and the Director respond, 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 case 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*, F.3d , BLR , No. 11-1020, 2011 WL 6396510 (4th Cir. Dec. 21, 2011). For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary. We further 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 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*, slip op. at 7-15; *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, BLR (3d Cir. 2011). While employer argues that the holding in *Mathews* does not apply to this case, because *Mathews* involved an insurance carrier, whereas employer is self-insured, this

³ As the miner's last coal mine employment occurred in 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 2.

argument must fail, as self-insured coal mine operators are held to the same standards as insurance carriers. See 20 C.F.R. §§726.4, 726.110(a)(1). Similarly, we reject employer's contention that the administrative law judge erred in failing to hold a formal hearing to allow employer to present evidence of damages incurred, in order to prove that amended 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) merely requires [employer] to pay money - and thus does not infringe a specific, identifiable property interest." *Stacy, slip op.* at 12, 14. As employer, in its position statement, acknowledged that claimant was an eligible survivor of the miner, and the administrative law judge found that claimant was entitled to benefits as a matter of law, the administrative law judge properly concluded that he lacked authority to conduct a hearing on damages resulting to employer from application of amended Section 932(l). Order at 2; see 20 C.F.R. §725.452(c); *Fairman v. Helen Mining Co.*, 24 BLR 1-225 (2011). Lastly, consistent with *Mathews*, we reject employer's request that this case be held in abeyance pending either promulgation of implementing regulations or resolution of the legal challenges to the PPACA. See *Mathews*, 24 BLR at 1-201.

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 Order Awarding Survivor's Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge