

BRB No. 11-0462 BLA

DONNA S. ROBINSON)	
(Widow of JAMES ROBINSON, JR.))	
)	
Claimant-Respondent)	
)	
v.)	
)	
BENCO MINING, INCORPORATED)	DATE ISSUED: 03/19/2012
)	
and)	
)	
TRAVELERS INDEMNITY 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 – Award of Survivor’s Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

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, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Survivor’s Benefits (2010-BLA-5856) of Administrative Law Judge Larry S. Merck rendered on a survivor’s 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). Claimant filed her survivor’s claim on February 17, 2010.¹ Director’s Exhibit 8.

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 January 28, 2011, the administrative law judge advised the parties of the applicability of the amendments to this claim, and directed the parties to submit position statements addressing why an order awarding benefits should not be entered. Claimant and the Director, Office of Workers’ Compensation Programs (the Director), submitted position statements in favor of claimant’s derivative entitlement to benefits. Employer argued in its position statement that the amendments to the Act are unconstitutional and, in the alternative, that the operative date for determining eligibility pursuant to amended Section 932(l) is the date of filing of the miner’s claim. Employer further argued that, in order to conform to the due process requirements of the Fifth Amendment, the administrative law judge should apply an equitable remedy, *i.e.*, transfer liability to the Black Lung Disability Trust Fund.

In his Decision and Order – Award of Survivor’s Benefits, the administrative law judge declined to address employer’s constitutional arguments, as beyond the scope of his authority. He further rejected employer’s argument that the filing date of the miner’s claim is the operative date under amended Section 932(l), and denied employer’s request that the case be held in abeyance. Finding that claimant satisfied the criteria for

¹ Claimant is the widow of the miner, James Robinson, Jr., who died on January 17, 2010. Director’s Exhibits 14. The miner was receiving federal black lung benefits at the time of his death, pursuant to a claim filed on December 5, 2000, which was granted in an Order Remanding Case to District Director for Payment of Benefits by Administrative Law Judge Joseph E. Kane on October 11, 2002, based on employer’s withdrawal of its controversion of the issues. Director’s Exhibits 1, 3.

derivative entitlement pursuant to amended Section 932(l), the administrative law judge awarded benefits commencing January 2010, the month in which the miner died.

On appeal, employer argues 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 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. Claimant and the Director respond, urging the Board to reject employer's contentions and affirm the administrative law judge's award of benefits. In a reply brief, employer generally 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, and reiterates the arguments raised in its petition for review and brief.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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 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, 254-63, BLR (3d Cir. 2011) (rejecting due process and takings challenges to amended Section 932(l)); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Further, the Board has held 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. *Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *aff'd sub nom. 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 and, consistent with our reasoning in *Mathews*, we reject employer's request to hold this case in abeyance pending resolution of legal challenges to the PPACA. *See Stacy*, No. 11-1020, 2011 WL 6396510 at *3 n.2; *Stacy*, 24 BLR at 1-215; *Mathews*, 24 BLR at 1-201; *Fairman v. Helen Mining Co.*, 24 BLR 1-225 (2011), *appeal docketed*, No. 11-2445 (3d Cir. May 31, 2011).

Because claimant filed her survivor's claim after January 1, 2005, her claim was pending on March 23, 2010, and the miner was receiving federal black lung 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 Decision and Order – Award of Survivor's Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge