

BRB No. 12-0335 BLA

BETTY J. SMITH	)	
(Widow of HASSEL SMITH)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SEA "B" MINING COMPANY	)	DATE ISSUED: 03/05/2013
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order of William S. Colwell, 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), Abingon, Virginia, for employer.

Helen H. Cox (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 Order (11-BLA-6009) of Administrative Law Judge William S. Colwell awarding benefits on a claim filed pursuant to the provisions of the

Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). This case involves a subsequent survivor's claim.

Claimant<sup>1</sup> filed her initial claim for survivor's benefits on July 17, 2001. In a Decision and Order dated October 27, 2003, Administrative Law Judge Pamela Lakes Wood denied benefits because she found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Director's Exhibit 2. Pursuant to claimant's appeal, the Board affirmed Judge Wood's denial of benefits. *Smith v. Sea "B" Mining Co.*, BRB No. 04-0230 BLA (Nov. 30, 2004) (unpub.). Claimant filed a second claim for survivor's benefits on May 17, 2006. Director's Exhibit 3. On December 18, 2006, the district director denied the claim because claimant failed to establish a change in any condition of entitlement pursuant to 20 C.F.R. §725.309. *Id.*

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, were enacted. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. 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 a 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).

Claimant filed the instant subsequent survivor's claim on March 29, 2011. Director's Exhibit 5. On April 21, 2011, the district director issued a Proposed Decision and Order, wherein he found that claimant was derivatively entitled to benefits pursuant to amended Section 932(l). Director's Exhibit 10. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing.

On January 17, 2012, claimant filed a motion for a summary decision, asserting that, pursuant to amended Section 932(l), she 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 filed a response, arguing that claimant's subsequent survivor's claim should be denied as a matter of law.

In a Decision and Order dated February 27, 2012, Administrative Law Judge William S. Colwell (the administrative law judge) found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l). Accordingly, the administrative law judge awarded benefits.

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<sup>1</sup> Claimant is the surviving spouse of the miner, who died on June 26, 2001. Director's Exhibit 8. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim. Director's Exhibit 1.

On appeal, employer challenges the constitutionality of amended Section 932(l), and its application to this subsequent survivor's claim. Claimant and the Director, Office of Workers' Compensation Programs, respond in support of the administrative law judge's award of benefits.<sup>2</sup>

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.<sup>3</sup> 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).

Employer argues that retroactive application of amended Section 932(l) is unconstitutional, as a violation of employer's due process rights and as an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. Employer also contends that the operative date for determining eligibility under amended Section 932(l) is the date the miner's claim was filed, not the date the survivor's claim was filed. The arguments employer makes are virtually identical to the ones that the United States Court of Appeals for the Fourth Circuit recently rejected. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 388, 25 BLR 2-65, 2-83 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *cert. denied*, 568 U.S. (2012); *see also B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011). For the reasons set forth in *Stacy*, we reject employer's arguments.<sup>4</sup>

Employer next contends that claimant is not eligible for derivative survivor's benefits under amended Section 932(l), because her prior claim was finally denied and her subsequent claim is barred pursuant to fundamental principles of res judicata or claim preclusion. We disagree. The Board recently held that the principles of res judicata

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<sup>2</sup> Employer does not challenge that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under amended Section 932(l): That she filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending on March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death.

<sup>3</sup> The record reflects that the miner's coal mine employment was in 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, 1-202 (1989) (en banc).

<sup>4</sup> Employer's argument, that this claim could be affected by constitutional challenges to the Patient Protection and Affordable Care Act, is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012).

addressed in 20 C.F.R. §725.309, requiring that a subsequent claim be denied unless a change is established, are not implicated in the context of a subsequent survivor's claim filed within the time limitations set forth under Section 1556 of the Patient Protection and Affordable Care Act, because entitlement thereunder is not tied to relitigation of the prior finding that the miner's death was not due to pneumoconiosis. *Richards v. Union Carbide Corp.*, 25 BLR 1-31 (2012) (en banc) (McGranery, J., concurring and dissenting) (Boggs, J., dissenting), *appeal docketed*, No. 12-1294 (4th Cir. Mar. 8, 2012). The Board, therefore, held that the automatic entitlement provisions of amended Section 932(l) are available to an eligible survivor who files a subsequent claim within the time limitations established in Section 1556. *Id.*

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge