

BRB No. 12-0373 BLA

VIRGINIA L. VANCE)	
(Widow of JIMMY VANCE))	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: 03/11/2013
)	
TALON RESOURCES, INCORPORATED)	
)	
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 Awarding Survivor's Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Kevin T. Gillen and Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Sarah M. Hurley (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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Survivor's Benefits (2011-BLA-5855) of Administrative Law Judge Thomas M. Burke, rendered on a request for modification of the denial of a survivor's claim filed on January 24, 2007, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).¹ The administrative law judge determined that claimant is automatically entitled to benefits under amended Section 932(l), 30 U.S.C. §932(l), based on the award of benefits in the miner's claim.² Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the constitutionality of amended Section 932(l), and asserts, in the alternative, that it does not apply to the present claim, based on the filing date of the miner's claim. In addition, employer contends that claimant is not an "eligible survivor" as defined by amended Section 932(l) and that a change in law is not a proper ground for granting claimant's request for modification. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, responds, asserting that the administrative law judge properly awarded benefits under amended Section 932(l).³

¹ Claimant is the widow of the miner, who died on January 3, 2007. Director's Exhibit 9. The miner was receiving benefits at the time of his death as the result of a Decision and Order – Awarding Benefits issued by Administrative Law Judge Paul H. Teitler on November 12, 1997. Director's Exhibit 1. The award of benefits was affirmed by the Board on February 2, 1999. *Vance v. Talon Resources, Inc.*, BRB No. 98-0598 BLA (Feb. 2, 1999)(unpub.). Claimant's claim was denied on December 8, 2009 by Administrative Law Judge Daniel L. Leland because claimant did not establish that the miner's death was due to pneumoconiosis. Director's Exhibit 43. Claimant filed a timely request for modification on May 24, 2010. Director's Exhibit 44.

² Section 1556 of the Patient Protection and Affordable Care Act (PPACA) included amendments to the Black Lung Benefits Act, which affected claims filed after January 1, 2005 that were pending on or after March 23, 2010. Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010)(codified at 30 U.S.C. §§921(c)(4) and 932(l)). In pertinent part, the amendments revived Section 932(l), 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.

³ Employer's request to hold the case in abeyance pending resolution of the constitutional challenges to the PPACA and the severability of non-health care provisions is moot. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.⁴ 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).

Employer asserts that the retroactive application of amended Section 932(l) to this claim constitutes a violation of its due process rights and an unconstitutional taking of private property. Employer also maintains that the operative date for determining eligibility for survivor's benefits 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.

The constitutional arguments raised by employer are virtually identical to the ones that the United States Court of Appeals for the Fourth Circuit rejected in *W. Va. CWP Fund v. Stacy*, 671 F. 3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012); *see also B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 254-63, 25 BLR 2-13, 2-44-61 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). For the reasons set forth in *Stacy*, we reject employer's arguments. In addition, the court in *Stacy* 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. *Stacy*, 671 F.3d at 388-89, 25 BLR at 2-82-83. We hold that there is no merit, therefore, in employer's contention to the contrary.

We also reject employer's assertion that claimant is not an "eligible survivor" within the meaning of amended Section 932(l) because she did not prove that pneumoconiosis caused, or contributed to, the miner's death. Contrary to employer's contention, the automatic entitlement provision of amended Section 932(l) provides benefits to a survivor without the requirement that she prove that the miner's death was due to pneumoconiosis.⁵ *See Campbell*, 662 F.3d at 249-50, 25 BLR at 2-38-39; *Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-231 (2011).

⁴ The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 4. 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).

⁵ Although the Fourth Circuit did not render a holding on this issue in *Stacy*, the court indicated its agreement with the United States Court of Appeals for the Third Circuit's decision in *B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011). *W. Va. CWP Fund v. Stacy*, 671 F. 3d 378, 389-91, 25 BLR 2-65, 2-85-88 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012).

Further, we reject employer's allegation that amended Section 932(l) does not apply to a request for modification of the denial of a survivor's claim, as modification cannot be based on a change in law. In *Mullins v. ANR Coal Co., LLC*, 25 BLR 1-49 (2012), the Board addressed and rejected arguments substantially similar to those raised by employer in this case.⁶ Because claimant filed her claim after January 1, 2005, timely requested modification such that the claim was pending 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 derivatively entitled to survivor's benefits pursuant to amended Section 932(l).

⁶ The Board held in *Mullins* that relying on amended Section 932(l) to modify the denial of a survivor's claim to an award did not constitute granting modification based on a change in law. *Mullins v. ANR Coal Co., LLC*, 25 BLR 1-49, 1-52-53 (2012). The Board observed that 20 C.F.R. §725.310 permits the readjudication of a denied survivor's claim within one year of the denial, based on a showing of a mistake in a determination of fact, including the ultimate fact of entitlement, and that Section 1556(c) of the PPACA requires application of amended Section 932(l) to claims that were filed after January 1, 2005 and were pending on or after March 23, 2010. *Id.*, citing 20 C.F.R. §725.310; *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

Accordingly, the administrative law judge's Decision and Order Awarding Survivor's Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge