

BRB No. 11-0557 BLA

BETTY LOU RHODES)	
(Widow of FRED RHODES))	
)	
Claimant-Respondent)	
)	
v.)	
)	
WESTMORELAND COAL COMPANY)	DATE ISSUED: 05/10/2012
)	
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, Administrative Law Judge, United States Department of Labor.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Maia S. Fisher (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Awarding Survivor's Benefits (2011-BLA-5255) of Administrative Law Judge William S. Colwell, with respect to 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).¹ On March 3, 2011, the administrative law judge issued an Order Directing Submission of Position Statements concerning claimant's entitlement to survivor's benefits based on recent amendments to the Act contained in the Patient Protection and Affordable Care Act (PPACA).² Employer responded, contending that the application of the amendments would not be appropriate in this claim.

In his Order Awarding Survivor's Benefits, issued on April 12, 2011, the administrative law judge found that, pursuant to amended Section 422(l), 30 U.S.C. §932(l), claimant is automatically entitled to benefits based on the award of benefits in the miner's claim. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the constitutionality of amended Section 932(l), and requests that the Board hold this case in abeyance. Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs, responds and asserts that amended Section 932(l) is applicable.

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.³ 33 U.S.C. §921(b)(3), as incorporated by 30

¹ Claimant is the widow of the miner, Fred Rhodes. The miner filed a claim for benefits on July 20, 1982. Director's Exhibit 1. Administrative Law Judge Daniel L. Leland awarded benefits in a Decision and Order on Remand issued on December 21, 1993. *Id.* Employer appealed to the Board, but subsequently requested that its appeal be withdrawn. *Id.* The Board granted its request. *Id.* The miner died on August 28, 2010. Director's Exhibit 4. Claimant filed her claim for benefits on September 20, 2010. Director's Exhibit 2.

² Section 1556 of the Patient Protection and Affordable Care Act included amendments to the Black Lung Benefits Act (the Act), affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. 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). In pertinent part, the amendments revived Section 422(l) of the Act, 30 U.S.C. §932(l), providing 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 The record reflects that the miner's coal mine employment was in West 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 (1989) (en banc).

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 the miner’s claim was filed, not the date the survivor’s claim was filed. Finally, employer asks that the Board hold in abeyance any further proceedings or actions related to this claim, pending resolution of the constitutional challenges to the PPACA in federal court, as Section 1556 is not severable from the other provisions of the PPACA.

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 Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Further, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has 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. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011), *aff’g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010). For the reasons set forth in our decision in *Stacy*, we reject employer’s arguments to the contrary and, consistent with our reasoning in *Mathews*, we also reject employer’s request to hold this case in abeyance pending resolution of the legal challenges to the PPACA.⁴ *Mathews*, 24 BLR at 1-201.

⁴ We also reject employer’s request for a remand to the administrative law judge so that it can submit evidence on the economic impact of the amendments. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011), *aff’g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge