

BRB No. 11-0614 BLA

LAEUNA M. JARRELL )  
(Widow of FREDDIE D. JARRELL) )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 CONSOLIDATION COAL COMPANY )  
 )  
 and )  
 )  
 CONSOL ENERGY, INCORPORATED ) DATE ISSUED: 05/24/2012  
 )  
 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 Granting Claimant's Motion for Summary Judgment and Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell and Cameron O. Flynn (Washington and Lee University School of Law), Lexington, Virginia, for claimant.

Amy Jo Holley and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Jeffrey S. Goldberg (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 Decision and Order Granting Claimant's Motion for Summary Judgment and Awarding Benefits (2010-BLA-5872) of Administrative Law Judge Thomas M. Burke rendered on a survivor's claim<sup>1</sup> 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 April 25, 2011, claimant filed a Motion for Summary Judgment, arguing that, under amended Section 932(l), and given the filing date of her claim, she was entitled to benefits based on the award of benefits to her deceased husband.<sup>2</sup> In response, employer maintained that claimant is not automatically entitled to survivor's benefits under amended Section 932(l), arguing that the parties were provided with inadequate notice of the amendments and that the provisions of the PPACA are unconstitutional. The Director, Office of Workers' Compensation Programs (the Director), responded in support of claimant's motion and an award of benefits.

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<sup>1</sup> Claimant is the widow of the miner, who died on July 6, 2006. Director's Exhibit 7. Claimant filed her survivor's claim on April 6, 2010. Director's Exhibit 5. On June 23, 2010, the district director determined that claimant was entitled to derivative benefits pursuant to amended Section 422(l) of the Act, 30 U.S.C. §932(l), and employer requested a hearing. Director's Exhibits 9, 10, 12.

<sup>2</sup> The miner was receiving federal black lung benefits at the time of his death pursuant to a claim filed on September 17, 2001, which was awarded by Administrative Law Judge Daniel L. Leland on March 20, 2008. The Board affirmed Judge Leland's award of benefits. *F.J. [Jarrell] v. Consolidation Coal Co.*, BRB No. 08-0551 BLA (Apr. 29, 2009)(unpub.).

In his Decision and Order, the administrative law judge found that claimant satisfied the criteria for derivative entitlement pursuant to Section 932(l), and awarded benefits to commence as of July 2006, the month in which the miner died.

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 an unconstitutional taking of private property. Employer also contends 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.<sup>3</sup> Claimant and the Director respond, urging the Board to reject employer's contentions and 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.<sup>4</sup> 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).

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, 1-198-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011)(Order)(unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011).<sup>5</sup> See also *B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, BLR (3d Cir. 2011); *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

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<sup>3</sup> By Order issued on January 23, 2010, the Board denied employer's motion to hold this appeal in abeyance.

<sup>4</sup> The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner's last coal mine employment occurred in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 2.

<sup>5</sup> We reject employer's assertion that if any portion of the PPACA is declared unconstitutional, the amendments to the Act, including amended Section 932(l), must also be declared invalid. Employer's Brief at 5-12. See *West Virginia CWP Fund v. Stacy*, 671 F.3d 378, BLR (4th Cir. 2011).

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*, 671 F.3d 378, BLR (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010). For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary.

Because claimant filed her survivor's claim after January 1, 2005, her claim was pending on or 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 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 Granting Claimant's Motion for Summary Judgment and 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