

BRB No. 12-0495 BLA

MILDRED LAWSON)	
(Widow of FRED LAWSON))	
)	
Claimant-Respondent)	
)	
v.)	
)	
WESTMORELAND COAL COMPANY)	DATE ISSUED: 05/30/2013
)	
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, Associate Chief Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Paul E. Frampton and Sarah E. Smith (Bowles Rice, LLP), Charleston, West 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 Awarding Survivor's Benefits (2012-BLA-05142) of

Associate Chief Administrative Law Judge William S. Colwell (the administrative law judge) rendered on a subsequent survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). Claimant filed this subsequent survivor's claim on July 21, 2011.¹

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), 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 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 5, 2012, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision, arguing that under amended Section 932(*l*), and given the filing date of the survivor's subsequent claim, there was no genuine issue of material fact concerning whether claimant was automatically entitled to benefits pursuant to amended Section 932(*l*). Employer filed a response in opposition to the Director's motion, arguing that amended Section 932(*l*) was unconstitutional and that claimant's subsequent survivor's claim should be denied as a matter of law.

In his Order Awarding Survivor's Benefits, the administrative law judge noted that the United States Courts of Appeals for the Third and Fourth Circuits have upheld the constitutionality of the automatic entitlement provisions of Section 1556 of the PPACA. The administrative law judge found that it was undisputed that claimant is the surviving

¹ Claimant is the widow of the miner, who died on September 3, 1999. Director's Exhibit 4. Claimant filed her initial claim on October 22, 1999. That claim was denied by Administrative Law Judge Pamela Lakes Wood on March 27, 2003 because claimant failed to establish that the miner's death was due to pneumoconiosis. Director's Exhibit 2. While her claim was on appeal before the Board, claimant submitted additional evidence, which the Board accepted as a request for modification and remanded the case to the district director. Following the district director's denial of claimant's modification request, the case was forwarded to the Office of Administrative Law Judges, where it was assigned to Administrative Law Judge Edward Terhune Miller. Judge Miller issued a Decision and Order on April 5, 2006, denying modification. *Id.* Claimant filed a second request for modification on March 16, 2007, which was denied by Administrative Law Judge Richard Stansell-Gamm on November 18, 2008. *Id.* No further action was taken by claimant until she filed her current claim on July 21, 2011. Director's Exhibit 4.

widow of the miner, who was receiving benefits at the time of his death,² and that claimant filed her subsequent claim after January 1, 2005. The administrative law judge, therefore, found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l). Accordingly, the administrative law judge awarded survivor's benefits, commencing as of April 2003, the month in which the denial of claimant's prior survivor's claim became final.

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 further argues that claimant is not eligible for derivative survivor's benefits because amended Section 932(l), when read in conjunction with 30 U.S.C. §§921 and 922, requires that she prove that the miner's death was due to pneumoconiosis. Claimant and the Director respond, urging the Board to affirm the administrative law judge's award of benefits. The Director, however, also notes that the administrative law judge erred in determining that the commencement date for benefits is April 2003.

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.³ 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 argues that retroactively applying amended Section 932(l), including the awarding of retroactive benefits, is unconstitutional as a violation of due process, and as a taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 8-9, 16-18. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has rejected the same arguments. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383-89, 25 BLR 2-65, 2-74-85

² The miner was receiving federal black lung benefits at the time of his death pursuant to a claim filed on October 15, 1985, which was awarded by Administrative Law Judge Ben L. O'Brien in a Decision and Order issued on June 10, 1988. Director's Exhibit 1. On October 30, 1990, the Board affirmed Judge O'Brien's award of benefits. *Lawson v. Westmoreland Coal Co.*, BRB No. 88-2369 BLA (Oct. 30, 1990)(unpub.); Director's Exhibit 3.

³ As the miner was last employed in the coal mining industry in Virginia, the Board will apply the law 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); Director's Exhibits 1, 2.

(4th Cir. 2011), *cert. denied*, 568 U.S. (2012); *see also* *Vision Processing, LLC v. Groves*, 705 F.3d 551, 556-58 (6th Cir. 2013); *B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 247-63, 25 BLR 2-13, 2-44-61 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 849-51, 24 BLR 2-385, 2-397-401 (7th Cir. 2011). For the reasons set forth in *Stacy*, we reject employer's arguments.

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. Employer's Brief at 4-8. Amended Section 932(l) provides benefits to a survivor without requiring proof that the miner's death was due to pneumoconiosis. *Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-231 (2011); *see also* *Stacy*, 671 F.3d at 389-91, 25 BLR at 2-85-88; *Campbell*, 662 F.3d at 249-50, 25 BLR at 2-38-39.

Employer next contends that claimant is ineligible for survivor's benefits under amended Section 932(l) because her prior claim was finally denied and, in employer's view, fundamental principles of res judicata or claim preclusion bar her subsequent claim. Employer's Brief at 11-13. We disagree. The Board recently held that the principles of res judicata 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 survivor's subsequent claim filed within the time limitations set forth under Section 1556 of Public Law No. 111-148. Specifically, the Board held that entitlement under amended Section 932(l) is not tied to the relitigation of the prior finding that claimant did not establish that the miner's death was 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). Therefore, contrary to employer's contention, the automatic entitlement provision of amended Section 932(l) is available to an eligible survivor who files a subsequent claim within the time limitations established in Section 1556.⁴ *Id.* Because claimant filed her subsequent survivor's claim after January 1, 2005, her claim was pending on or after March 23, 2010, and the miner was eligible to receive benefits 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 amended Section 932(l).

Lastly, the Director acknowledges that the administrative law judge erred in setting the commencement date for benefits as April 2003. Because benefits on a

⁴ We deny employer's request that this case be held in abeyance pending the Fourth Circuit's decision in *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). Employer's Brief at 13, 18.

subsequent claim may not commence until the month after the month in which the prior denial became final, *see* 20 C.F.R. §725.309(d)(5), the Director states that, rather than April 2003, claimant is entitled to benefits commencing in January 2009. Director's Letter Brief at 2 n.3. The Board recently adopted the Director's position, holding that benefits are payable in a subsequent survivor's claim filed within the time limitations set forth in Section 1556 of the PPACA from the month after the month in which the denial of the prior claim became final. *Richards*, 25 BLR at 1-39. As the Decision and Order denying claimant's prior claim became final in December 2008, at the expiration of the thirtieth day after it was filed with the district director in November 2008,⁵ *see* 20 C.F.R. §725.479(a), claimant's survivor's benefits under amended Section 932(l) in her subsequent claim properly commence as of January 2009, the month after the month in which the denial of claimant's prior claim became final. Consequently, we modify the commencement date for benefits to January 2009. 20 C.F.R. §725.309(d)(5).

Accordingly, the administrative law judge's Order Awarding Survivor's Benefits is affirmed, as modified to reflect January 2009 as the date from which benefits commence.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁵ In a Decision and Order issued on November 18, 2008, Judge Stansell-Gamm denied claimant's second request for modification of the April 2003 denial of her initial claim. Director's Exhibit 2.