

BRB No. 12-0542 BLA

TERESA K. LILLY)	
(Widow of VIRGIL R. LILLY))	
)	
Claimant-Respondent)	
)	
v.)	
)	
RANGER FUEL CORPORATION &)	DATE ISSUED: 05/17/2013
PITTSTON COMPANY)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Tiffany B. Davis (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Michelle S. Gerdano (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-05432) of Administrative Law Judge Lystra A. Harris, rendered on a survivor's claim filed on November 15, 2011, pursuant to the provisions of the Black Lung Benefits Act, as

amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).¹ Congress enacted amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, amended Section 932(l) provides that a survivor of a miner who was determined to be 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), *amended by* Pub. L. No. 111-148, §1556(b), 124 Stat. 119, 260 (2010). The administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l). Specifically, the administrative law judge found that claimant is the survivor of the miner; that the miner was receiving federal black lung benefits at the time of his death;² that the survivor's claim was filed after January 1, 2005; and that it was pending after March 23, 2010. Accordingly, the administrative law judge awarded survivor's benefits, commencing November 2011, the month in which the miner died.

On appeal, employer asserts that retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005 results in a violation of employer's right to due process of law and an unlawful taking of private property.³ Employer also contends that because employer's appeal of the award of benefits to the miner is pending before the Board, benefits should not be awarded based on automatic benefits, as the miner's claim is not yet final. Employer further argues that, insofar as claimant has not proven that the miner's death was due to pneumoconiosis, she is not an eligible survivor of the miner. Employer requests that the case be held in abeyance pending the outcome of the miner's claim. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to affirm the administrative law judge's award of benefits. Claimant has not filed a response brief.

¹ Claimant is the widow of the miner, who died on November 7, 2011. Director's Exhibits 3, 4.

² The administrative law judge found that the miner was receiving benefits at the time of his death pursuant to a Decision and Order – Awarding Benefits, issued by Administrative Law Judge Michael P. Lesniak on May 4, 2012. *See* Decision and Order at 1. The Board affirmed the award of benefits in the miner's claim. *Lilly v. Ranger Fuel Corp.*, BRB No. 12-0447 BLA (Apr. 25, 2013) (unpub.).

³ Employer's request to hold this case in abeyance, pending resolution of *W. Va. CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011), *petition for cert. filed*, U.S.L.W. (May 4, 2012) (No. 11-1342) by the Supreme Court of the United States, is moot. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *cert. denied*, 568 U.S. (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 rational, supported by substantial evidence, and 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).

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 an unlawful taking of private property under the Fifth Amendment of the United States Constitution. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *cert. denied*, 568 U.S. (2012); *B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010). Accordingly, we deny employer's request to remand this case to the administrative law judge for development of evidence regarding the economic impact of amended Section 932(l), to support its contention that an unconstitutional taking has occurred. *See Stacy*, 671 F.3d at 387, 25 BLR at 2-80. We also reject, as meritless, employer's argument that claimant must establish that the miner's death was due to pneumoconiosis in order to be an "eligible survivor" of the miner. *See Fairman v. Helen Mining Co.*, 24 BLR 1-225 (2010).

Employer's request to hold this case in abeyance pending resolution of the miner's claim is moot, as the Board has recently affirmed the award of benefits to the miner. *See Lilly v. Ranger Fuel Corp.*, BRB No. 12-0447 BLA (Apr. 25, 2013) (unpub.). Because claimant filed her claim after January 1, 2005, it was pending after March 23, 2010, and the miner was receiving benefits at the time of his death, we affirm the administrative law judge's finding that claimant is entitled to survivor's benefits pursuant to amended Section 932(l).

⁴ 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 was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); *Lilly*, BRB No. 12-0447 BLA, slip op. at 2 n.2.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge