

BRB No. 11-0242 BLA

ELLA D. MOORE)	
(Widow of WILLIAM P. MOORE))	
)	
Claimant-Respondent)	
)	
v.)	
)	
U.S. STEEL MINING COMPANY, LLC)	DATE ISSUED: 11/30/2011
)	
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 Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Abigail P. van Alstyne (Quinn, Walls, Weaver & Davies), Birmingham, Alabama, for claimant.

Kary B. Wolfe and Timothy M. Davis (Jones, Walker, Waechter, Poitevent, Carrère & Denègre LLP), Birmingham, Alabama, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2009-BLA-5416) of Administrative Law Judge Theresa C. Timlin rendered on a survivor's claim¹ 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).

Following the hearing in this case, amendments to the Act were enacted, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010. *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 12, 2010, claimant filed a motion requesting that the administrative law judge enter an award of benefits in this case, based on derivative entitlement under amended Section 932(l). The Director, Office of Workers' Compensation Programs (the Director), responded in support of the motion, while employer responded in opposition to the motion, and requested that the case be held in abeyance. The administrative law judge denied claimant's motion and ordered the parties to submit position statements addressing the applicability of the PPACA to this claim. In a Decision and Order dated November 12, 2010, the administrative law judge found that claimant is an eligible survivor of a miner who was receiving benefits at the time of his death; that claimant filed her survivor's claim after January 1, 2005; and that her claim was pending on March 23, 2010. Accordingly, the administrative law judge found that claimant was automatically entitled to survivor's benefits pursuant to amended Section 932(l).

On appeal, employer contends that the operative date for determining eligibility for survivor's benefits under amended Section 932(l) is the date the miner's claim was filed, not the date the survivor's claim was filed. Employer also contends that Section 1556 of the PPACA violates Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), because the amendments create irreconcilable inconsistencies within the Act. Additionally, employer maintains that retroactive

¹ Claimant is the widow of the miner, who died on February 15, 2008. Director's Exhibit 8. On December 28, 1999, the district director awarded benefits in the miner's claim. By letter dated February 28, 2000, employer agreed to pay benefits. After the miner's death, claimant filed a claim for survivor's benefits on March 12, 2008. Director's Exhibit 2.

application of amended Section 932(l) is unconstitutional, because it violates employer's due process rights and constitutes an unlawful taking of employer's property. Lastly, employer asserts that, because the PPACA has been declared to be unconstitutional in *Florida ex rel. Bondi v. U. S. Dept. of Health and Human Services*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011), the award of benefits should be vacated and the case remanded to the district director for a determination of whether the miner's death was due to pneumoconiosis, or, in the alternative, the case should be held in abeyance pending final resolution of any appeal in *Bondi*. Claimant and the Director respond in support of the award of benefits. Employer has filed a reply to claimant's brief arguing in support of its position.

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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Board has held 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 v. Olga Coal Co.*, 24 BLR 1-207 (2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011). For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary. Further, as we did in *Fairman v. Helen Mining Co.* 24 BLR 1-225, 1-229-30 (Apr. 29, 2011), *appeal docketed*, No. 11-2445 (3d Cir. May 31, 2011), we reject employer's assertions that amended Section 931(l) creates irreconcilable inconsistencies in the Act and violates Section 7(c) of the APA. We also 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 B&G Constr. Co. v. Director, OWCP [Campbell]*, F.3d , BLR , No. 10-4179, 2011 WL 5068092 (3d Cir. Oct. 26, 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Lastly, the decision cited by employer, declaring the individual mandate of the PPACA unconstitutional, has no effect on the instant case, as an order was issued staying that decision, pending appeal, and the United States Court of Appeals for the Eleventh Circuit severed the litigation on the individual mandate from the litigation on the remainder of the Act. *See Florida ex rel. Bondi v. U.S. Dept. of Health and Human Services*, 648 F.3d 1235 (11th Cir. 2011); *Florida ex rel. Bondi v. U.S. Dept. of Health and Human Services*, 780 F. Supp. 2d 1307 (N.D. Fla. 2011). Thus, as we did in *Mathews*, we reject employer's request that this case be held in

abeyance pending resolution of the legal challenges to Public Law No. 111-148. *Mathews*, 24 BLR at 1-201.

Because claimant, an eligible survivor of the miner, filed her survivor's claim after January 1, 2005, her claim was pending on 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 determination that claimant is entitled to receive survivor's benefits pursuant to amended Section 932(l).

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

BETTY JEAN HALL
Administrative Appeals Judge