

BRB No. 11-0258 BLA

VIRGINIA PERKINS)	
(Widow of AUBREY PERKINS))	
)	
Claimant-Respondent)	
)	
v.)	
)	
ISLAND CREEK COAL COMPANY)	DATE ISSUED: 11/08/2011
)	
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.

George E. Roeder, III (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges

PER CURIAM:

Employer appeals the Order Awarding Survivor's Benefits (10-BLA-5742) of Administrative Law Judge William S. Colwell (the administrative law judge) 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).

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 November 2, 2010, the administrative law judge issued an Order Directing Submission of Position Statements wherein the parties were required to address whether an order awarding benefits should be granted in this case.² In response, employer advanced various legal challenges to the statutory amendments, and argued that this survivor's claim does not meet the threshold date of filing requirements for application of the PPACA, because the miner's claim was filed before January 1, 2005, and was not pending on or after March 23, 2010. The Director, Office of Workers' Compensation Programs (the Director), responded in opposition to employer's arguments, and averred that, under amended Section 932(l), and given the filing date of her claim, claimant was entitled to benefits based on the award to her deceased husband.³

The administrative law judge found that claimant is an eligible survivor of the miner, and that claimant met the eligibility requirements for application of amended Section 932(l), as she filed her survivor's claim for benefits after January 1, 2005, the claim was pending on March 23, 2010, the effective date of the amendments, and the

¹ Claimant is the widow of the miner, who died on December 20, 2009. Director's Exhibit 6. Claimant filed her claim for survivor's benefits on January 27, 2010. *Id.* at 2.

² On October 28, 2010, the Director, Office of Workers' Compensation Programs, filed a Motion for Summary Decision, which was received by the administrative law judge shortly after issuance of his Order Directing Submission of Position Statements. Decision and Order at 1 n.1. On December 6, 2010, employer filed a response to the Director's motion, to which the Director replied on December 17, 2010.

³ On July 24, 1996, Administrative Law Judge Jeffrey Tureck issued an Order of Remand, acknowledging employer's withdrawal of its controversion of the miner's entitlement to benefits, *see* Director's Exhibit 110, and returning the case to the district director for entry of an award of benefits, which was duly issued on August 21, 1996. Employer took no further adversarial action. Therefore, at the time of his death, the miner was receiving federal black lung benefits pursuant to a final award.

miner was receiving benefits at the time of his death. Accordingly, the administrative law judge found claimant entitled to survivor's benefits, commencing as of December 2009.

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 asserts that the operative date for determining eligibility pursuant to amended Section 932(l) should be the date of filing of the miner's claim. Employer requests that further proceedings or actions related to this claim be held in abeyance, pending resolution of the constitutional challenges to Public Law No. 111-148 in federal court. Claimant has not filed a response brief in this appeal. The Director responds, urging affirmance of the 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.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).

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 (Dec. 22, 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. We further 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 unconstitutional taking of private property, for the same reasons the Board rejected identical 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 , 2011 WL 5068092 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Lastly, we reject employer's request that this case be held in abeyance pending resolution of legal challenges to Public Law No. 111-148, consistent with our reasoning in *Mathews*, 24 BLR at 1-201, and as no final ruling has been issued. *See Stacy*, 24 BLR at 1-214-15; *Fairman v. Helen Mining Co.*, 24 BLR 1-225 (2011), *appeal docketed*, No. 11-2445 (3d Cir. May 31, 2011). Employer's request, that this case be held in abeyance pending a

⁴ The miner's last coal mine employment was in Virginia. *See* Decision and Order at 13; Director's Exhibits 2, 4 at 5, 78 at 19 (miner's claim). Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director*, 12 BLR 1-200, 1-202 (1989).

decision by the United States Court of Appeals for the Fourth Circuit in *Stacy*, is also denied.

Because claimant 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 finding that claimant is derivatively 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 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