

BRB No. 11-0262 BLA

NORMA F. FOX)	
(Widow of CHARLES E. FOX))	
)	
Claimant-Respondent)	
)	
v.)	
)	
IMPERIAL COLLIERY COMPANY)	
)	DATE ISSUED: 11/09/2011
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Summary Decision-Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell (Black Lung Legal Clinic, Washington and Lee University School of Law), Lexington, Virginia, for claimant.

George E. Roeder, III (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Maia S. Fisher (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 Summary Decision-Awarding Benefits (10-BLA-5681) of Administrative Law Judge Michael P. Lesniak rendered on a claim 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). Claimant filed her survivor's claim on March 16, 2010.¹ Director's Exhibit 2.

On March 23, 2010, amendments to the Act were enacted, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010. The amendments, in pertinent part, revive Section 932(l) of the Act, which provides that the eligible 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).

On November 4, 2010, while this case was pending before the administrative law judge, claimant moved for a summary decision awarding survivor's benefits, based on amended Section 932(l). Employer filed a response, arguing that claimant was not automatically entitled to survivor's benefits, because the operative date for derivative entitlement is the date the miner's claim was filed. Employer contended that because the miner filed his claim before January 1, 2005, claimant's claim was not affected by the amendment to the Act and, therefore, claimant was not derivatively entitled to benefits. The Director, Office of Workers' Compensation Programs (the Director), responded, requesting that the administrative law judge issue an award of benefits to claimant, because there was no genuine issue as to any material fact regarding her automatic entitlement to survivor's benefits under amended Section 932(l).

In a decision dated December 8, 2010, the administrative law judge found that the miner was receiving benefits at the time of his death, that claimant filed her survivor's claim after January 1, 2005, that her claim was pending on March 23, 2010, and that she is an eligible survivor of the miner. Accordingly, the administrative law judge found that claimant is automatically entitled to survivor's benefits pursuant to amended Section 932(l).

On appeal, employer challenges the administrative law judge's application of amended Section 932(l) to this case. Claimant filed a response brief, in support of the administrative law judge's award of benefits. The Director responds, urging affirmance of 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,

¹ Claimant is the widow of the miner, who died on February 25, 2010. Director's Exhibit 5. At the time of his death, the miner was receiving federal black lung benefits pursuant to a February 8, 2000 award on his lifetime claim by an administrative law judge. Decision and Order at 2; Administrative Law Judge's Exhibit 1.

and in accordance with applicable law.² 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 asserts that retroactive application of amended Section 932(l) is unconstitutional, as it violates employer’s due process rights and constitutes an unlawful taking of employer’s property, in violation of the Fifth Amendment to the United States Constitution. Employer’s Brief at 5-15. 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. Employer’s Brief at 16-19. Further, employer asserts that this case should be held in abeyance pending resolution of the constitutional challenges to Public Law No. 111-148, and the eventual interpretation of amended Section 932(l) by the United States Court of Appeals for the Fourth Circuit. Employer’s Brief at 20-28. Employer’s arguments lack merit.

Initially, we reject employer’s contentions that retroactive application of the automatic entitlement provision of amended Section 932(l) to claims filed after January 1, 2005 constitutes a due process violation and a taking of private property. 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 , 2011 WL 5068092 (3d Cir. Oct. 26, 2011)(Hardiman, J., concurring); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). We, therefore, reject them here for the reasons set forth in *Mathews*, and also reject employer’s request for a remand to the administrative law judge so that it can submit evidence on the economic impact of the amendments. Further, the Board recently 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, 1-211-14 (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. Finally, employer’s request, that this case be held in abeyance pending resolution of the legal challenges to Public Law No. 111-148, and the interpretation of amended Section 932(l) by the Fourth Circuit, is also denied. *See Mathews*, 24 BLR at 1-201.

² The record indicates that the miner’s coal mine employment was in West Virginia. Director’s Exhibit 30 (Miner’s Claim), internal exhibit 5. Accordingly, this case arises within the jurisdiction 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*).

Consequently, we affirm the administrative law judge's determination that claimant is derivatively entitled to benefits pursuant to amended Section 932(l), as she filed her survivor's claim after January 1, 2005, the claim was pending on March 23, 2010, and the miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(l); Pub. L. No. 111-148, §1556(b), (c).

Accordingly, the administrative law judge's Summary Decision-Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge