

BRB No. 11-0264 BLA

JOAN WHITTINGTON)
(Widow of HARRY WHITTINGTON))
)
Claimant-Respondent)
)
v.)
)
PRINCESS SUSAN COAL COMPANY)
)
and)
)
WEST VIRGINIA COAL WORKERS') DATE ISSUED: 11/02/2011
PNEUMOCONIOSIS FUND)
)
Employer/Carrier-)
Petitioners)
)
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.

Francesca Tan (Jackson Kelly PLLC), Morgantown, West Virginia, for
employer/carrier.

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 (10-BLA-5873) of Administrative Law Judge William S. Colwell (the administrative law judge) rendered on a 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 8, 2010, the administrative law judge issued an Order Directing Submission of Position Statements, informing the parties of the possible applicability of the amendments contained in Section 932(l) to this claim. In response, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Judgment, arguing that, under amended Section 932(l), and given the filing date of her claim, claimant was entitled to benefits based on the prior award to her deceased husband.² Employer filed its Response in Opposition to Director's Motion for Summary Decision, asserting that claimant is not automatically entitled to survivor's benefits, based on the amendments to Section 932(l), because her deceased husband's claim was neither filed after January 1, 2005, nor pending on or after March 23, 2010.

The administrative law judge found that claimant is an eligible survivor of the miner, and that claimant met the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l). Accordingly, the administrative law judge awarded survivor's benefits.

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 a taking of private property. Assuming, *arguendo*, that retroactive application is permissible, employer asserts that the

¹ Claimant, Joan Whittington, is the widow of the miner, who died on August 11, 2008. Director's Exhibit 13. Claimant filed her claim for survivor's benefits on September 9, 2008. Director's Exhibit 6.

² At the time of his death, the miner was receiving federal black lung benefits pursuant to an award issued by Administrative Law Judge Daniel F. Sutton on February 24, 2000. Director's Exhibit 3.

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 the promulgation of implementing regulations and resolution of the constitutional challenges to Public Law No. 111-148. 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. 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).³

We reject employer's contention, that the 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 this same argument 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 Stacy v. Olga Coal Co.*, 24 BLR 1-207 (Dec. 22, 2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 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). Likewise, the Board recently held that the operative date for determining eligibility for survivors' 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*, 24 BLR at 1-213. For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary. Further, 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; *see Fairman v. Helen Mining Co.*, 24 BLR 1-225 (2011).⁴

³ As the miner's last coal mine employment occurred in West 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*).

⁴ Employer acknowledges that the Board has previously addressed and rejected many of its allegations of error 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), and *Stacy v. Olga Coal Co.*, 24 BLR 1-207 (Dec. 22, 2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011). Employer, nevertheless, raises these contentions herein to preserve them for purposes of appeal.

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 finding that claimant is entitled to receive survivor's benefits pursuant to Section 932(l).

Accordingly, the Order Awarding Survivor's Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge