

BRB No. 11-0282 BLA

MOSELLE M. HUNSUCKER	)	
(Widow of CHARLES B. HUNSUCKER)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FLAT GAP MINING COMPANY	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE	)	DATE ISSUED: 11/30/2011
COMPANY	)	
	)	
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, Associate Chief Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

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: McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Order Awarding Survivor's Benefits (10-BLA-5841) of Associate Chief Administrative Law Judge William S. Colwell 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 April 29, 2010.<sup>1</sup> 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).

By Order dated October 29, 2010, the administrative law judge noted that claimant's survivor's claim was filed after January 1, 2005 and was pending on March 23, 2010, and that the miner was determined to be eligible to receive benefits at the time of his death. The administrative law judge therefore directed the parties to file position statements addressing whether an order awarding survivor's benefits should be entered.

On November 23, 2010, the Director, Office of Workers' Compensation Programs (the Director), moved for a summary decision awarding survivor's benefits, based on amended Section 932(l). Claimant filed a position statement in support of a finding of automatic entitlement under amended Section 932(l). Employer requested that the case be held in abeyance until the legal challenges to Public Law No. 111-148 are resolved and the Department of Labor promulgates implementing regulations.

In an Order Awarding Survivor's Benefits issued November 30, 2010, the administrative law judge found that the miner was receiving benefits at the time of his death, and noted that employer did not dispute that claimant 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).

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<sup>1</sup> Claimant is the widow of the miner, who died on August 1, 2003. Director's Exhibit 5. At the time of his death, the miner was receiving federal black lung benefits pursuant to a final award on his lifetime claim. Director's Exhibit 1.

On appeal, employer challenges the administrative law judge's application of amended Section 932(l) to this case. Claimant and the Director respond, 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, 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).

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 11-22. 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 3-10. Further, employer asserts that this case should be held in abeyance pending resolution of the constitutional challenges to Public Law No. 111-148 in federal court, and the promulgation of regulations by the Department of Labor implementing amended Section 932(l). Employer's Brief at 22-26. 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 that decision. 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 (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 also deny employer's request that this case be held in abeyance pending the promulgation of regulations implementing amended Section 932(l). As the Board held in *Mathews*, the mandatory language of amended Section 932(l) supports the conclusion that the provision is self-executing and, therefore, that there is no need to hold this case in abeyance pending the promulgation of new regulations. *Mathews*, 24 BLR at 1-201. Finally, employer's request, that this case be held in abeyance pending resolution of the

legal challenges to Public Law No. 111-148, is also denied. *See Mathews*, 24 BLR at 1-201.

Consequently, we affirm the administrative law judge's determination that claimant is derivatively entitled to payment of 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, she is an eligible survivor, 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 Order Awarding Survivor's Benefits is affirmed.

SO ORDERED.

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge