

BRB No. 11-0287 BLA

KATHLEEN M. WOLF )  
(Widow of RAYMOND WOLF) )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 D & L COAL COMPANY )  
 ) DATE ISSUED: 11/30/2011  
 and )  
 )  
 WEST VIRGINIA COAL WORKERS' )  
 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 of William S. Colwell, Administrative Law Judge,  
United States Department of Labor.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia,  
for employer/carrier.

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: DOLDER, Chief Administrative Appeals Judge, SMITH and  
McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Order (2010-BLA-5769) of Administrative Law Judge William S. Colwell awarding benefits 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). This case involves a survivor's claim filed on December 8, 2009.<sup>1</sup>

On March 23, 2010, while this case was pending before the administrative law judge, amendments to the Act, affecting claims filed after January 1, 2005, were enacted. The amendments, in pertinent part, revive Section 932(l) of the Act, which provides that a 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.<sup>2</sup> 30 U.S.C. §932(l).

On October 29, 2010, the administrative law judge ordered the parties to show cause, within thirty days, why an order awarding survivor's benefits should not be entered. *See* 20 C.F.R. §725.452(d). Employer responded by arguing, *inter alia*, that

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<sup>1</sup> Claimant is the surviving spouse of the miner, who died on November 23, 2009. Director's Exhibit 7. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim. Director's Exhibit 13.

<sup>2</sup> As it existed prior to March 23, 2010, Section 932(l) provided that:

In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner, except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981, [*sic*].

30 U.S.C. §932(l). On March 23, 2010, Public Law No. 111-148 amended Section 932(l) as follows: “(b) Continuation of Benefits – Section 422(l) of the Black Lung Benefits Act (30 U.S.C. §932(l)) is amended by striking ‘except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981.’” Pub. L. No. 111-148, §1556(b), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §932(l)). Section 1556 of Public Law No. 111-148 provides further that “[t]he amendments made by this section shall apply with respect to claims filed under part B or part C of the Black Lung Benefits Act (30 U.S.C. 921 et seq., 931 et seq.) after January 1, 2005, that are pending on or after the date of enactment of this Act.” Pub. L. No. 111-148, §1556(c).

Section 1556 of Public Law No. 111-148 violates its due process rights. Employer further argued that the operative date for determining eligibility for survivor's benefits pursuant to amended Section 932(l) is the date on which the miner's claim was filed, not the date on which the survivor's claim was filed. The Director, Office of Workers' Compensation Programs (the Director), argued that benefits should be awarded, asserting that there was no genuine issue of fact as to whether claimant was entitled to benefits under amended Section 932(l).

In an Order dated November 30, 2010, the administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 932(l) to this case. The Director responds, urging affirmance of the administrative law judge's award of benefits. Claimant has not filed a response brief.

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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer asserts that retroactive 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, in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 7-12. Employer also contends that the operative date for determining eligibility for survivor's benefits pursuant to amended Section 932(l) is the date on which the miner's claim was filed, not the date on which the survivor's claim was filed. *Id.* at 12-23.

We reject employer's arguments regarding the constitutionality of the amendments, as applied to this case. The arguments employer makes are virtually identical to the ones that the Board rejected in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-198-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order) (unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). We, therefore, reject them here for the reasons set forth in that decision. *Mathews*, 24 BLR at 1-198-200; *see also Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011).

We further reject employer's contention regarding the operative filing date for determining eligibility pursuant to amended Section 932(l). The Board has held that the operative date for determining eligibility for survivors' benefits under amended Section

932(l) is the date on which the survivor's claim was filed, not the date on which the miner's claim was filed. *Stacy*, 24 BLR at 1-214.

In this case, claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under amended Section 932(l): That she filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending on March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death. Therefore, we affirm the administrative law judge's determination that claimant is derivatively entitled to benefits pursuant to amended Section 932(l) of the Act. 30 U.S.C. §932(l).

Accordingly, the administrative law judge's Order granting benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge