

BRB No. 12-0070 BLA

MAMIE N. HULLETT)
(Widow of FRANK V. HULLETT))
)
Claimant-Respondent)
)
v.)
)
MINERALTEC CORPORATION) DATE ISSUED: 11/19/2012
)
and)
)
METLIFE INSURANCE COMPANY OF)
CONNECTICUT)
)
Employer/Carrier-)
Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Kathy R. Davis and Jordan D. Watson (Carr, Allison, Pugh, Howard, Oliver & Sisson, P.C.), Birmingham, Alabama, for employer.

Ann Marie Scarpino (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 Decision and Order Awarding Benefits (2010-BLA-05798) of Administrative Law Judge Adele Higgins Odegard rendered on a survivor's claim filed on March 4, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).¹ In a Proposed Decision and Order dated March 4, 2010, the district director denied benefits, finding that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis. Director's Exhibit 11. On March 11, 2010, claimant requested that the case be referred to the Office of Administrative Law Judges for a formal hearing.

On March 23, 2010, Congress enacted amendments to the Act, contained in the Patient Protection and Affordable Care Act (PPACA), which affect claims filed after January 1, 2005. The amendments, in pertinent part, revive 30 U.S.C. §932(*l*), 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.

On April 9, 2010, claimant submitted a letter to the district director stating that she wished to withdraw her appeal and request for a formal hearing, as she is automatically entitled to survivor's benefits. Claimant's Exhibit E; *see* 20 C.F.R. §725.310. The district director characterized claimant's request as a "request for modification" and, in a Proposed Decision and Order dated June 2, 2010, determined that claimant is an eligible survivor of a miner who "was entitled to black lung benefits at the time of his death pursuant to a final and effective Award of Benefits entered February 3, 2010." *See* Director's Exhibit 12; Claimant's Exhibit G. Therefore, the district director concluded that claimant is entitled to an automatic award of benefits under amended Section 932(*l*). *Id.* Employer contested the award and requested that the case be transferred to the Office of Administrative Law Judges for a hearing. Director's Exhibit 13.

In her Decision and Order Awarding Benefits, the administrative law judge rejected the procedural argument employer raised at the hearing, that modification was improperly granted, and found that claimant's survivor's claim was properly adjudicated in accordance with 20 C.F.R. §725.310. The administrative law judge further found that claimant satisfied the criteria for derivative entitlement pursuant to amended Section

¹ Claimant is the widow of the miner, Frank V. Hullett, who died on January 19, 2009. Director's Exhibit 7. In a Proposed Decision and Order dated December 29, 2009, the district director awarded the miner benefits, commencing July 2008, on his lifetime claim that was pending at the time of his death. *See* Director's Exhibit 3. The award of benefits was not contested. *See* Director's Exhibit 4.

932(l). Consequently, the administrative law judge awarded benefits to commence as of January 2009, the month in which the miner died.

On appeal, employer challenges the constitutionality of amended Section 932(l), and its application to this survivor's claim.² Employer maintains that the operative date for determining eligibility for survivor's benefits under amended Section 932(l) is the date that the miner's claim was filed, that claimant's request for modification is not a claim under the Act, and that her claim was finally denied. Claimant has not responded to this appeal. The Director, Office of Workers' Compensation Programs, responds and urges 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 supported by substantial evidence, is rational, and is in accordance with applicable law.³ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

As an initial matter, we 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 a taking of private property, for the reasons that 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) and *Stacy v. Olga Coal Corp.*, 24 BLR 1-207 (2010), *aff'd sub nom. W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-69 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012). *See also B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Furthermore, employer's assertion, that amended Section 932(l) is not applicable, based on the filing date of the miner's claim, has no merit. The Board held in

² Employer also requests that the Board hold the case in abeyance, pending resolution of the constitutionality of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, and the severability of the non-health care provisions. Subsequent to the briefing in this case, the United States Supreme Court held that the PPACA is constitutional. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012). Therefore, employer's request is moot.

³ The record reflects that the miner's coal mine employment was in Alabama. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 5.

Stacy 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. *See Stacy*, 24 BLR at 1-211.

We also reject employer's argument that amended Section 932(l) does not apply to a request for modification of the denial of a survivor's claim. In *Mullins v. ANR Coal Co.*, 25 BLR 1-49 (2012), *recon. denied* (June 14, 2012) (Order) (unpub.), the Board addressed and rejected arguments substantially similar to those raised by employer in this case. In applying amended Section 932(l) to a survivor's request for modification,⁴ the Board held that the language of Section 1556(c) of the PPACA mandates the application of amended Section 932(l) to all claims filed after January 1, 2005, that are pending on or after March 23, 2010, and provides that a survivor of a miner who was eligible to receive benefits at the time of his death is now automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. Pub. L. No. 111-148, §1556(c) (2010); 30 U.S.C. §932(l); *Mullins*, 25 BLR at 1-53; *see also Richards v. Union Carbide Corp.*, 25 BLR 1-31 (2012) (en banc) (McGranery, J., concurring and dissenting) (Boggs, J., dissenting), *appeal docketed*, No. 12-1294 (4th Cir. Mar. 8, 2012). Because claimant filed her claim after January 1, 2005, the claim was pending after March 23, 2010, and the miner was determined to be eligible to receive benefits at the time of his death, we affirm the administrative law judge's finding that claimant is derivatively entitled to survivor's benefits pursuant to amended Section 932(l) of the Act.

⁴ Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a), permits the reopening and readjudication of a claim within one year of the order awarding or denying benefits, based on a showing of a mistake in a determination of fact, including the ultimate fact of entitlement. 20 C.F.R. §725.310; *see Director, OWCP v. Drummond Coal Co. [Cornelius]*, 831 F.2d 240, 10 BLR 2-322 (11th Cir. 1987).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge