

BRB No. 12-0127 BLA

JOAN C. WATTS)
(Widow of HUBERT P. WATTS))
)
Claimant-Respondent)
)
v.)
)
ATLAS MINING COMPANY) DATE ISSUED: 11/21/2012
INCORPORATED)
)
and)
)
INSURANCE MUTUAL INCORPORATED)
)
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 – Award of Survivor’s Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Rita Roppolo (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 – Award of Survivor’s Benefits (2011-BLA-6062) of Administrative Law Judge Larry S. Merck on a survivor’s claim filed on March 16, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).¹ 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), Pub. L. 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.

Subsequent to the enactment of the amendments, the administrative law judge issued an Order instructing the parties to file statements as to why benefits should not be awarded in the survivor’s claim, based upon the award of benefits in the miner’s claim.² The Director, Office of Workers’ Compensation Programs (the Director), submitted a position statement in favor of claimant’s derivative entitlement to benefits. Claimant filed a position statement agreeing with the Director’s position. Employer argued in its response that the amendments to the Act are unconstitutional and, additionally, that the date on which the miner’s claim was filed is the date relevant to the applicability of amended Section 932(*l*). Alternatively, employer argued that the case should be held in abeyance pending resolution of the constitutional challenges to the PPACA and the legal challenges to the amendments to the Act.

In the administrative law judge’s Decision and Order, he found that claimant satisfied the criteria for derivative entitlement pursuant to amended Section 932(*l*), and awarded benefits, commencing as of January 2009, the month in which the miner died. On appeal, employer reiterates the arguments it raised before the administrative law

¹ Claimant is the surviving spouse of the miner, who died on January 4, 2009. Director’s Exhibits 4, 6, 7, 17.

² Administrative Law Judge Thomas F. Phalen awarded benefits to the miner in a Decision and Order issued on February 12, 2009. Director’s Exhibit 3. In a Decision and Order issued on April 29, 2010, the Board affirmed Judge Phalen’s award of benefits. *Watts v Atlas Mining Co.*, BRB No. 09-0515 BLA (Apr. 29, 2010) (unpub.).

judge.³ Both claimant and the Director respond, urging affirmance of the award of benefits.⁴

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.⁵ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer argues that retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005, violates employer's right to due process, as it constitutes a taking of private property, in violation of the Fifth Amendment to the United States Constitution. Employer also contends that the operative date for determining eligibility under amended Section 932(l) is the date the miner's claim was filed, not the date the survivor's claim was filed. The arguments employer makes are virtually identical to those rejected by the United States Court of Appeals for the Fourth Circuit in *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *cert. denied*, 568 U.S. (2012) (No. 11-1342); *see also B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011). For the reasons set forth in *Stacy*, we reject employer's arguments.

Because claimant filed her survivor's claim after January 1, 2005, her claim was pending after 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 amended Section 932(l).

³ Employer's request that this case be held in abeyance pending the resolution of the constitutional challenges to the Patient Protection and Affordable Care Act, Public Law No. 111-148, is moot. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012).

⁴ We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant filed her survivor's claim after January 1, 2005, that her claim was pending on or after March 23, 2010, and that the miner was entitled to receive benefits at the time of his death. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

Accordingly, the administrative law judge's Decision and Order – Award of Survivor's Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge