

BRB No. 11-0162 BLA

REGINA PICKETT)
(Widow of TOM PICKETT, SR.))
)
Claimant-Respondent)
)
v.)
)
HAWLEY COAL MINING COMPANY)
)
and)
)
WEST VIRGINIA COAL WORKERS') DATE ISSUED: 10/24/2011
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 Decision and Order and Order Denying Reconsideration of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman and Wendy G. Adkins (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Paul L. Edenfield (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order and Order Denying Reconsideration (2009-BLA-05316) of Administrative Law Judge Pamela Lakes Wood rendered 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 March 10, 2008.¹ 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 March 30, 2010, the administrative law judge canceled the scheduled hearing and ordered the parties to provide a position statement on whether this claim should be granted in light of the recent amendment. Employer responded, arguing that this claim should be held in abeyance until the 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 contended that requiring employer to proceed without proper notice of how the Department intended to implement amended Section 932(l) would violate employer's due process rights. In the alternative, employer contended that the claim should proceed to a hearing to allow employer the opportunity to examine claimant regarding the statutory requirements of an eligible survivor. Claimant responded, arguing that the instant claim is governed by amended Section 932(l) and, therefore, she is entitled to benefits.

On May 13, 2010, the Director, Office of Workers' Compensation Programs (the Director), moved for a summary decision, based on the recent amendments to the Act. Employer declined to submit a substantive response to the Director's motion.

In a decision dated September 9, 2010, the administrative law judge found that the miner was receiving benefits at the time of his death, that claimant filed her survivor's claim after January 1, 2005, that her claim was pending on March 23, 2010, and that she is an eligible survivor of the miner. Accordingly, the administrative law judge found that

¹ Claimant is the widow of the miner, who died on February 11, 2008. Director's Exhibit 10. At the time of his death, the miner was receiving federal black lung benefits pursuant to a November 15, 2000 award on his lifetime claim by an administrative law judge. Decision and Order at 2; Director's Exhibit 0.

claimant is automatically entitled to survivor's benefits pursuant to amended Section 932(l). Employer timely moved for reconsideration, which the administrative law judge denied by Order dated October 25, 2010.

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

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.² 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).

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 5-11. 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 11-14. 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 Reply Brief at 3-11. 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 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

² The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction 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*).

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 we 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 challenge 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 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, 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 Decision and Order awarding benefits and Order Denying Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge