

BRB No. 11-0192 BLA

ROSEMARY ELSWICK)
(Widow of MELVIN D. ELSWICK))
)
 Claimant-Respondent)
)
 v.) DATE ISSUED: 10/25/2011
)
 MEADOW RIVER COAL COMPANY)
)
 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 Decision and Order Awarding Benefits and Decision and Order Denying Request for Reconsideration of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

Wendy G. Atkins (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Helen H. Cox (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Decision and Order Denying Request for Reconsideration (08-BLA-5451) of Administrative Law Judge Adele Higgins Odegard 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 June 6, 2007.¹

The administrative law judge held a hearing on December 16, 2009. On March 23, 2010, amendments to the Act affecting claims filed after January 1, 2005, were enacted. The amendments, in pertinent part, revive Section 422(l) of the Act, 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.² 30 U.S.C. §932(l).

¹ Claimant is the surviving spouse of the miner, who died on May 20, 2007. Director's Exhibit 12. 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 2.

² As it existed prior to March 23, 2010, Section 422(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 422(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,

On May 17, 2010, the administrative law judge ordered the parties to show cause why, in light of amended Section 932(l), an order awarding benefits should not be entered in the survivor's claim. In response to the administrative law judge's order, claimant asserted that, pursuant to amended Section 932(l), she was automatically entitled to benefits. The Director, Office of Workers' Compensation Programs (the Director), responded by filing a Motion for Summary Decision, in which the Director indicated that claimant was automatically entitled to benefits pursuant to amended Section 932(l). Employer responded by filing a Motion to Hold Claim in Abeyance, in which employer requested that the case be held in abeyance pending the issuance of regulations implementing the amendments, and the resolution of legal challenges to Public Law No. 111-148. Employer further objected to the retroactive application of the amendments.

In her Decision and Order Awarding Benefits, dated August 2, 2010, the administrative law judge noted that the miner was receiving benefits at the time of his death, that claimant filed her survivor's claim on June 6, 2007, that her claim was pending on March 23, 2010, and that claimant is an eligible surviving spouse of the miner. The administrative law judge, therefore, found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l). Accordingly, the administrative law judge denied employer's Motion to Hold Claim in Abeyance, granted the Director's Motion for Summary Decision, and awarded benefits. The administrative law judge subsequently denied employer's motion for reconsideration.

On appeal, employer challenges the administrative law judge's application of amended Section 932(l) to this case. Claimant and the Director respond, urging the Board to affirm the administrative law judge's award of benefits. Employer has filed a reply brief, reiterating its challenges to the application of amended Section 932(l).

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.³ 33 U.S.C. §921(b)(3), as incorporated by 30

2005, that are pending on or after the date of enactment of this Act." Pub. L. No. 111-148, §1556(c).

³ The record reflects 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 (1989)(*en banc*).

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 unconstitutional taking of employer’s property, in violation of the Fifth Amendment to the United States Constitution. 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 further argues that this case should be held in abeyance pending the resolution of legal challenges to Public Law No. 111-148.

We reject employer’s arguments regarding the constitutionality of amended Section 932(l), 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 argument that the date of filing of the miner’s claim is the operative date for determining whether amended Section 932(l) applies to the survivor’s claim. In *Stacy*, the Board 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*, 24 BLR at 1-211. We also reject employer’s request that this case be held in abeyance pending resolution of the legal challenges to Public Law No. 111-148. *See Mathews*, 24 BLR at 1-201.

In this case, claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under amended Section 932(l): She filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on March 23, 2010; and the miner was receiving 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). 30 U.S.C. §932(l).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Decision and Order Denying Request for Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge