

BRB No. 12-0008 BLA

REBECCA JANE STOWERS)
(Widow of WILLIAM STOWERS))
)
 Claimant-Respondent)
)
 v.)
)
 MOUNTAIN LAUREL RESOURCES) DATE ISSUED: 10/19/2012
)
 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 Granting Director's Motion for Summary Decision and Awarding Survivor's Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman and Kevin T. Gillen (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Sarah M. Hurley (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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Director's Motion for Summary Decision and Awarding Survivor's Benefits (2011-BLA-6125) of Administrative Law Judge Thomas M. Burke, rendered on a survivor's claim¹ filed on April 20, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (Supp. 2011) (the Act). On March 23, 2010, amendments to the Act contained in Section 1556 of the Patient Protection and Affordable Care Act were enacted, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §§921(c)(4) and 932(l)). In pertinent part, the amendments revived 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.

On August 24, 2011, the Director, Office of Workers' Compensation Programs (the Director), moved for a summary decision, asserting that there was no genuine issue of material fact concerning whether claimant was automatically entitled to benefits pursuant to amended Section 932(l). The administrative law judge granted the Director's motion and determined that claimant is entitled to benefits under amended Section 932(l) since, at the time of his death, the miner was receiving federal black lung benefits, based on a lifetime award issued on September 17, 2003.

On appeal, employer challenges the constitutionality of amended Section 932(l) and asserts, in the alternative, that it is not applicable, based on the filing date of the miner's claim. Employer argues that claimant is not eligible for derivative survivor's benefits because amended Section 932(l), when read in conjunction with 30 U.S.C. §§921 and 922, requires that she prove either that the miner's death was due to pneumoconiosis or that the miner had complicated pneumoconiosis. Employer also requests that the Board hold the case in abeyance.² Claimant has not filed a response brief. The Director responds, urging affirmance of the award of benefits pursuant to amended Section 932(l).

¹ Claimant is the widow of the miner, William Stowers, who died on April 14, 2011. Director's Exhibits 5, 6.

² Employer's requests to hold this case in abeyance are moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012); *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Corp.*, 24 BLR 1-207 (2010), *cert. denied*, 568 U.S. (2012).

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 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we reject employer's contention 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. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Corp.*, 24 BLR 1-207 (2010), *cert. denied*, 568 U.S. (2012); *see also B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-16 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). We also deny employer's request to remand the case to the administrative law judge for development of evidence relevant to the economic impact of amended Section 932(l), since employer's constitutional argument with regard to the Takings Clause of the Fifth Amendment to the United States Constitution has been rejected by the United States Court of Appeals for the Fourth Circuit. *See Stacy*, 671 F.3d at 387, 25 BLR at 2-80 (holding that "the mere imposition of an obligation to pay money does not give rise to a claim under the Takings Clause.").

Further, there is no merit to employer's assertion that amended Section 932(l) is not applicable, based on the filing date of the miner's claim. The Fourth Circuit has affirmed the Board's holding 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*, 671 F.3d at 388-89, 25 BLR at 2-83-84. Employer also contends that claimant is not an "eligible survivor," within the meaning of amended Section 932(l), because she did not prove that pneumoconiosis caused, or contributed to, the miner's death. Employer's Brief in Support of Petition for Review at 32-41. Contrary to employer's contention, the automatic entitlement provisions of amended Section 932(l) provide benefits to a survivor without the requirement that she prove that the miner's death was due to pneumoconiosis. *See Stacy*, 671 F.3d at 383-89, 25 BLR at 2-76-85; *Campbell*, 663 F.3d at 249-50, 253, 25 BLR at 2-38-39, 2-44; *Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-231 (2011).

Because claimant filed her survivor's claim after January 1, 2005, her claim was pending on March 23, 2010, and the miner was receiving benefits under a final award at

³ Because the miner's coal mine employment was in West Virginia, 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); Director's Exhibit 1.

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). *See* Decision and Order Granting Director's Motion for Summary Decision and Awarding Survivor's Benefits at 1; Director's Exhibit 1.

Accordingly, the administrative law judge's Decision and Order Granting Director's Motion for Summary Decision and Awarding Survivor's Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge