

BRB Nos. 12-0009 BLA and
12-0010 BLA

TERESA C. POWELL)
(Widow of CHARLES POWELL))
)
and)
)
RUBY POWELL)
(Divorced Spouse of CHARLES POWELL))
)
Claimants-Respondents)
)
v.)
)
A & D COAL COMPANY) DATE ISSUED: 10/18/2012
)
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

Appeals of the Decisions and Orders Awarding Survivor's Benefits of
Christine L. Kirby, Administrative Law Judge, United States Department of
Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford &
Reynolds), Norton, Virginia, for claimants.

Ashley M. Harman and Amy Jo Holley (Jackson Kelly PLLC),
Morgantown, West Virginia, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decisions and Orders Awarding Survivor's Benefits (2008-BLA-05001 and 2008-BLA-05002) of Administrative Law Judge Christine L. Kirby, with respect to two survivor's claims 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 Teresa C. Powell, the miner's surviving spouse, filed her application for benefits on December 27, 2006. Claimant Ruby Powell, the miner's divorced spouse, filed her application on December 28, 2006.¹ On March 23, 2010, Congress enacted amendments to the Act, 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) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). In pertinent part, the amendments revived Section 422(l) of the Act, 30 U.S.C. §932(l), providing 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.²

On July 7, 2011, the administrative law judge issued an Order Denying Motion for Partial Summary Judgment, in which she cancelled the formal hearing, based on her determination that the application of amended Section 932(l) of the Act meant that there

¹ On May 19, 2009, Administrative Law Judge Robert B. Rae issued an order remanding Theresa C. Powell's claim to the district director for consolidation with Ruby Powell's claim. Although the claims were consolidated and assigned to Administrative Law Judge Christine L. Kirby for hearing, they retained separate case numbers and Judge Kirby (the administrative law judge) issued a separate Decision and Order on each claim. After receiving Notices of Appeal from employer with respect to the administrative law judge's decisions, the Board issued an Order consolidating the appeals for the purpose of decision only. *Powell v. A & D Co.*, BRB Nos. 12-0009 BLA and 12-0010 BLA (Nov. 15, 2011) (unpub. Order).

² In this case, the miner filed an initial claim for benefits on April 11, 1991 and a subsequent claim on May 11, 1994. Survivor's Claim One (SC1) Director's Exhibit 1. Administrative Law Judge Daniel F. Sutton awarded benefits on the subsequent claim in a Decision and Order issued on May 19, 1998. *Id.* The miner was in pay status at the time of his death on December 6, 2006. SC1 Director's Exhibits 1, 10; Survivor's Claim Two (SC2) Director's Exhibit 10.

were no remaining issues for adjudication in either survivor's claim. The administrative law judge also gave the parties the opportunity to file position statements as to why she should not enter an order awarding benefits. Claimants and employer responded. Claimants urged the administrative law judge to award benefits pursuant to amended Section 932(l), while employer asserted that amended Section 932(l) does not apply to either claim, as the miner's claim was filed before January 1, 2005. Employer also preserved its constitutional challenges to the amendments.

In separate Decisions and Orders, the administrative law judge found that the miner was receiving federal black lung benefits at the time of his death, that both claims were filed after January 1, 2005, and that both claims were pending on March 23, 2010. The administrative law judge further determined that claimants were entitled to receive benefits pursuant to amended Section 932(l) and, accordingly, awarded benefits in both claims.

On appeal, employer challenges the constitutionality of amended Section 932(l), and asserts, in the alternative, that it does not apply to the survivors' claims, based on the filing date of the miner's claim. In addition, employer contends that claimants are not "eligible survivors" as defined by amended Section 932(l).³ Claimant and the Director, Office of Workers' Compensation Programs, respond, asserting that the administrative law judge properly awarded benefits under 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 supported by substantial evidence, is rational, and is in accordance with applicable law.⁴ 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).

³ By Order dated April 27, 2012, the Board denied employer's motion to hold this case in abeyance, pending the resolution of the legal challenges to the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, and the appeal in *Stacy v. Olga Co.*, 24 BLR 1-207 (2010). *Powell v. A & D Co.*, BRB Nos. 12-0009 BLA and 12-0010 BLA (Apr. 27, 2012) (Order) (unpub.). Subsequent to the issuance of this order, the United States Supreme Court upheld the validity of the PPACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012).

⁴ The record reflects that the miner's coal mine employment was in West Virginia. SC1 Director's Exhibit 3; SC2 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).

The constitutional arguments raised by employer are virtually identical to the ones that the United States Court of Appeals for the Fourth Circuit rejected 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), *petition for cert. denied*, U.S.L.W. (U.S. Oct. 1, 2012) (No. 11-1342); *see also B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 254-63, 25 BLR 2-13, 2-44-61 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). For the reasons set forth in *Stacy*, we also reject employer's arguments. In addition, the court in *Stacy* 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. *Stacy*, 671 F.3d at 388-89, 25 BLR at 2-82-83. We hold, therefore, that there is no merit in employer's contention to the contrary.

We also reject employer's argument that, because claimants did not establish that pneumoconiosis caused or contributed to the miner's death, they are not "eligible survivors" within the meaning of amended Section 932(l). The Board held that a virtually identical contention was without merit in *Fairman v. Helen Mining Co.*, 24 BLR 1-225 (2010). Therefore, we reject employer's assertion for the reasons set forth in *Fairman*.

Because claimants filed their claims after January 1, 2005, their claims were pending on 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 both claimants are entitled to receive survivor's benefits pursuant to amended Section 932(l).

Accordingly, the administrative law judge's Decisions and Orders Awarding Survivor's Benefits are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge