

BRB No. 12-0094 BLA

GENEVEL SEXTON)
(Widow of HERBERT SEXTON)¹)
)
Claimant-Respondent)
)
v.)
)
BULLION HOLLOW ENTERPRISES,)
INCORPORATED) DATE ISSUED: 10/25/2012
)
Employer-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Order Awarding Survivor's Benefits of William S. Colwell,
Administrative Law Judge, United States Department of Labor.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville,
Kentucky, for employer.

Jonathan Rolfe (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.

¹ In an Order Correcting Clerical Error and Order on Reconsideration, issued on October 20, 2011, the administrative law judge granted claimant's motion to amend the caption of this case to reflect that claimant is the widow of Herbert, not Russell, Sexton. The administrative law judge also considered employer's motion for reconsideration, denied the relief requested, and declined to otherwise alter his September 30, 2011 decision.

PER CURIAM:

Employer appeals the Order Awarding Survivor's Benefits (2011-BLA-6105) of Administrative Law Judge William S. Colwell rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a subsequent survivor's claim filed on March 31, 2011.

Claimant² filed her initial claim for survivor's benefits on July 11, 1994. Director's Exhibit 2. On November 2, 1994, the district director denied benefits because he found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Id.* No further action was taken on this claim.

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. 30 U.S.C. §932(l).

Claimant filed a subsequent survivor's claim on March 31, 2011. Director's Exhibit 5. On May 13, 2011, the district director issued a Proposed Decision and Order, wherein she found that claimant was derivatively entitled to benefits pursuant to amended Section 932(l). Director's Exhibit 12. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing.

On August 25, 2011, the Director, Office of Workers' Compensation Programs (the Director), moved for a summary decision, asserting that, pursuant to amended Section 932(l), claimant was automatically entitled to benefits as a matter of law, and that there was no genuine issue as to any material fact concerning her entitlement. Neither claimant nor employer filed a response.

In an Order dated September 30, 2011, the administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l). Accordingly, the administrative law judge awarded survivor's benefits, commencing as of March 1994, the month in which the miner died.

² Claimant is the surviving spouse of the miner, who died on March 20, 1994. Director's Exhibit 10. Following his death, the miner was awarded black lung benefits pursuant to his lifetime claim. Director's Exhibit 3.

On appeal, employer challenges the constitutionality of amended Section 932(l), and its application to this subsequent survivor's claim.³ The Director responds in support of the administrative law judge's application of amended Section 932(l) to this case. However, the Director contends that the appropriate date from which benefits commence in this case is December 1994, the month after the month in which the denial of the prior survivor's claim became final. In a reply brief, employer reiterates its previous contentions. Employer also agrees with the Director that, if awarded, benefits should commence as of December 1994.

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.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).

Employer argues that retroactive application of amended Section 932(l) is unconstitutional, as a violation of employer's due process rights and as an unlawful 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 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 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, 383-89 (4th Cir. 2011), 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, 254-63 (3d Cir. 2011). For the reasons set forth in *Stacy*, we reject employer's arguments.

Employer also asserts that amended Section 932(l) is not applicable to this claim, filed on March 31, 2011, because it was not pending on March 23, 2010. Employer's Brief at 7-9; Employer's Reply Brief at 1-3. Contrary to employer's argument, the amendments to the Act affect claims filed "after January 1, 2005, that are pending *on or*

³ Employer's additional argument 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. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012).

⁴ The record reflects that the miner's coal mine employment was in 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).

after” March 23, 2010, the date of enactment of the Act. Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (codified at 30 U.S.C. §§921(c)(4) and 932(l)) (emphasis added). Thus, as the Director asserts, claimant has established each of the elements of entitlement under Section 932(l): that her claim was filed after January 1, 2005; that it was pending on or after March 23, 2010; that she is an eligible survivor of the miner; and that the miner was determined to be eligible to receive benefits as a result of his lifetime claim.

Employer next contends that claimant is not eligible for derivative survivor’s benefits under amended Section 932(l), because to award benefits on a subsequent claim would render meaningless the finality of the prior denied claim. Employer’s Brief at 9-10; Employer’s Reply Brief at 3-4. Employer asserts that Section 1556 is not applicable to subsequent claims, and that, even assuming its applicability, claimant cannot seek to modify her prior denial based on a change in law. Employer’s Brief at 9-10. We disagree. The Board recently held that the principles of res judicata addressed in 20 C.F.R. §725.309, requiring that a subsequent claim be denied unless a change is established, are not implicated in the context of a subsequent survivor’s claim filed within the time limitations set forth under Section 1556, because entitlement thereunder is not tied to relitigation of the prior finding that the miner’s death was not due to pneumoconiosis. *Richards v. Union Carbide Corp.*, BRB Nos. 11-0414 BLA & 11-0414 BLA-A, slip op. at 4-6 (Jan. 9, 2012) (en banc) (McGranery, J., concurring and dissenting) (Boggs, J., dissenting), *appeal docketed*, No. 12-1294 (4th Cir. Mar. 8, 2012). The Board, therefore, held that the automatic entitlement provisions of amended Section 932(l) are available to an eligible survivor who files a subsequent claim within the time limitations established in Section 1556. *Id.*

Finally, the Director argues that the administrative law judge erred in setting the benefits commencement date as March 1994. Noting that benefits on a subsequent claim may not commence until the month after the month in which the prior denial became final, *see* 20 C.F.R. §725.309(d)(5), the Director argues that claimant is entitled to benefits commencing in December 1994, rather than in March 1994. The Board recently adopted the Director’s position, holding that benefits are payable in a subsequent survivor’s claim filed within the time limitations set forth in Section 1556 from the month after the month in which the denial of the prior claim became final. *Richards*, slip op. at 7. As the order denying claimant’s prior claim became final in November 1994 at the expiration of the thirtieth day after it was issued by the district director, *see* 20 C.F.R. §725.419(d), claimant’s survivor benefits under amended Section 932(l) in her subsequent claim properly commence as of December 1994, the month after the month in which the denial of claimant’s prior claim became final.

Accordingly, the administrative law judge's Order Awarding Survivor's Benefits is affirmed, as modified to reflect December 1994 as the date from which benefits commence.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge