

BRB No. 11-0847 BLA

GLORIA JEAN DRUMHELLER )  
(Widow of BILLY K. DRUMHELLER) )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 CALVERT COAL COMPANY ) DATE ISSUED: 09/17/2012  
 )  
 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 Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Mark J. Grigoraci (Robinson & McElwee PLLC), Charleston, 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-5112) of Administrative Law Judge Michael P. Lesniak with respect to a survivor's 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). On March 23, 2010, amendments to the Act, affecting claims pending on or after January 1, 2005, were enacted. The amendments, in pertinent part, revive Section 932(*l*), which provides that a 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 receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*).

Claimant filed her application for benefits on April 26, 2010.<sup>1</sup> The Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision on May 20, 2011, alleging that there was no genuine issue of material fact concerning whether claimant was automatically entitled to benefits pursuant to amended Section 932(*l*). In a Decision and Order issued on August 15, 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 May 2009, the month in which the miner died.

On appeal, employer asserts that the administrative law judge erred in awarding benefits based on the application of amended Section 932(*l*).<sup>2</sup> Claimant has not filed a response brief in this appeal. The Director responds and asserts that the administrative law judge properly awarded benefits.

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,

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<sup>1</sup> Claimant is the widow of the miner, Billy Drumheller. Director's Exhibit 3. The miner filed a claim on November 21, 1983, which resulted in an award of benefits. Director's Exhibit 1. The miner was in pay status at the time of his death on May 5, 2009. Director's Exhibits 1, 8.

<sup>2</sup> Employer's request that this case be held in abeyance, pending resolution by the United States Supreme Court of the constitutional challenges to the Patient Protection and Affordable Care Act, is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566, 2012 WL 2427810 (June 28, 2012).

and is in accordance with applicable law.<sup>3</sup> 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).

Employer contends that the administrative law judge erred in applying amended Section 932(l) to award benefits in this case, as its terms are in “irreconcilable conflict” with Sections 411(a) and 412(a) of the Act, 30 U.S.C. §§921(a) and 922(a). Employer’s Brief at 4. This argument is virtually identical to one 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. filed*, U.S.L.W. (U.S. May 4, 2012) (No. 11-1342); *see also B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011). Thus, for the reason set forth in *Stacy*, we reject employer’s argument.

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 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).

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<sup>3</sup> The record reflects that the miner’s coal mine employment was in West Virginia. Director’s Exhibit 4. 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).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge