

BRB No. 11-0867 BLA

CHARLOTTE J. DiCASIMIRRO )  
(Widow of BERNARD J. DiCASIMIRRO) )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 SKYTOP CONTRACTING COMPANY, )  
 INCORPORATED )  
 )  
 and )  
 )  
 LACKAWANNA CASUALTY COMPANY ) DATE ISSUED: 09/05/2012  
 )  
 Employer/Carrier- )  
 Petitioners )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

Appeal of the Order Granting Director's Motion for Decision and Order Awarding Benefits Based on Automatic Entitlement of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Maureen E. Herron, Wilkes-Barre, Pennsylvania, for employer/carrier.

Jeffrey S. Goldberg (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: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Employer/carrier (employer) appeals the Order Granting Director's Motion for Decision and Order Awarding Benefits Based on Automatic Entitlement (2011-BLA-6063) of Administrative Law Judge Theresa C. Timlin (the administrative law judge), rendered on a subsequent survivor's claim<sup>1</sup> 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 filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010). The amendments, in pertinent part, revive Section 422(l) of the Act, 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. 30 U.S.C. §932(l).

Claimant filed her current survivor's claim on April 22, 2011. Director's Exhibit 3. On April 26, 2011, the district director issued a Proposed Decision and Order, wherein he found that claimant was derivatively entitled to benefits pursuant to amended Section 932(l). Director's Exhibit 7. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 8.

On July 26, 2011, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision, arguing that under amended Section 932(l), and given the filing date of her claim, claimant was entitled to benefits based on the award of benefits to her deceased husband.<sup>2</sup> On August 5, 2011, the administrative

---

<sup>1</sup> Claimant is the widow of the miner, who died on April 21, 1996. Director's Exhibit 5. Claimant filed her initial claim for survivor's benefits on June 10, 1996, which was denied on August 6, 1997 by Administrative Law Judge Ralph Romano. On December 23, 1997, the Board dismissed claimant's appeal as abandoned. Director's Exhibit 1; *DiCasimirro v. Skytop Contracting Co.*, BRB No. 97-1612 BLA (Dec. 23, 1997)(Order)(unpub.). Claimant filed a subsequent claim on December 16, 2002, which was denied by the district director on February 6, 2003. Director's Exhibit 2. Claimant took no further action with respect to this claim.

<sup>2</sup> The miner was receiving federal black lung benefits at the time of his death pursuant to a claim filed on March 19, 1987, which was awarded by Administrative Law Judge Ralph Romano and ultimately affirmed by the Board on July 26, 1994.

law judge issued an Order directing the parties to show cause why the Director's motion should not be granted. Claimant joined in the Director's motion. Employer responded, arguing that claimant was not eligible for derivative survivor's benefits under amended Section 932(l), because her prior claim was finally denied and her subsequent claim is barred pursuant to the doctrines of collateral estoppel and res judicata.

In her Order Granting Director's Motion for Decision and Order Awarding Benefits Based on Automatic Entitlement, the administrative law judge agreed with the Director's position that subsequent survivor's claims are not barred under 20 C.F.R. §725.309(d) and that, pursuant to amended Section 932(l), derivative benefits are available to an eligible survivor of a miner who was receiving benefits at the time of his death, if the claim is filed after January 1, 2005 and is pending on or after March 23, 2010. Finding that claimant meets the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l), the administrative law judge granted the Director's motion for summary decision, and awarded benefits to commence as of April 2003, the month after the month in which claimant's prior denial of benefits became final.

On appeal, employer argues that the retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005 constitutes a violation of its due process rights and an unconstitutional taking of private property. Employer 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 argues that claimant is not eligible for derivative survivor's benefits under amended Section 932(l), because her prior claim was finally denied and her subsequent claim is barred pursuant to the provisions at 20 C.F.R. §725.309(d)(3) and fundamental principles of res judicata and collateral estoppel.<sup>3</sup> Employer further contends that the administrative law judge erred in granting the motion for summary decision, arguing that the administrative law judge improperly concluded that there was no genuine issue of material fact. Lastly, employer asserts that the April 2003 commencement date for benefits is an arbitrary date constituting an "unanticipated windfall" for claimant. The Director responds, urging the Board to affirm the

---

*DiCasimirro v. Skytop Coal Co.*, BRB Nos. 92-1735 BLA and 92-1735 BLA-A (July 26, 1994)(unpub.).

<sup>3</sup> Employer generally asserts that amended Section 932(l) directly conflicts with established provisions of the Act. We decline to address this issue, as employer has not included a specific supporting argument identifying those provisions. See 20 C.F.R. §802.211; *Sarf v. Director*, OWCP, 10 BLR 1-119 (1987).

administrative law judge's award of benefits. Claimant responds, agreeing with the Director's position.<sup>4</sup>

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. 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).

We reject employer's contention that retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005 constitutes a due process violation and a taking of private property, for the same reasons the Board rejected substantially similar arguments in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011)(Order)(unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). *See also B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Further, 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. *W. Va. CWP Fund v. Stacy*, 671 F. 3d 378, 25 BLR 2-65 (4th Cir. 2011), *petition for cert. filed*, U.S.L.W. (U.S. May 4, 2012) (No. 11-1342). For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary. We also reject employer's contention that claimant's subsequent claim is barred under the doctrines of res judicata and collateral estoppel, for the reasons set forth in *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). Further, we reject employer's assertion that the administrative law judge erred in concluding that there was no genuine issue of material fact. The issues of relationship and dependency were not contested by employer, and the administrative law judge could reasonably rely upon the record evidence that claimant is the widow of the miner, and her statement that she has not remarried since the miner's death. Director's Exhibits 1, 3. While employer maintains that it did not concede that claimant was an eligible survivor, employer does not specifically state that the record evidence is inaccurate, or otherwise show that a genuine issue of material fact exists. *See* 29 C.F.R. §18.40.<sup>5</sup> Thus, the administrative law judge

---

<sup>4</sup> Employer's challenges to the constitutionality of the PPACA and the severability of its non-health care provisions are moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012).

<sup>5</sup> Section 18.40 states, in relevant part, that a party opposing a motion for summary decision may not rest upon the mere allegations or denials of a pleading. The response

rationality concluded that there was no genuine issue of material fact regarding claimant's entitlement to benefits under amended Section 932(l), and properly granted the Director's motion for summary decision.

Lastly, we reject employer's contention that the administrative law judge acted arbitrarily in determining that benefits in this case should commence in April 2003. In *Richards*, the Board held that derivative benefits are payable in a subsequent survivor's claim filed within the time limitations set forth in Section 1556 of the PPACA from the month after the month in which the denial of the prior claim became final.<sup>6</sup> *See Richards*, slip op. at 7. Consequently, as the order denying claimant's prior claim became final in March 2010, at the expiration of the thirtieth day after it was issued, *see* 20 C.F.R. §725.419, claimant's survivor's benefits under amended Section 932(l) in her subsequent claim properly commence as of April 2003, the month after the month in which claimant's prior denial of benefits became final. *See* 20 C.F.R. §725.309(d)(5).

---

must set forth specific facts showing that there is a genuine issue of fact for the hearing. *See* 29 C.F.R. §18.40.

<sup>6</sup> The denial of claimant's prior survivor's claim was issued by the district director on February 6, 2003, and became final thirty days later, in March 2003. *See* 20 C.F.R. §725.419; Director's Exhibit 2.

Accordingly, the administrative law judge's Order Granting Director's Motion for Decision and Order Awarding Benefits Based on Automatic Entitlement is affirmed.

SO ORDERED.

---

REGINA C. McGRANERY  
Administrative Appeals Judge

I concur.

---

BETTY JEAN HALL  
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

For the reasons set forth in my dissent in *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), I respectfully disagree with my colleagues as to the application of the doctrine of res judicata to this previously finally decided survivor's claim and, consequently, would reverse the administrative law judge's award of benefits. However, because the Board has held to the contrary in a precedent-setting opinion, I reluctantly concur.

---

JUDITH S. BOGGS  
Administrative Appeals Judge