

BRB No. 11-0877 BLA

VICIE WALLS )  
(Widow of HERBERT WALLS) )  
 )  
Claimant-Respondent )  
 )  
v. )  
 )  
ANGUS MINING COMPANY ) DATE ISSUED: 09/10/2012  
 )  
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 Order Awarding Survivor's Benefits of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

Tiffany B. Davis (Jackson Kelly PLLC), Morgantown, West Virginia, 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer/Carrier (carrier) appeals the Order Awarding Survivor's Benefits (2011-BLA-5922) of Administrative Law Judge William S. Colwell, rendered on a claim filed on February 25, 2011 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).<sup>1</sup> On March 23, 2010, amendments to the Act, contained in the Patient Protection and Affordable Care Act (PPACA), were passed, which affect claims filed after January 1, 2005 that were pending on or after March 23, 2010. *See* Section 1556 of the PPACA, Public Law No. 111-148 (2010). 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.

In a Proposed Decision and Order dated March 29, 2011, the district director determined that claimant was derivatively entitled to benefits pursuant to amended Section 932(l), based on a lifetime award of benefits granted to the miner. Director's Exhibit 9. Carrier requested a hearing, and the case was assigned to the administrative law judge. Director's Exhibits 11, 13. On August 2, 2011, the Director, Office of Workers' Compensation Programs (the Director), filed a motion for 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. Carrier opposed the Director's motion, challenging the constitutionality and retroactive application of amended Section 932(l) to this survivor's claim. Carrier also argued that the operative date for determining eligibility for survivor's benefits under amended Section 932(l) is the date that the miner's claim was filed, which was prior to January 1, 2005. In his Order Awarding Survivor's Benefits dated September 7, 2011, the administrative law judge granted the Director's motion and determined that benefits should commence as of February 2011, the month in which the miner died.

On appeal, carrier challenges the constitutionality of amended Section 932(l), and its retroactive application to this survivor's claim. Carrier argues, alternatively, that if the Board does not reverse the award of benefits, due process requires that the case be remanded to the administrative law judge to give employer the opportunity to submit

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<sup>1</sup> Claimant is the widow of the miner, Herbert Walls, who died on February 1, 2011. Director's Exhibit 4. At the time of his death, the miner was receiving federal black lung benefits pursuant to a lifetime award issued on May 22, 1991 by Administrative Law Judge Nicodemo De Gregorio. Director's Exhibits 2, 9.

evidence of the economic impact created by the amendments to support its argument that this legislation effects an unconstitutional taking of property under the Fifth Amendment. Carrier further argues that the operative date for determining eligibility for survivor's benefits under amended Section 932(l) is the date that the miner's claim was filed, which was prior to January 1, 2005.<sup>2</sup> The Director responds and urges the Board to affirm the award of benefits. Claimant has not filed a response brief.

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.<sup>3</sup> 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).

As an initial matter, we reject carrier'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 an unlawful 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 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), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010); *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). In addition, we deny carrier's alternative request that we remand the case for development of evidence relevant to the economic impact of amended Section 932(l). *Stacy*, 671 F. 3d at 387, 25 BLR at 2-75; *Stacy*, 24 BLR at 1-214.

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<sup>2</sup> Carrier's argument, that further proceedings or actions related to this claim should be held in abeyance pending resolution of the constitutional challenges to the Patient Protection and Affordable Care Act, Public Law No. 111-148 (2010 ) is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012). We also deny carrier's request to hold this case in abeyance until the Supreme Court considers *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), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010).

<sup>3</sup> The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 1. 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).

Furthermore, the United States Court of Appeals for 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. *Stacy*, 671 F. at 383 n.2, 25 BLR at 2-74 n.2. For the reasons set forth in *Stacy*, we hold that carrier's arguments to the contrary are without merit. *Id.*

Because claimant filed her subsequent survivor's claim after January 1, 2005, her claim was pending after 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), 30 U.S.C. §932(l).

Accordingly, the administrative law judge's Order Awarding Survivor's 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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JUDITH S. BOGGS  
Administrative Appeals Judge