

BRB No. 12-0003 BLA

BERTHA MCMILLION)	
(Widow of JIMMIE MCMILLION))	
)	
Claimant-Respondent)	
)	
v.)	
)	
WESTMORELAND COAL COMPANY)	DATE ISSUED: 09/10/2012
)	
Employer-Petitioner)	
)	
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.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Sarah M. Hurley (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.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-6080) of Administrative Law Judge Michael P. Lesniak rendered on 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). Claimant filed this survivor's claim on January 20, 2011.¹ Director's Exhibit 4.

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).

On August 2, 2011, while this case was pending before the administrative law judge, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision, asserting that no material issue of fact was contested and 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. Employer responded, arguing that claimant is not automatically entitled to survivor's benefits under amended Section 932(l) because the operative filing date is the date of the miner's claim, which was filed before January 1, 2005 and was not pending on March 23, 2010. Claimant did not respond to the Director's motion.

In his Decision and Order Awarding Benefits, the administrative law judge found that there was no genuine issue of material fact regarding whether claimant satisfied the criteria for derivative entitlement pursuant to amended Section 932(l), finding that her claim was filed after January 1, 2005, the claim was pending after March 23, 2010, and the miner was receiving benefits at the time of his death pursuant to a claim filed during his lifetime.² Accordingly, the administrative law judge awarded benefits, commencing as of January 2011, the month in which the miner died.

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 further 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

¹ Claimant is the widow of the miner, who died on January 2, 2011. Director's Exhibit 6.

² The miner was receiving federal black lung benefits at the time of his death pursuant to a request for modification of the denial of his 1982 duplicate claim, based on employer's agreement to accept liability in 1998. Director's Exhibit 2.

date that the survivor's claim was filed. The Director responds, urging the Board to affirm the administrative law judge's award of benefits. Claimant has not responded to employer's appeal. Employer filed a reply brief in support of its position.³

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, within whose jurisdiction this case arises, recently rejected.⁵ *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); *see also B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011). For the reasons set forth in *Stacy*, we reject employer's arguments.

³ Employer argues that because the Patient Protection and Affordable Care Act (PPACA) is being litigated in the United States Supreme Court, adjudication of this case should be held in abeyance pending resolution of the constitutionality of the PPACA, and the severability of non-health care provisions by the Court. Subsequent to the filing of employer's Brief in Support of Petition for Review, the Court upheld the constitutionality of the PPACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012). Thus, employer's argument that this case should be held in abeyance pending resolution of the constitutionality of the PPACA is moot.

⁴ As the miner was last employed in the coal mining industry in West Virginia, the Board will apply the law 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); Director's Exhibits 1, 2.

⁵ Employer's request, that further proceedings or action related to this case be held in abeyance pending a final decision from the Fourth Circuit in *Stacy*, is moot. *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).

Because claimant filed her 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 Section 422(l) of the Act, 30 U.S.C. §932(l).

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge