

BRB No. 12-0023 BLA

ANNA PEARL WILKINS)	
(Widow of HUBERT WILKINS))	
)	
Claimant-Respondent)	
)	
v.)	
)	
GIBRALTAR COAL CORPORATION c/o)	DATE ISSUED: 09/27/2012
OLD REPUBLIC INSURANCE COMPANY)	
)	
and)	
)	
PEABODY INVESTMENTS,)	
INCORPORATED)	
)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2011-BLA-5163) of Administrative Law Judge John P. Sellers, III (the administrative law judge), rendered on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act,¹ 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).

On July 12, 2010, claimant filed a timely request for modification of the denial of her survivor's claim. 20 C.F.R. §725.310; Director's Exhibit 52. In a Revised Proposed Decision and Order dated August 12, 2010, the district director determined that claimant is an eligible survivor of a miner who was receiving benefits at the time of his death and, therefore, is entitled to an automatic award of benefits under amended Section 932(l). Director's Exhibit 55. At employer's request, the case was transferred to the Office of Administrative Law Judges for a hearing. Director's Exhibit 56.

By Order dated September 7, 2011,² the administrative law judge cancelled the scheduled hearing and admitted into the record Director's Exhibits 1-62. Additionally, the administrative law judge provided the parties the opportunity to submit written

¹ Claimant is the widow of the miner, who died on May 4, 2008. Director's Exhibit 12. Claimant filed her survivor's claim on May 30, 2008. Director's Exhibit 2. On January 29, 2010, Administrative Law Judge Donald W. Mosser issued a Decision and Order denying benefits. Director's Exhibit 50.

² Within the September 7, 2011 Order, the administrative law judge stated that a teleconference had taken place on that date with claimant and counsel for employer. Additionally, the administrative law judge stated that during the teleconference, counsel for employer indicated that "he did not anticipate any factual issues for hearing and that the [e]mployer's opposition to an award of benefits involved a legal challenge to the constitutionality of the automatic entitlement provision of the [Patient Protection and Affordable Care Act]." Order Cancelling Hearing at 2.

objections to the Director's Exhibits and proffer any additional evidence, subject to the evidentiary limitations. Neither party responded to the administrative law judge's Order.

In his Decision and Order Awarding Benefits, the administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l), finding that the miner was receiving benefits at the time of his death due to a final award and that claimant met the relationship and dependency criteria.³ Accordingly, the administrative law judge awarded survivor's benefits, commencing as of May 2008, the month of the miner's death.

On appeal, employer challenges the administrative law judge's application of amended Section 932(l) to this case, arguing that the survivor's claim had been finally denied on January 29, 2010 and, therefore, was not pending on March 23, 2010.⁴ Employer's Brief at 4-5. Employer further argues that the automatic entitlement provision at amended Section 932(l) "is, in effect, an irrebuttable presumption" that will not "pass constitutional muster" because it is not explicit and the facts presumed do not bear a rational connection to the facts proved. *Id.* at 6. Additionally, employer argues that the PPACA does not provide a basis for the relitigation of the denial of a survivor's claim under 20 C.F.R. §725.310. *Id.* at 10-11. The Director, Office of Workers' Compensation Programs, responds, urging the Board to reject employer's contentions and to affirm the administrative law judge's award of benefits. Claimant has not filed a response.

³ The miner was receiving federal black lung benefits at the time of his death pursuant to a claim filed on July 9, 1986, which was awarded by Administrative Law Judge Robert G. Mahony on October 27, 1994. Director's Exhibit 1. The administrative law judge's award of benefits was affirmed by the Board, *Wilkins v. Gibraltar Coal Co.*, BRB No. 95-0712 BLA (July 27, 1995)(unpub.), and the United States Court of Appeals for the Sixth Circuit, *Peabody Coal Co. v. Wilkins*, 156 F.3d 1231 (Table), 1998 WL 416016 (6th Cir. 1998). Director's Exhibit 1.

⁴ Employer argues that because the Patient Protection and Affordable Care Act (PPACA) is being litigated in the United States Supreme Court, adjudication of this claim 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. , 132 S.Ct. 2566 (2012). Thus, employer's argument that this case should be held in abeyance pending resolution of the constitutionality of the PPACA is moot.

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.⁵ 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).

Initially, we reject employer's argument that the recent amendments to Section 932(l) do not apply to a request for modification of the denial of a survivor's claim. Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a), permits the reopening and readjudication of a denied survivor's claim within one year of the order denying benefits, based on a showing of a mistake in a determination of fact, including the ultimate fact of entitlement. *See* 20 C.F.R. §725.310; *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-996 (6th Cir. 1994); *Mullins v. ANR Coal Co.*, 25 BLR 1-49 (2012), *recon. denied* (June 14, 2012)(Order)(unpub.). The language of Section 1556(c) of the PPACA mandates the application of amended Section 932(l) to all claims filed after January 1, 2005, that are **pending on or after March 23, 2010**, and provides that a survivor of a miner who was receiving benefits at the time of his or her death is now automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. Pub. L. No. 111-148, §1556(c) (2010); 30 U.S.C. §932(l); *Mullins*, 25 BLR at 1-53; *see also Richards v. Union Carbide Corp.*, 25 BLR 1-31 (2012) (en banc) (McGranery, J., concurring and dissenting) (Boggs, J., dissenting), *appeal docketed*, No. 12-1294 (4th Cir. Mar. 8, 2012).

Moreover, based on the reasoning set forth in *B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011), we reject employer's contention that amended Section 932(l) creates an irrebuttable presumption in violation of the United States Constitution and the Act. *See Wright v. Eastern Associated Coal Co.*, 25 BLR 1-69, 1-73 (2012).

As claimant filed her survivor's claim after January 1, 2005, timely requested modification such that her claim was pending after March 23, 2010, and the miner was found to be eligible to receive benefits at the time of his death by a final award of benefits, *see* n.3, *supra*, we affirm the administrative law judge's finding that claimant is derivatively entitled to survivor's benefits pursuant to amended Section 932(l). *See Mullins*, 25 BLR at 1-53.

⁵ The record indicates that the miner was employed in the coal mining industry in Kentucky. This case, therefore, arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge