

BRB No. 12-0026 BLA

EVA ELIZABETH HILL)
(Widow of ARTHUR HILL))
)
Claimant-Respondent)
)
v.)
)
PEABODY COAL COMPANY) DATE ISSUED: 09/26/2012
)
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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Barry H. Joyner (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-5627) of Administrative Law Judge Alice M. Craft, rendered on a survivor's subsequent 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).¹ 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.

Claimant filed her subsequent survivor's claim on January 18, 2011. Director's Exhibit 2. On June 19, 2011, the administrative law judge issued an Order to Show Cause Why Benefits Should Not be Awarded Under the Automatic Survivor Entitlement Provision of the Black Lung Benefits Act Without Holding a Hearing. None of the parties filed a response to the Order. Decision and Order at 2. The administrative law judge determined that, pursuant to amended Section 932(l), claimant was automatically entitled to benefits, and awarded survivor's benefits, commencing as of March 23, 2010, the date on which the PPACA was enacted.

On appeal, employer challenges the retroactive application of amended Section 932(l) to the subsequent survivor's claim, arguing that the claim is barred by the principles of res judicata and 20 C.F.R. §725.309(d). Employer further maintains that "revising the facts and rewriting the law" violates its constitutional right to due process and the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).² Employer's Brief at 9. The Director, Office of Workers' Compensation

¹ Claimant is the widow of the miner, Arthur Hill, who was receiving federal black lung benefits at the time of his death on May 9, 2000. Director's Exhibits 3, 9, 14. Claimant filed her initial survivor's claim on June 19, 2000, which was denied by Administrative Law Judge Robert L. Hillyard because claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The Board, and the United States Court of Appeals for the Sixth Circuit, affirmed the denial of benefits. *Hill v. Peabody Coal Co.*, No. 03-3321 (6th Cir. Apr. 7, 2004); *Hill v. Peabody Coal Co.*, BRB No. 02-0433 BLA (Jan. 28, 2003)(unpub.); Director's Exhibit 1. Claimant took no further action with respect to this claim.

² Employer notes that challenges to the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010), of which the amendments are a part, may affect the viability of amended Section 932(l). Subsequent to the briefing in this case, the United States Supreme 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). Employer's request that this case be held in abeyance is, therefore, moot.

Programs (the Director), responds and urges the Board to affirm the award of benefits. However, the Director contends that the administrative law judge's finding that benefits commence on March 23, 2010, must be modified. 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.³ 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).

As an initial matter, 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 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 also* *W.Va. CWP Fund v. Stacy*, 671 F. 3d 378, 25 BLR 2-69 (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); *B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-16 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). For the reasons set forth in *Campbell*, we also reject employer's argument that the automatic entitlement provision at amended Section 932(l), "is, in effect, an irrebuttable presumption that a miner's death is influenced by pneumoconiosis." *Campbell*, 662 F.3d at 254-58, 25 BLR at 2-47-53; Employer's Brief at 12.

Employer next alleges that the subsequent claim in this case is barred by the general principles of res judicata and 20 C.F.R. §725.309, as claimant's prior claim for survivor's benefits was denied and that denial became final. We disagree. The terms of 20 C.F.R. §725.309, which require that a subsequent claim be denied unless a change in an applicable condition of entitlement is established, do not preclude a survivor's subsequent claim, filed within the time limitations set forth in Section 1556 of the PPACA, as entitlement thereunder is not tied to relitigation of the prior finding that claimant did not prove that the miner's death was not due to pneumoconiosis. *See Richards v. Union Carbide Corp.*, BLR , BRB Nos. 11-0414 BLA and 11-0414 BLA-A, slip op. at 4-6 (Jan. 9, 2012) (en banc) (McGranery, J., concurring and dissenting)

³ The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

(Boggs, J., dissenting), *appeal docketed*, No. 12-1294 (4th Cir. Mar. 8, 2012). Contrary to employer's contention, therefore, the automatic entitlement provisions of amended Section 932(l) are available to an eligible survivor who files a subsequent claim within the time limitations established in Section 1556 of the PPACA. *Id*

Finally, we agree with the Director that the administrative law judge did not set the proper date for the commencement of benefits. In *Richards*, the Board determined that the provisions of 20 C.F.R. §725.309(d)(5) must be applied in a survivor's subsequent claim to bar the payment of benefits from a date prior to the date upon which the denial of the prior claim became final. *Richards*, slip op. at 7-8. In the present case, the United States Court of Appeals for the Sixth Circuit issued its decision affirming the denial of benefits in claimant's 2000 claim on April 7, 2004 and the court's decision became final on June 1, 2004, when the court's mandate issued. *See Youghioghney & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 952, 22 BLR 2-46, 2-61 (6th Cir. 1999); Director's Exhibit 1. Thus, claimant's survivor's benefits properly commence as of July 1, 2004, the first day of the month after the month in which the prior denial of benefits became final. 20 C.F.R. §§725.309(d)(5), 725.479(a); *see Richards*, slip op. at 7-8.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed, as modified to reflect July 2004, as the date from which benefits commence.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

BETTY JEAN HALL
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I concur in the majority's decision affirming the award of benefits in this subsequent survivor's claim. I also concur in the majority's determination to modify the administrative law judge's order to provide for commencement of benefits in the month after the month in which the denial of the prior survivor's claim became final, because I

am bound by the majority's decision in *Richards v. Union Carbide Corp.*, BLR , BRB Nos. 11-0414 BLA and 11-0414 BLA-A (Jan. 9, 2012) (en banc) (McGranery, J., concurring and dissenting) (Boggs, J., dissenting), *appeal docketed*, No. 12-1294 (4th Cir. Mar. 8, 2012). In my separate opinion in *Richards*, I stated my disagreement with the majority's determination of the commencement of benefits in subsequent survivors' claims. I pointed out that the amended Act makes no distinction between survivors who had previously filed a claim for benefits and those who had not. In my view, pursuant to 20 C.F.R. §725.503(c), claimant is entitled to benefits from May 2000, the month in which the miner died.

REGINA C. McGRANERY
Administrative Appeals Judge