

BRB No. 12-0055 BLA

MARY E. PATRICK )  
(Widow of HAROLD R. PATRICK SR.) )  
 )  
Claimant-Respondent )  
 )  
v. )  
 )  
DEHUE COAL COMPANY ) DATE ISSUED: 09/25/2012  
 )  
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (The Law Office of Roger D. Forman, L.C.), Charleston, West Virginia, for claimant.

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

Maia S. Fisher (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-06130) of Administrative Law Judge Richard A. Morgan rendered on a survivor's claim filed on May 16, 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, 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), Pub. L. 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 22, 2011, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision, arguing that, under amended Section 932(l), and based on the filing date of her claim, claimant is entitled to receive benefits based on the award of benefits to her deceased husband. Employer opposed the motion and argued that the case should be held in abeyance pending the final determination on the constitutionality of the PPACA and amended Section 932(l). Employer also argued that claimant is not entitled to survivor's benefits under Section 932(l) because the operative date for determining eligibility thereunder was the filing date of the miner's claim, which was before January 1, 2005. Claimant did not file a response to the Director's motion.

In his Decision and Order Awarding Benefits, the administrative law judge found that claimant satisfied the criteria for derivative entitlement pursuant to amended Section 932(l), and awarded benefits, commencing on May 1, 2011, the first day of the month in which the miner died.

On appeal, employer challenges the constitutionality of amended Section 932(l), and its application to this claim.<sup>2</sup> Claimant and the Director respond in support of the

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<sup>1</sup> Claimant is the widow of the miner, who died on May 14, 2011. Director's Exhibit 6. The miner filed his lifetime claim for black lung benefits on August 28, 1989. Decision and Order at 2; Director's Exhibits 2. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim. *Id.*

<sup>2</sup> Employer also argues that, because the Patient Protection and Affordable Care Act (PPACA) is being litigated in the United States Supreme Court, this case should be held in abeyance, pending resolution of the constitutionality of the PPACA and the

administrative law judge's application of amended Section 932(l) to this case and urge the Board to reject employer's arguments and affirm the award of survivor's benefits.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer argues that retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005, violates employer's due process rights and constitutes a taking of private 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 that the survivor's claim was filed. The arguments employer makes are virtually identical to those that the United States Court of Appeals for the Fourth Circuit recently rejected in *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (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). *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 hold that employer's arguments are without merit.

Employer next contends that claimant is not an "eligible survivor" within the meaning of amended Section 932(l), because she did not prove that pneumoconiosis caused, or contributed to, the miner's death. Contrary to employer's contention, the automatic entitlement provisions of amended Section 932(l) provide benefits to a survivor without the requirement that she prove that the miner's death was due to pneumoconiosis. *See Campbell*, 663 F.3d at 249-50, 253, 25 BLR at 2-38-39, 2-44; *Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-231 (2011). Thus, we reject employer's

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severability of the non-health care provisions. 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 request that this case should be held in abeyance pending resolution of the constitutionality of the PPACA is moot.

<sup>3</sup> The record indicates that the miner was employed in the coal mining industry in West Virginia. Director's Exhibits 2. 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).

assertion that claimant is not an “eligible survivor” within the meaning of amended Section 932(l).

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). Director’s Exhibit 2.

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

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge