

BRB No. 12-0060 BLA

CAROL S. McKINNEY )  
(Widow of OPIE W. McKINNEY) )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 HIOPE MINING, INCORPORATED )  
 )  
 and )  
 )  
 WEST VIRGINIA COAL WORKERS' ) DATE ISSUED: 09/26/2012  
 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,  
Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton,  
Virginia, for claimant.

Tiffany B. Davis (Jackson Kelly PLLC), Morgantown, West Virginia, for  
employer/carrier.

Emily Goldberg-Kraft (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/carrier (employer) appeals the Order Awarding Survivor's Benefits (11-BLA-5989) of Administrative Law Judge William S. Colwell rendered on a 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). This case involves a survivor's claim filed on May 17, 2011.<sup>1</sup> Director's Exhibit 2.

On March 23, 2010, Congress enacted amendments to the Act, affecting claims filed after January 1, 2005. The amendments, in pertinent part, revive Section 932(*l*) of the Act, which provides that a survivor of a miner who was determined to be 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*). The district director awarded benefits to claimant pursuant to amended Section 932(*l*), and employer requested a hearing. Director's Exhibits 8, 9, 12.

On September 2, 2011, the Director, Office of Workers' Compensation Programs (the Director), moved for a summary decision, asserting that, pursuant to amended Section 932(*l*), claimant is automatically entitled to benefits as a matter of law, and that there is no genuine issue as to any material fact regarding her entitlement. Employer responded on September 16, 2011, arguing that amended Section 932(*l*) should not be applied. Claimant did not file a response to the Director's motion.

In an Order Awarding Survivor's Benefits dated September 26, 2011, the administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(*l*). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 932(*l*) to this case. Claimant and the Director respond in support of the administrative law judge's award of benefits. Employer filed a reply brief, reiterating its arguments on appeal.

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<sup>1</sup> Claimant is the widow of the miner, who died on May 3, 2011. Director's Exhibit 5. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim. Director's Exhibit 1.

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>2</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and 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. Additionally, employer argues that conflicting language contained in other sections of the Act requires a survivor to establish that the miner's death was due to pneumoconiosis, negating the automatic entitlement provision of amended Section 932(l).<sup>3</sup> Employer's Brief at 11-43; Employer's Reply Brief at 1-9. The arguments employer makes are virtually identical to the ones that the United States Court of Appeals for the Fourth Circuit recently rejected. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383-89, 25 BLR 2-65, 2-76-85 (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, 244 & n.12, 25 BLR 2-13, 2-28 & n.12 (3d Cir. 2011). For the reasons set forth in *Stacy*, we reject employer's arguments.

In this case, the administrative law judge found that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under amended Section 932(l): that she filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending on March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death. Therefore, we

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<sup>2</sup> The record reflects that the miner's coal mine employment was in Virginia and 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, 1-202 (1989) (en banc).

<sup>3</sup> Employer's request that this case be held in abeyance pending the United States Supreme Court's resolution of the petition for certiorari filed in *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), is denied. Additionally, employer's request that this case be held in abeyance pending the resolution of the constitutional challenges to other provisions of the Patient Protection and Affordable Care Act, Public Law No. 111-148, is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012).

affirm the administrative law judge's determination that claimant is entitled to receive benefits pursuant to amended Section 932(l) of the Act. 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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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