BRB No. 10-0113 BLA

ELSIE STACY (Widow of HOWARD STACY) Claimant-Petitioner v. OLGA COAL COMPANY and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/22/2010 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jeffrey S. Tureck, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Wendy G. Adkins (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Michael J. Rutledge and 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (08-BLA-5293) of Administrative Law Judge Jeffrey S. Tureck rendered on a survivor's claim[1] 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). Adjudicating the claim under 20 C.F.R. Part 718, the administrative law judge credited the miner with eleven years of coal mine employment, based on the parties' stipulation. The administrative law judge found that the doctrine of collateral estoppel did not preclude employer from contesting the existence of pneumoconiosis in the survivor's claim, because "the issue of pneumoconiosis was never litigated in the [m]iner's claim." Decision and Order at 3-4. The administrative law judge further found that the evidence of record did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

Claimant appealed, arguing that the administrative law judge erred in finding that collateral estoppel does not apply to this claim, and further erred in his consideration of the computerized tomography and medical opinion evidence when he found that the existence of pneumoconiosis was not established under 20 C.F.R. §718.202(a)(4). Employer responded, urging the Board to affirm the administrative law judge's findings and the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a response brief.

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, were enacted. The amendments, in pertinent part, revive Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that an eligible survivor of a miner who was receiving 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.[2] 30 U.S.C. §932(*l*).

[1] Claimant is the widow of the miner, who died on January 17, 2007. Director's Exhibit 9. Claimant filed her claim for survivor's benefits on February 1, 2007. Director's Exhibit 2. At the time of his death, the miner was receiving federal black lung benefits pursuant to a final award on his lifetime claim. Administrative Law Judge Exhibit 1 at 155, 174.

[2] As it existed prior to March 23, 2010, Section 932(*l*) provided that:

On May 19, 2010, claimant moved that this case be remanded to the district director for an award of survivor's benefits to be entered under the automatic entitlement provision. The Director responded, agreeing with claimant that the recent amendment to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), mandates an award of benefits, regardless of whether claimant is able to prove that the miner had pneumoconiosis, or that his death was due to pneumoconiosis. The Director specifically noted that the miner was receiving benefits pursuant to a final award on his claim at the time of his death, that claimant filed her survivor's claim after January 1, 2005, and that her claim was pending on March 23, 2010. The Director requested that the Board vacate the administrative law judge's denial of benefits and enter an order directing employer to pay survivor's benefits. Employer responded, asserting, *inter alia*, that the retroactive application of the recent amendments is unconstitutional, and arguing that this case should be held in abeyance until sixty days after the Department of Labor issues guidelines or promulgates regulations implementing 30 U.S.C. §932(*l*), as amended and made applicable by Section 1556 of Public Law No. 111-148.

On August 5, 2010, employer filed a Supplemental Brief in Opposition to Remand for Application of Automatic Entitlement Provision, along with a motion to accept and consider the additional brief. *See* 20 C.F.R. §802.215. In its Supplemental Brief, employer argued that claimant is not automatically entitled to survivor's benefits based on the recent amendment to Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), because, under the plain language of Section 932(*l*), as amended by Section 1556 of Public Law No.

> In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner, except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981, [*sic*].

30 U.S.C. §932(*l*). On March 23, 2010, Public Law No. 111-148 amended Section 932(*l*) as follows: "(b) Continuation of Benefits – Section 432(*l*) of the Black Lung Benefits Act (30 U.S.C. §932(*l*)) is amended by striking 'except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981'." Pub. L. No. 111-148, §1556(b), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §932(*l*)). Section 1556 of Public Law No. 111-148 provides further that "[t]he amendments made by this section shall apply with respect to claims filed under part B or part C of the Black Lung Benefits Act (30 U.S.C. §921 et seq., 931 et seq.) after January 1, 2005, that are pending on or after the date of enactment of this Act." Pub. L. No. 111-148, §1556(c).

111-148, the operative date for determining eligibility for survivor's benefits is the date the miner's claim was filed, not the date the survivor's claim was filed. Employer contended that, because the miner filed his claim before January 1, 2005, and his claim was not pending on or after March 23, 2010, the amendments to Section 932(*l*) did not apply to claimant's survivor's claim. Employer further asserted that the Director's position is not entitled to deference, because his reliance on the filing date of the survivor's claim as the operative filing date under Section 932(*l*), is inconsistent with the plain language of the Act and with his previous position in briefs filed with the United States Supreme Court and the United States Court of Appeals for the Third Circuit.[3]

On September 23, 2010, the Board accepted employer's Supplemental Brief, and ordered the Director to file a brief responding to the arguments in employer's Supplemental Brief. The Order also allowed claimant to file a brief responding to employer's arguments. The Director and claimant responded, urging the Board to reject employer's arguments, vacate the denial of benefits, and award benefits on the basis that claimant is derivatively entitled to survivor's benefits. Specifically, the Director and claimant contend that the recent amendments apply to this claim because the plain language of Section 1556 mandates its applications to all claims filed after January 1, 2005, and that this interpretation is consistent with the totality of Section 1556 and the underlying purpose of amended Section 932(*l*). The Director further asserts that, contrary to employer's assertion, his position is entitled to deference. Employer filed an additional brief in response to the Director's brief, reiterating the arguments raised in its Supplemental Brief.

We will first address employer's assertion that, under the plain language of Section 932(*l*), as amended by Section 1556, the operative date for determining eligibility for survivor's benefits is the date that the miner's claim was filed. Specifically, employer asserts that, because Section 1556(c) states that the amendments apply to "claims filed" within a specific time frame, and because Section 932(*l*) provides that survivors of miners who were receiving benefits are not required to file claims, the date that the miner's claim was filed, not the date that the survivor's claim was filed, determines whether the derivative entitlement provision of Section 932(*l*) is available to an eligible survivor.

We disagree. The plain language of Section 1556(c) mandates the application of Section 932(*l*), as amended, to all "claims" filed after January 1, 2005, that are pending on or after March 23, 2010. Pub. L. No. 111-148, §1556(c). Given that both miners and survivors may file "claims" under the Act, and that Congress used the term "claims" in Section 1556(c) without any qualifying or limiting language, except for the specific effective date, the plain language supports the Director's position that Section 1556(c)

[3] Employer cited and attached copies of those briefs.

must be interpreted to apply amended Section 932(*l*) to survivors' claims that are filed after January 1, 2005.

Moreover, even if the word "claims" in Section 1556(c) were ambiguous, we agree that the Director's interpretation is correct because it is consistent with the "fundamental purpose"[4] and "practical reality" of amended Section 932(*l*). Director's Brief at 8. Although employer correctly states that survivors are not "required" to file claims under amended Section 932(*l*), Employer's Supplemental Brief at 4, employer's conclusion that, therefore, Section 1556(c)'s use of the word "claims" refers only to miners' claims, ignores the fact that the recent amendments to Section 932(*l*) repealed language that, since 1982, required survivors to file claims, by restricting the availability of derivative entitlement. Thus, in reviving the derivative entitlement provision of Section 932(*l*), the recent amendments automatically entitle eligible survivors, who were previously required to file claims, to derivative benefits based solely on the miner's awarded claim. As the Director states, "[t]he effect of amended [Section 932(*l*)] is to change the condition of entitlement for certain survivors previously required to prove that the miner died due to pneumoconiosis. The amendment added an alternative condition under which those survivors could establish entitlement – that the miner had been awarded benefits." Director's Brief at 8-9. Moreover, the Director correctly observes that Section 932(*l*) does not "prohibit filings for which there is an administrative need," and that survivors will need to file some sort of paperwork or "claim," because a survivor cannot begin to receive benefits unless the Office of Workers' Compensation Programs is notified of the miner's death and of the survivor's current status. Director's Brief at 9, *citing Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 1328, 12 BLR 2-60, 2-72 (3d Cir. 1988). Therefore, given that the recent amendments make derivative entitlement available to survivors who were previously required to file claims, that Section 932(*l*) does not prohibit filings for which there is an administrative need, and that survivors will need to file some sort of paperwork to ensure that they receive benefits, we reject employer's assertion that it would "contravene the plain language of [Section 932(*l*)] to determine the applicability of [Section 1556] based on the date a survivor's claim is filed." Employer's Supplemental Brief at 4.

Employer additionally asserts that the Director's interpretation of Section 1556(c) renders meaningless the time limitations imposed by Congress in Section 1556(c), because "[a]ny eligible survivor of a miner who was receiving benefits at the time of his

[4] The Director, Office of Workers' Compensation Programs (the Director), asserts, and employer agrees, that the "fundamental purpose" of Section 932(*l*), as demonstrated by its plain language, is to automatically entitle an eligible survivor to derivative benefits, based solely on a miner's awarded claim. Director's Brief at 8; Employer's Reply Brief at 8.

death, is automatically entitled to benefits if she now files a claim because that claim would be filed after January 1, 2005 and pending after March 23, 2010." Employer's Supplemental Brief at 5. As the Director states, pursuant to the plain language of Section 1556, this statement of eligibility is correct. Director's Brief at 10. Employer's assertion, however, overlooks the fact that not all survivors' claims filed after January 1, 2005 were pending on or after March 23, 2010. Thus, the accurate application of Section 1556(c)'s time limitations does not render them "meaningless." *Id*.

Further, we agree with the Director and claimant that the legislative history of Section 1556 supports the Director's reading of its plain text. On March 25, 2010, Senator Robert C. Byrd, the sponsor of Section 1556, explained that its amendments to the Act will apply not only to future claims filed by miners and "widows," but that Section 1556 will also benefit "all of the claimants who have recently filed a claim, and are awaiting or appealing a decision and order, or who are in the midst of trying to determine whether to seek a modification of a recent order." 156 Cong. Rec. S2083-84 (daily ed. Mar. 25, 2010) (statement of Sen. Byrd). Although, as employer notes, Senator Byrd made those statements two days after the enactment of Section 1556, he was the sponsor of Section 1556, and thus, his post-enactment statements are probative of Congress's legislative intent.[5] *See Pacific Gas and Elec. Co. v. State Energy Res. Conservation and Development Comm'n*, 461 U.S. 190, 208 (1983) (citing post-enactment statements by a person involved with the drafting of a particular act as "confirming" Congress's legislative intent); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 527 (1982) (holding that post-enactment statements made by a legislation's sponsor "are an authoritative guide to the statute's construction").

Employer additionally asserts that the Director's interpretation of Section 1556 is not entitled to deference because the Director has taken inconsistent positions regarding the operative filing date for the application of Section 932(*l*). In support, employer notes that, after the Black Lung Benefits Amendments of 1981, Pub. L. 97-119, §203(a)(6), 95 Stat. 1635, 1644 (1981) (the "1981 Amendments"), the Director took the position that

[5] Employer's reliance on Justice Scalia's concurring opinion in *Sullivan v. Finkelstein*, 496 U.S. 617 (1990), for the proposition that post-enactment legislative history is oxymoronic and "should not be taken seriously," is misplaced. In *Sullivan*, Justice Scalia criticized the majority for considering, as legislative history, documents that represented what committees of the Ninety-ninth and Ninety-fifth Congresses thought that the Seventy-sixth Congress intended, because the specific legislators in question did not vote on the particular statute in question. *Sullivan*, 496 U.S. at 631. Here, by contrast, given that Senator Byrd was the sponsor of the legislation, and that his statements were made two days after its enactment, the facts of this case are distinguishable from those of *Sullivan*.

"the operative date for determining whether the survivor is eligible for benefits under §932(*l*) is the date the miner's claim was filed." Employer's Supplemental Brief at 10. Employer's argument, however, ignores the fact that it was the limiting language that was added by the 1981 Amendments that the Director then interpreted as premising the availability of derivative entitlement on the date that the miner's claim was filed.[6] Section 1556 has now repealed the language added by the 1981 Amendments, and employer acknowledges that the issue before the Board is the statutory construction of Section 1556(c). Employer's Reply Brief at 2, 8. Therefore, employer's focus on the Director's interpretation of the former language in Section 932(*l*) that was added by the 1981 Amendments, is misplaced. Moreover, since both the plain text and legislative history of Section 1556 support the Director's position, and his interpretation is consistent with the "practical reality" and "fundamental purpose" of Section 932(*l*), we reject employer's assertion that the Director's interpretation is not entitled to deference. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (2004); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 845 (1984); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

Based on the foregoing, we hold that, under amended Section 932(*l*), an eligible survivor who files a claim after January 1, 2005, that is pending on or after the March 23, 2010 effective date of the Section 1556 amendments, is entitled to benefits based solely on the miner's lifetime award, without having to prove that the miner died due to pneumoconiosis. *See* 30 U.S.C. §932(*l*). Thus, because claimant filed her claim after January 1, 2005, the claim was pending on March 23, 2010, and the miner was receiving benefits under a final award at the time of his death, claimant is derivatively entitled to survivor's benefits pursuant to Section 932(*l*).

We next address the arguments raised by employer in its initial response to claimant's Motion to Remand. Employer contends that the retroactive application of amended Section 932(*l*) to claims filed after January 1, 2005, is unconstitutional in that it violates employer's due process rights, because Congress provided no "legitimate

[6] Section 932(*l*), as originally enacted, provided that: "[i]n no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner." 30 U.S.C. §932(*l*) (1978). Subsequently, the Black Lung Benefits Amendments of 1981, Pub. L. 97-119, §203(a)(6), 95 Stat. 1635, 1644 (1981) (the "1981 Amendments"), inserted the following language at the end of Section 932(*l*), "*except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981*." 30 U.S.C. §932(l) (1982) (emphasis added). The effective date of the 1981 Amendments was January 1, 1982.

purpose" for making the legislation retroactive, and arbitrarily chose January 1, 2005 as the operative filing date for the application of amended Section 932(*l*). Employer's Brief at 8-9. Employer additionally asserts that the retroactive application of amended Section 932(*l*) to this case constitutes an unlawful taking of employer's property under the Fifth Amendment to the United States Constitution. Specifically, employer asserts that: (1) the amendments impose a "harsh new reality" on employer that it could not have foreseen in 2005, (2) employer had no opportunity to adjust its conduct to avoid or minimize the adverse effect of these amendments, and (3) employer based its assessments of premiums for federal black lung insurance for 2005 on the Act as it then existed and cannot prospectively adjust those premiums to compensate for the increase in the number of claims that will be awarded due to the recent amendments. These arguments are identical to the ones that the Board rejected in *Mathews v. United Pocahontas Coal Co.*, BLR , BRB No. 09-0666 BLA (Sept. 22, 2010)(motion for reconsideration pending). We reject them here for the same reasons set forth in *Mathews*. The retroactive application of amended Section 932(*l*) to claims filed after January 1, 2005 does not violate the Fifth Amendment Due Process Clause, nor has employer demonstrated that it constitutes an unlawful taking of employer's property under the Fifth Amendment.[7] *Mathews*, BRB No. 09-0666 BLA, slip op. at 4-7.

Finally, we reject employer's request that this case be held in abeyance until sixty days after DOL issues guidelines or promulgates regulations implementing amended Section 932(*l*). As the Board stated in *Mathews*, the mandatory language of amended Section 932(*l*) supports the conclusion that the provision is self-executing, and, therefore, there is no need to hold this case in abeyance, pending the promulgation of new regulations. *Matthews*, BRB No. 09-0666 BLA, slip op. at 7; *see also Hanson v. Marine Terminals Corp.*, 307 F.3d 1139, 1141-42 (9th Cir. 2002); *Alabama Power Co. v. FERC*, 160 F.3d 7, 12-14 (D.C. Cir. 1998); *Gholston v. Housing Authority of Montgomery*, 818 F.2d 776, 784-87 (11th Cir. 1987). Employer also notes that the constitutionality of Public Law No. 111-148 has been challenged in a lawsuit filed in the United States District Court for the Northern District of Florida. Employer therefore requests that "[p]otentially affected federal black lung claims . . . be held in abeyance until resolution of this legal challenge . . . ." Employer's Supplemental Brief at 13. Employer does not indicate that any court has yet enjoined the application, or ruled on the validity, of the

[7] As was the case in *Mathews v. United Pocahontas Coal Co.*, BLR , BRB No. 09-0666 BLA (Sept. 22, 2010)(motion for reconsideration pending), employer, in this case, has offered no direct proof of its financial situation.

recent amendments to the Act. Consequently, employer's request to hold this case in abeyance is denied.

Accordingly, because claimant is derivatively entitled to benefits under the recent amendments to the Act, we vacate the administrative law judge's denial of benefits and remand this case to the district director for the entry of an award of benefits pursuant to amended Section 932(*l*).[8]

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[8] In light of our disposition of this case, we need not address the administrative law judge's findings regarding the merits of entitlement.