

BRB No. 11-0613 BLA

BARBARA JEAN WRIGHT)	
(Widow of SANKIE WRIGHT))	
)	
Claimant-Respondent)	
)	
v.)	
)	
EASTERN ASSOCIATED COAL)	DATE ISSUED: 05/24/2012
CORPORATION)	
)	
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

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

Rita A. Roppolo (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 appeals the Decision and Order Awarding Benefits (2011-BLA-5494) of Administrative Law Judge Thomas M. Burke rendered on a survivor's 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). Claimant filed her survivor's claim on December 7, 2009.¹ Director's Exhibit 2.

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 March 14, 2011, while the case was pending before the administrative law judge, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision, asserting that no material issue of fact was contested and that, under amended Section 932(l), and given the filing date of her claim, claimant was entitled to benefits, based on the award of benefits to her deceased husband.²

On March 21, 2011, employer filed a Motion to Remand, Dismiss EACC or to Hold the Case in Abeyance, arguing that claimant is not automatically entitled to survivor's benefits under amended Section 932(l) because the operative filing date is the date of the miner's claim, which was filed before January 1, 2005 and was not pending on March 23, 2010. Employer also argued that, even if the date of the survivor's claim is the operative filing date, employer should be dismissed because the application of amended Section 932(l) is impermissibly retroactive and violates employer's due process rights. In the alternative, employer requested that further proceedings or actions related to this claim be held in abeyance, pending the resolution of the constitutional challenges to the PPACA in federal court. The Director responded, urging the administrative law judge to reject employer's motions and to award survivor's benefits pursuant to amended Section 932(l). Claimant did not respond to the motions by employer and the Director.

¹ Claimant is the widow of the miner, who died on October 28, 2009. Director's Exhibit 9.

² The miner was receiving federal black lung benefits at the time of his death, pursuant to a claim filed on August 4, 1986, which was awarded by Administrative Law Judge John H. Bedford on April 12, 1989. Director's Exhibit 1. In a Decision and Order issued on November 30, 1992, the Board affirmed Judge Bedford's award of benefits. *Wright v. Eastern Associated Coal Corp.*, BRB No. 89-1479 BLA (Nov. 30, 1992) (unpub.).

In his Decision and Order Awarding Benefits, the administrative law judge rejected employer's argument that amended Section 932(l) is inapplicable because the miner's claim was filed prior to January 1, 2005, and was not pending on or after March 23, 2010. The administrative law judge also rejected employer's contention that amended Section 932(l) is impermissibly retroactive and, therefore, is unconstitutional because it violates employer's due process rights. The administrative law judge also declined to hold the case in abeyance. The administrative law judge found that claimant satisfied the criteria for derivative entitlement pursuant to amended Section 932(l), and awarded benefits commencing October 2009, the month in which the miner died.

On appeal, employer contends that amended Section 932(l) is not applicable in this claim because the operative date for determining eligibility for survivor's benefits under amended Section 932(l) is the filing date of the miner's claim. 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. Employer's Brief at 6. Additionally, employer requests that the Board hold the case in abeyance, pending resolution of the constitutionality of the PPACA and the severability of the non-health care provisions. The Director responds, urging the Board to reject employer's contentions. Specifically, the Director urges the Board to reject employer's contention that the amendments to Section 932(l) create an irrebuttable presumption, as this argument has been addressed and rejected by the United States Court of Appeals for the Third Circuit in *B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, BLR (3d Cir. 2011). Claimant did not file 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we reject employer's contentions that the miner's filing date is the operative date for determining eligibility under amended Section 932(l), as the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, affirmed the Board's holding that the operative date for determining eligibility for survivor's benefits under amended Section 932(l) is the date that the survivor's claim was

³ The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibits 1, 6. 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).

filed, not the date that the miner's claim was filed. *West Virginia CWP Fund v. Stacy*, 671 F.3d 378, BLR (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010). For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary.

Employer also contends 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." Employer's Brief at 5-6. Employer maintains that the creation of such a presumption conflicts with 30 U.S.C. §901(a), which provides that the Act is intended to compensate survivors of miners who died due to black lung disease. Employer further asserts that "[i]n order to pass constitutional muster, an irrebuttable presumption must be explicit and the fact presumed must bear a rational connection to the fact proved." *Id.* Employer also contends that amended Section 932(l) is flawed because Congress took no scientific testimony to determine whether the alleged irrebuttable presumption passed constitutional muster or is scientifically valid. *Id.* at 6. The Director asserts, in response, that the Board should reject employer's arguments for the reasons identified by the Third Circuit in *Campbell*.

We agree with the position asserted by the Director. In *Campbell*, the court held that amended Section 932(l) does not create an irrebuttable presumption, stating: "[B]y eliminating the need for a widow to show causation between the miner's pneumoconiosis and his death, Congress simply has set forth as substantive law a provision that the survivor of a miner receiving benefits is entitled to survivors' benefits regardless of the absence of causation between the miner's pneumoconiosis and his death." *Campbell*, 662 F.3d at 254. The court concluded that this "represents a legislative choice to compensate a miner's dependents for the suffering they endured due to the miner's pneumoconiosis or as a means to provide a miner with peace of mind that his dependents will continue to receive benefits after his death." *Id.* at 258. The court declined to "override Congress' implicit determination that the choice was reasonable." *Id.* The court further concluded that amended Section 932(l) is consistent with Section 901(a) of the Act, which provides that the Act is intended to "ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis." *Id.* at 258, *quoting* 30 U.S.C. §901(a). The court concluded that, to the extent that amended Section 932(l) conflicts with Section 901(a) of the Act, the more specific terms of Section 1556(b) of the PPACA prevail. *Campbell*, 662 F.3d at 258.

We are persuaded that the reasoning in *Campbell* represents the proper disposition of employer's contention that amended Section 932(l) creates an irrebuttable presumption in violation of the Constitution and the Act. Accordingly, we reject employer's argument in this regard. Having disposed of employer's constitutional arguments, we also deny employer's request to hold this case in abeyance, pending resolution of the challenges to the PPACA. *See Stacy*, 671 F.3d at 383 n.2; *Stacy*, 24 BLR at 1-214; *Mathews v. United*

Pocahontas Coal Co., 24 BLR 1-193, 1-201 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011)(unpub. Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011).

Because claimant filed her survivor's claim after January 1, 2005, her claim was pending on or 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 Exhibits 1, 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