

BRB No. 12-0368 BLA

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| HELEN B. REKEN                | ) |                         |
| (Widow of JOHN M. REKEN)      | ) |                         |
|                               | ) |                         |
| Claimant-Respondent           | ) |                         |
|                               | ) |                         |
| v.                            | ) |                         |
|                               | ) |                         |
| HELEN MINING COMPANY          | ) | DATE ISSUED: 04/08/2013 |
|                               | ) |                         |
| Employer-Petitioner           | ) |                         |
|                               | ) |                         |
| 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 and Denying Motion to Hold Claim in Abeyance of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Ashley M. Harman and Tiffany B. Davis (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Michelle S. Gerdano (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 Order Awarding Survivor's Benefits and Denying Motion to

Hold Claim in Abeyance (2012-BLA-5512) of Associate Chief Administrative Law Judge William S. Colwell (the administrative law judge) rendered on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). Claimant<sup>1</sup> filed this survivor's claim on October 13, 2011.

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 February 27, 2012, the Director, Office of Workers' Compensation Programs (the Director), moved for a summary decision, asserting that, pursuant to amended Section 932(*l*), claimant was automatically entitled to benefits as a matter of law, and that there was no genuine issue as to any material fact concerning her entitlement. Employer opposed the Director's motion, arguing that the amendments to Section 932(*l*), as contained in the PPACA, are invalid, and that the operative date for determining eligibility for survivor's benefits under amended Section 932(*l*) is the filing date of the miner's claim, which was prior to January 1, 2005. Employer urged the administrative law judge to hold the case in abeyance pending resolution of these constitutional challenges to the PPACA before the United States Supreme Court and several of the United States Courts of Appeals. Claimant did not respond to the Director's motion.

In his Order Awarding Survivor's Benefits and Denying Motion to Hold Claim in Abeyance, the administrative law judge rejected employer's challenges to the applicability of amended Section 932(*l*) in this survivor's claim, and he also rejected employer's request to hold this case in abeyance. Finding it undisputed that claimant satisfied the criteria for derivative entitlement pursuant to amended Section 932(*l*),<sup>2</sup> the

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<sup>1</sup> Claimant is the widow of the miner, who died on September 23, 2011. Director's Exhibit 6.

<sup>2</sup> The miner was found to be entitled to federal black lung benefits at the time of his death pursuant to a claim filed on September 26, 1985, which was awarded by Administrative Law Judge Gerald M. Tierney on August 22, 1988. Director's Exhibit 2. In a Decision and Order issued on April 29, 1992, the Board affirmed Judge Tierney's award of benefits. *Reken v. Helen Mining Co.*, BRB No. 88-3567 BLA (Apr. 29, 1992) (unpub.).

administrative law judge awarded benefits to commence as of September 2011, 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>3</sup> Employer also contends that the operative date for determining eligibility pursuant to amended Section 932(l) is the date that the miner's claim was filed, not the date that the survivor's claim was filed. Additionally, employer argues that claimant is not an "eligible survivor" as defined by amended Section 932(l). Both claimant and the Director respond, urging affirmance of the administrative law judge's award of 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>4</sup> 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).

Employer argues that retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005 is unconstitutional, as a violation of employer's due process rights and as a taking of private property, in violation of the Fifth Amendment to the United States Constitution. Employer also contends that claimant is not an "eligible survivor" because the automatic entitlement provision of amended Section 932(l) is rendered unenforceable by inconsistent language contained in other sections of the Act that, employer asserts, require claimant to establish that the miner's death was due to pneumoconiosis. The arguments employer makes are virtually identical to the ones that the United States Court

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<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), is moot. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012). To the extent employer requests 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, as well as the issue of severability, employer's request is also moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012); Employer's Brief at 5-9.

<sup>4</sup> The record indicates that the miner was employed in the coal mining industry in Pennsylvania. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

of Appeals for the Third Circuit recently rejected.<sup>5</sup> *B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 247-63, 25 BLR 2-13, 2-35-63 (3d Cir. 2011). For the reasons set forth in *Campbell*, we reject employer's arguments.

Employer further 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. With respect to the relevant filing date, the Board has held that the operative date for determining eligibility under amended Section 932(l) is the date the survivor's claim was filed, not the date the miner's claim was filed. *Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *aff'd sub. nom. W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012). Thus, for the reasons set forth in *Stacy*, we reject employer's arguments to the contrary.

Because claimant filed her subsequent claim after January 1, 2005, her claim was pending after March 23, 2010, and the miner was determined to be eligible to receive benefits 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 amended Section 932(l), 30 U.S.C. §932(l). Director's Exhibits 2-3, 6.

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<sup>5</sup> We also deny employer's alternate request to remand this case for development of evidence relevant to the economic impact of amended Section 932(l), as employer's argument with regard to the Takings Clause of the Fifth Amendment has been rejected by the United States Court of Appeals for the Third Circuit and the Board. *B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 259-263, 25 BLR 2-13, 2-54-60 (3d Cir. 2011); *Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (2010).

Accordingly, the administrative law judge's Order Awarding Survivor's Benefits and Denying Motion to Hold Claim in Abeyance is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge