

BRB No. 12-0520 BLA

FONNIE M. GROSS	)	
(Widow of JAMES J. GROSS)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOMINION COAL COMPANY	)	DATE ISSUED: 04/24/2013
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Denying Employer's Motion to Hold Claim in Abeyance and Granting Director's Motion for Summary Decision Awarding Benefits of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer.

Barry H. Joyner (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Denying Employer's Motion to Hold Claim in Abeyance and Granting Director's Motion for Summary Decision Awarding Benefits (2011-BLA-6334) of Administrative Law Judge Robert B. Rae (the administrative law

judge), rendered on a survivor's claim<sup>1</sup> filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).

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*).

Claimant filed her survivor's claim on June 24, 2011. Director's Exhibit 2. On December 8, 2011, the Director, Office of Workers' Compensation (the Director), filed a Motion for Summary Decision, arguing 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. Employer filed a Motion to Hold Claim in Abeyance Pending Final Resolution of PPACA Issues on January 6, 2012, urging that the case be held in abeyance because issues regarding the proper application of the automatic entitlement provisions of amended Section 932(*l*) were being litigated and would ultimately be resolved by the United States Supreme Court. On April 27, 2012, the administrative law judge issued a Notice of Assignment, Hearing and Pre-Hearing Order and scheduled the formal hearing in this matter for July 31, 2012. By letters dated May 9, 2012 and May 30, 2012, claimant and employer respectively requested that the hearing be cancelled and urged the administrative law judge to rule on the pending motions that were filed by the Director and employer. On June 13, 2012, the administrative law judge issued his Order Denying Employer's Motion to Hold Claim in Abeyance and Granting Director's Motion for Summary Decision Awarding Benefits. The administrative law judge found that, pursuant to amended Section 932(*l*), derivative benefits are available to an eligible survivor of a miner who was eligible to receive lifetime benefits at the time of his death, if the claim was filed after January 1, 2005 and was pending on or after March 23, 2010. Finding that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(*l*), the administrative law judge granted the Director's motion for summary decision, denied employer's motion to hold the claim in abeyance, and awarded survivor's benefits.

On appeal, employer argues that the retroactive application of the automatic entitlement provisions of amended Section 932(*l*) to claims filed after January 1, 2005

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<sup>1</sup> Claimant, Fannie M. Gross, is the widow of the miner, James J. Gross, who died on May 23, 2011. Director's Exhibit 5. At the time of his death, the miner was receiving federal black lung benefits pursuant to a final award on his lifetime claim.

constitutes a violation of its due process rights and an unconstitutional taking of private property.<sup>2</sup> In addition, employer asserts 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 any survivor's claim was filed. Claimant has not filed a response in this appeal. The Director responds, urging the Board to affirm 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>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).

We reject employer's contention that retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005 constitutes a due process violation and a taking of private property, for the same reasons the Board rejected substantially similar arguments in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010). *See also B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Further, the operative date for determining eligibility for survivor's benefits under amended Section 932(l) is the date that the survivor's claim was filed, not the date that the miner's claim was filed. *West Virginia CWP Fund v. Stacy*, 671 F. 3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012). For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary.

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 derivatively entitled to survivor's benefits pursuant to amended Section 932(l).

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<sup>2</sup> By Order issued on November 9, 2012, the Board denied employer's motion to hold this appeal in abeyance, based on the United States Supreme Court's denial of the petition for certiorari in *West Virginia CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012).

<sup>3</sup> The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's last coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 1.

Accordingly, the Order Denying Employer's Motion to Hold Claim in Abeyance and Granting Director's Motion for Summary Decision Awarding Benefits of the administrative law judge 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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REGINA C. McGRANERY  
Administrative Appeals Judge