

BRB No. 14-0043 BLA

SHIRLEY A. CAREY )  
(Widow of JOSEPH E. CAREY) )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 JONES & BRAGUE MINING COMPANY )  
 )  
 and )  
 ) DATE ISSUED: 04/18/2014  
 STATE WORKERS' INSURANCE 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 Granting Director's Motion for Summary Decision of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Ryan M. Krescanko (Zimmer Kunz, PLLC), Pittsburgh, Pennsylvania, for employer/carrier.

Jonathan Rolfe (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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Order Granting Director's Motion for Summary Decision (2011-BLA-05185) of Administrative Law Judge Theresa C. Timlin, awarding benefits on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Claimant<sup>1</sup> filed this claim on December 14, 2009. Director's Exhibit 4.

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 a survivor of a miner who was held 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).

While this case was pending before the administrative law judge, the Director, Office of Workers' Compensation Programs (the Director), moved for a summary decision, asserting that there was no genuine issue of material fact regarding claimant's entitlement to benefits under Section 932(l). Employer did not file a response.

In an Order dated March 11, 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 has not filed a response brief. The Director responds, urging affirmance of the administrative law judge's award of benefits.<sup>2</sup>

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,

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<sup>1</sup> Claimant is the widow of the miner, who died on November 12, 2009. Director's Exhibit 11. 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.

<sup>2</sup> Employer does not challenge the administrative law judge's findings that claimant established 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 or after March 23, 2010; and that the miner was held to be eligible to receive benefits at the time of his death. Therefore, those findings are affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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).

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’s Brief at 7-12. The arguments employer makes are substantially similar to the ones that the United States Court of Appeals for the Third Circuit has rejected. *See B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 253-63, 25 BLR 2-13, 2-44-61 (3d Cir. 2011) (holding that amended Section 932(l) does not violate due process or the Takings Clause of the Fifth Amendment); *see also W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383-88, 25 BLR 2-65, 2-74-82 (4th Cir. 2011). For the reasons set forth in *Campbell*, we reject employer’s arguments.<sup>4</sup>

Employer also contends that claimant is not entitled to survivor’s benefits because she did not prove that pneumoconiosis caused, or contributed to, the miner’s death. Employer’s Brief at 13-18. Contrary to employer’s contention, the automatic entitlement provisions of amended Section 932(l) provide benefits to a survivor without the requirement that she prove that the miner’s death was due to pneumoconiosis. *See Campbell*, 662 F.3d at 253, 25 BLR at 2-44; *Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-231 (2011). Thus, we reject employer’s assertion that claimant is not entitled to survivor’s benefits pursuant to amended Section 932(l).

In this case, 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 or after March 23, 2010; and that the miner was held to be eligible to receive benefits at the time of his death. We therefore affirm the administrative law judge’s determination that claimant is derivatively entitled to receive benefits pursuant to amended Section 932(l) of the Act.

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<sup>3</sup> The miner’s coal mine employment was 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, 1-202 (1989) (en banc).

<sup>4</sup> Employer’s additional argument, that amended Section 932(l) was rendered unconstitutional by the decision in *Florida v. HHS*, 648 F.3d 1235 (11th Cir. 2011), is moot. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012); Employer’s Brief at 12.

Accordingly, the administrative law judge's Order Granting Director's Motion for Summary Decision is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge