

BRB No. 10-0651 BLA

JULIA M. McCARTHY )  
(Widow of DAVID McCARTHY) )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 CLINCHFIELD COAL COMPANY )  
 ) DATE ISSUED: 08/17/2011  
 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 – Award of Survivor’s Benefits:  
Automatic Entitlement of Richard T. Stansell-Gamm, Administrative Law  
Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton,  
Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, 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, McGRANERY  
and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Survivor’s Benefits:  
Automatic Entitlement (2010-BLA-5114) of Administrative Law Judge Richard T.

Stansell-Gamm rendered on a 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 November 25, 2005.<sup>1</sup> Director's Exhibit 2.

On March 23, 2010, amendments to the Act were enacted, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010. The amendments, in pertinent part, revive Section 932(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.<sup>2</sup> 30 U.S.C. §932(l).

On June 1, 2010, both claimant and the Director, Office of Workers' Compensation Programs (the Director), moved for a summary decision in this case, based on the recent amendments to the Act. Employer declined to submit a substantive response.

In a Decision and Order dated July 7, 2010, the administrative law judge found that the miner was receiving benefits at the time of his death, that claimant filed her survivor's claim after January 1, 2005, that her claim was still pending on March 23, 2010, and that she is an eligible survivor of the miner. Accordingly, the administrative

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<sup>1</sup> Claimant is the widow of the miner, who died on November 8, 2005. Director's Exhibit 10. At the time of his death, the miner was receiving federal black lung benefits pursuant to a May 12, 1989 award on his lifetime claim by an administrative law judge. Decision and Order at 2. Claimant's survivor's claim was denied by the current administrative law judge on November 11, 2008, because claimant did not establish that the miner had pneumoconiosis under 20 C.F.R. §718.202(a). Director's Exhibit 40. Pursuant to claimant's appeal, the Board affirmed the denial of survivor's benefits. *J.M.M. [McCarthy] v. Clinchfield Coal Co.*, BRB No. 08-0360 BLA (Jan. 29, 2009)(unpub.); Director's Exhibit 47. Thereafter, claimant timely requested modification pursuant to 20 C.F.R. §725.310. Director's Exhibits 49, 51.

<sup>2</sup> As the administrative law judge correctly noted, the amendments also reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides that if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled by pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)); Decision and Order at 2-3.

law judge found that claimant is automatically entitled to survivor's benefits pursuant to amended Section 932(l).

On appeal, employer challenges the administrative law judge's application of amended Section 932(l) to this case.<sup>3</sup> 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer asserts that retroactive application of amended Section 932(l) is unconstitutional, as it violates employer's due process rights and constitutes an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 3-12. 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. Employer's Brief at 14. Further, employer asserts that this case should be held in abeyance pending resolution of the constitutional challenges to Public Law No. 111-148 in federal court, and the promulgation of regulations by the Department of Labor implementing amended Section 932(l). Employer's Brief at 14-15. Employer's arguments lack merit.

Initially, we reject employer's contentions that retroactive application of the automatic entitlement provision of amended Section 932(l) to claims filed after January 1, 2005 constitutes a due process violation and a taking of private property. The Board rejected substantially similar arguments in *Mathews v. United Pocahontas Coal Co.*, 24

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<sup>3</sup> Employer additionally asserts that, because the current regulations, which pre-date the recent amendments, limit application of 20 C.F.R. §718.305 to claims filed before 1982, the Board must reverse the administrative law judge's award of benefits. Employer's Brief at 14-15. We disagree. While the administrative law judge noted that the recent amendments also revived the presumption of Section 411(c)(4), which was formerly implemented by 20 C.F.R. §718.305, the administrative law judge awarded benefits pursuant to amended Section 932(l), not amended Section 411(c)(4). Decision and Order at 4; Director's Brief at 2 n.2. We, therefore, reject employer's argument.

<sup>4</sup> The record indicates that the miner's coal mine employment was in Virginia. Director's Exhibit 3. 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, 1-202 (1989)(*en banc*).

BLR 1-193, 1-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order)(unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). *See also Keene v. Consolidation Coal Co.*, F.3d , 2011 WL 1886106 (7th Cir. 2011). We, therefore, reject them here for the reasons set forth in that case. Further, the Board recently held 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 filed, not the date that the miner's claim was filed. *Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011). For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary. We also deny employer's request that this case be held in abeyance pending the promulgation of regulations implementing amended Section 932(l). As we noted in *Mathews*, the mandatory language of amended Section 932(l) supports the conclusion that the provision is self-executing, and, therefore, that there is no need to hold this case in abeyance pending the promulgation of new regulations. *Mathews*, 24 BLR at 1-201. Finally, employer's request, that this case be held in abeyance pending resolution of the legal challenge to Public Law No. 111-148, is also denied. *See Mathews*, 24 BLR at 1-201.

Consequently, we affirm the administrative law judge's determination that claimant is derivatively entitled to benefits pursuant to amended Section 932(l), as she filed her survivor's claim after January 1, 2005, the claim was pending on March 23, 2010, and the miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(l); Pub. L. No. 111-148, §1556(b), (c).

Accordingly, the administrative law judge's Decision and Order – Award of Survivor's Benefits: Automatic Entitlement 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