

BRB No. 11-0112 BLA

RUTH GOINS)
(Widow of BILLY J. GOINS))
)
 Claimant-Respondent)
)
 v.)
)
 ROYAL COAL COMPANY) DATE ISSUED: 08/17/2011
)
 and)
)
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS FUND)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision Granting Summary Judgment in Part and the Decision and Order Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Ruth Goins, Scarbro, West Virginia, *pro se*.

Tiffany B. Davis (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Paul L. Edenfield (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: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision Granting Summary Judgment in Part and the Decision and Order Awarding Benefits (2009-BLA-5175) 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 March 17, 2008.¹ Director's Exhibit 2.

On March 23, 2010, amendments to the Act, pertaining to claims filed after January 1, 2005, became effective. 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 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 May 18, 2010, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for 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. On May 25, 2010, the administrative law judge advised the parties of the Director's request, and issued a notice directing the parties to file responses. Employer objected on several grounds and requested that, if the case is not held in abeyance pending resolution of legal challenges to Public Law No. 111-148, or until the Department of Labor (DOL) promulgates implementing regulations, the administrative law judge should schedule a formal hearing to determine the eligibility of the surviving spouse pursuant to 20 C.F.R. §725.212(a), and her dependent daughter pursuant to 20 C.F.R. §725.209(a)(2)(ii). Claimant did not file a response.

In his June 17, 2010 Decision Granting Summary Judgment in Part, the administrative law judge rejected employer's request to hold this case in abeyance finding that the provisions of Section 1556 are, by their terms, effective now. The administrative law judge determined that employer cited no support for its argument that the provisions cannot be applied without implementing regulations, and that concerns over the constitutionality of the amendments are too tentative to support postponement of an award of benefits to claimant. The administrative law judge therefore found that

¹ Claimant is the widow of the miner, who died on February 12, 2008. Director's Exhibit 9. At the time of his death, the miner was receiving federal black lung benefits pursuant to a June 16, 1989 award on his lifetime claim by an administrative law judge. Decision Granting Summary Judgment in Part at 2; Decision and Order Awarding Benefits at 1.

claimant is eligible for automatic entitlement to survivor's benefits. The administrative law judge then scheduled a hearing to resolve solely whether claimant meets the requirements of a surviving spouse pursuant to 20 C.F.R. §725.212(a), and whether her dependent daughter meets the requirements of an augmentee pursuant to 20 C.F.R. §725.209(a)(2)(ii).

Following the hearing, in a Decision and Order Awarding Benefits issued on September 14, 2010, the administrative law judge determined that claimant is the widow of the miner, who died on February 12, 2008 and was receiving black lung benefits during his lifetime, based on a Decision and Order Awarding Benefits issued on June 16, 1989, by Administrative Law Judge Robert M. Glennon. After consideration of claimant's hearing testimony, a statement from the Social Security Administration, and a report from the Fayetteville County Board of Education of Fayetteville, West Virginia, the administrative law judge determined that claimant meets the requirements of a surviving spouse pursuant to 20 C.F.R. §725.212(a) and that her daughter meets the requirements of an augmentee pursuant to 20 C.F.R. §725.209(a)(2)(ii). The administrative law judge found, therefore, that claimant satisfied the eligibility criteria for automatic entitlement to benefits, pursuant to amended Section 932(l), and that she is entitled to receive benefits commencing as of February 1, 2008.

On appeal, employer challenges the administrative law judge's application of amended Section 932(l) to this case. Claimant has not file a response brief. The Director responds, urging affirmance of the administrative law judge's award of benefits.²

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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

² We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant filed her survivor's claim after January 1, 2005, that her claim was pending on March 23, 2010, that the miner was receiving lifetime benefits at the time of his death based on a June 16, 1989 award, that claimant meets the requirements of a surviving spouse pursuant to 20 C.F.R. §725.212(a) and that her daughter meets the requirements of an augmentee pursuant to 20 C.F.R. §725.209(a)(2)(ii). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order Awarding Benefits at 1-3.

³ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

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 5-12. 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 12-24. 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 identical arguments in *Mathews v. United Pocahontas Coal Co.*, 24 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. Consequently, we affirm the administrative law judge's determination that claimant is derivatively entitled to receive 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, we affirm the administrative law judge's Decision and Order Awarding Benefits, and his Decision Granting Summary Judgment in Part.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge