

BRB No. 11-0855 BLA

GLADOLA LASH)	
(Widow of JULIUS LASH))	
)	
Claimant-Respondent)	
)	
v.)	
)	
OLGA COAL COMPANY)	DATE ISSUED: 08/29/2012
)	
and)	
)	
WEST VIRGINIA CWP 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 and Order Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for carrier.

Maia S. Fisher (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:

Carrier appeals the Decision and Order Awarding Benefits (2011-BLA-5639) of Administrative Law Judge Michael P. Lesniak rendered on a survivor's claim filed on January 24, 2011, 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).

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), P. 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 June 7, 2011, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision, arguing that under amended Section 932(l), and given the filing date of her claim, claimant¹ is entitled to benefits based on the award of benefits to her deceased husband.² In response, carrier argued that the case should be held in abeyance pending the final determination on the constitutionality of the PPACA and amended Section 932(l). Carrier also argued that claimant is not entitled to survivor's benefits under Section 932(l) because the operative date for determining eligibility thereunder was the miner's claim, which was filed before January 1, 2005, and was not pending on or after March 23, 2010. Claimant did not file a response to the Director's motion.

In his Decision and Order Awarding Benefits, the administrative law judge found that claimant satisfied the criteria for derivative entitlement pursuant to amended Section 932(l), and awarded benefits to commence as of December 1, 2010, the first day of the month in which the miner died.

On appeal, carrier challenges the constitutionality of amended Section 932(l), and its application to this claim.³ The Director responds in support of the administrative law

¹ Claimant is the widow of the miner, who died on December 15, 2010. Director's Exhibit 6. She filed her first survivor's claim on January 24, 2011. Director's Exhibit 4.

² The miner filed claims on February 11, 1984 and September 6, 1996. Director's Exhibits 1, 2. 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 2.

³ Carrier argues that because the Patient Protection and Affordable Care Act (PPACA) is being litigated in the United States Supreme Court, adjudication of this claim

judge's application of amended Section 932(l) to this case. Claimant has not filed a brief in this appeal.

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.⁴ 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).

Carrier 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 carrier's due process rights and as a taking of private property, in violation of the Fifth Amendment to the United States Constitution. Carrier also 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. The arguments carrier makes are virtually identical to the ones that the United States Court of Appeals for the Fourth Circuit recently rejected. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *petition for cert. filed*, U.S.L.W. (U.S. May 4, 2012)(No. 11-1342), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010); *see also B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011). For the reasons set forth in *Stacy*, we reject carrier's arguments.

Carrier next contends that claimant is not an "eligible survivor" within the meaning of amended Section 932(l) because she did not prove that pneumoconiosis caused, or contributed to, the miner's death. Contrary to carrier'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. *Campbell*, 663 F.3d at 249-50, 253, 25 BLR at 2-38-39, 2-44; *Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-231 (2011). Thus, we reject carrier's assertion that claimant is not an "eligible survivor" within the meaning of amended Section 932(l).

should be held in abeyance pending resolution of the constitutionality of the PPACA, and the severability of non-health care provisions by the Court. Subsequent to the filing of carrier's Brief in Support of Petition for Review, the Court upheld the constitutionality of the PPACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012). Thus, carrier's argument that this claim should be held in abeyance pending resolution of the constitutionality of the PPACA is moot.

⁴ The record indicates that the miner was employed in the coal mining industry in West Virginia. Director's Exhibits 1, 2. Accordingly, the law of the United States Court of Appeals for the Fourth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

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 entitled to receive survivor's benefits pursuant to Section 422(l) of the Act, 30 U.S.C. §932(l). Director's Exhibit 2.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge