

BRB Nos. 12-0362 BLA  
and 12-0362 BLA-A

OLLIE P. GARDNER	)	
(Widow of MELVIN GARDNER, SR.)	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
DRUMMOND COMPANY,	)	DATE ISSUED: 02/27/2013
INCORPORATED	)	
	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

John R. Jacobs (Maples & Jacobs, LLC), Birmingham, Alabama, for claimant.

John A. Smyth III, Will A. Smith and Katherine A. Collier (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

Richard A. Seid (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:

Employer appeals, and claimant<sup>1</sup> cross-appeals, the Decision and Order Awarding Benefits<sup>2</sup> (2010-BLA-5557) of Administrative Law Judge Adele Higgins Odegard rendered on a subsequent survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). Claimant filed this subsequent claim on May 21, 2010.

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), Public Law 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 January 11, 2011, employer filed a Motion for Summary Judgment, asserting that claimant's subsequent survivor's claim should be denied as a matter of law because the claim was not timely filed pursuant to 20 C.F.R. §725.309(d). Employer further challenged the constitutionality of the PPACA and its applicability to this claim. Claimant responded, urging the administrative law judge to reject employer's contentions and award benefits, asserting that, pursuant to amended Section 932(*l*), claimant was automatically entitled to benefits as a matter of law. The Director, Office of Workers' Compensation Programs (the Director), did not respond to employer's motion.

In an Order Denying Motion for Summary Decision, and Awarding Benefits; and Inviting Parties to Submit Supplemental Briefs on the Issue of the Effective Date for Payment of Benefits, dated December 23, 2011, the administrative law judge denied employer's Motion for Summary Judgment. The administrative law judge rejected employer's contention that this subsequent survivor's claim must be denied, as a matter of law, under 20 C.F.R. §725.309(d), as well as its challenges to the PPACA. Rather, the administrative law judge determined that Section 1556 of the PPACA reinstates the

---

<sup>1</sup> Claimant is the widow of the miner, who died on April 6, 2001. Director's Exhibit 12. Claimant filed an initial survivor's claim on May 3, 2001, which was denied by Administrative Law Judge Gerald M. Tierney in a Decision and Order issued on September 16, 2003. Director's Exhibits 6, 9.

<sup>2</sup> The administrative law judge incorporated her December 23, 2001 Order Denying Motion for Summary Decision, and Awarding Benefits; and Inviting Parties to Submit Supplemental Briefs on the Issue of the Effective Date for Payment of Benefits into her Decision and Order Awarding Benefits issued on February 23, 2012.

automatic eligibility for survivors of miners who had been awarded benefits under the Act and, therefore, awarded benefits. The administrative law judge found that claimant satisfied the criteria for derivative entitlement pursuant to amended Section 932(*l*), because her claim was filed after January 1, 2005, the claim was pending after March 23, 2010, and the miner was receiving benefits at the time of his death pursuant to a claim filed during his lifetime.<sup>3</sup> However, noting that the issue of the effective date for the payment of benefits was not a settled issue, the administrative law judge provided the parties the opportunity to brief this issue prior to rendering her decision.

On February 23, 2012, following submission of additional briefing by the parties, the administrative law judge issued her Decision and Order Awarding Benefits, incorporating her December 2011 Order and awarding benefits payable from October 2003, the month after claimant's prior claim was denied.

On appeal, employer challenges the constitutionality of amended Section 932(*l*), and its application to this subsequent survivor's claim. Employer argues that the retroactive application of the automatic entitlement provision of amended Section 932(*l*) to claims filed after January 1, 2005 constitutes a violation of its due process rights and an unconstitutional taking of private property. Employer also contends that claimant is not eligible for derivative survivor's benefits under amended Section 932(*l*), because her prior claim was finally denied in 2003 and her subsequent claim is barred pursuant to the provisions at 20 C.F.R. §725.309(d)(3) and the fundamental principle of *res judicata*. Moreover, employer contends that there is not an active claim because 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. Lastly, employer challenges the administrative law judge's determination regarding the commencement date of benefits, contending that any benefits awarded should not precede the filing date of the subsequent claim. Claimant and the Director each respond in support of the administrative law judge's application of amended Section 932(*l*) to this case and the administrative law judge's award of benefits.

Claimant has also filed a cross-appeal, asserting that the administrative law judge erred in awarding benefits as of October 2003. Claimant argues that the appropriate commencement date for benefits in this case is May 2001, the month after the month in which the miner died. In response, the Director contends that the administrative law judge erred in awarding benefits as of October 2003. The Director argues that the

---

<sup>3</sup> The miner was receiving federal black lung benefits at the time of his death pursuant to a claim filed on February 10, 1992, based on Administrative Law Judge Christine M. Moore's Decision and Order Granting Benefits, issued on August 31, 1995. Director's Exhibits 1, 4, 5.

appropriate commencement date for benefits in this case is November 2003, the month after the month in which the denial of the prior survivor's claim became final.<sup>4</sup> Employer has not responded to claimant's cross-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. 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).

As an initial matter, we reject employer's contention 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, for the reasons that the Board rejected substantially similar arguments in *Stacy v. Olga Coal Corp.*, 24 BLR 1-207 (2010), *aff'd sub nom. W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-69 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012), and *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (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). Furthermore, employer's assertion that amended Section 932(l) is not applicable, based on the filing date of the miner's claim, has no merit. The Board held in *Stacy* 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. *See Stacy*, 24 BLR at 1-211.

Employer also contends that claimant is not eligible for derivative survivor's benefits under amended Section 932(l), because her prior claim was finally denied and her subsequent claim is barred pursuant to fundamental principles of res judicata or claim preclusion. We disagree. The Board recently held that the principles of res judicata addressed in 20 C.F.R. §725.309, requiring that a subsequent claim be denied unless a change is established, are not implicated in the context of a subsequent survivor's claim filed within the time limitations set forth under Section 1556 of the PPACA. The Board held that entitlement thereunder is not tied to relitigation of the prior finding that the miner's death was not due to pneumoconiosis. *Richards v. Union Carbide Corp.*, 25 BLR 1-31 (2012) (en banc) (McGranery, J., concurring and dissenting) (Boggs, J., dissenting), *appeal docketed*, No. 12-1294 (4th Cir. Mar. 8, 2012). The Board, therefore,

---

<sup>4</sup> Employer does not challenge the administrative law judge's finding that 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 after March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death.

held that the automatic entitlement provision of amended Section 932(l) is available to an eligible survivor who files a subsequent claim within the time limitations established in Section 1556 of the PPACA. *Id.*

Likewise, we reject employer's contention 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 employer's contention, the automatic entitlement provision of amended Section 932(l) provides benefits to a survivor without the requirement that she prove that the miner's death was due to pneumoconiosis. *Campbell*, 662 F.3d at 249-50, 25 BLR at 2-38-39, 2-44; *Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-231 (2011).

Claimant, in her cross-appeal, asserts that the appropriate onset date for benefits is May 2001, the month after the month in which the miner died.<sup>5</sup> The Director also disagrees with the administrative law judge's commencement of benefits determination, arguing that claimant is entitled to benefits commencing in November 2003, the month after the month in which the denial of the prior claim became final.<sup>6</sup> The Board has adopted the position taken by the Director, holding that derivative benefits are payable in a subsequent survivor's claim, filed within the time limitations set forth in Section 1556, from the month after the month in which the denial of the prior survivor's claim became final. *See Richards*, 25 BLR at 1-38-39. Consequently, we modify the administrative law judge's commencement date determination to November 2003. 20 C.F.R. §725.309(d)(5).

---

<sup>5</sup> Employer asserts that the administrative law judge's award of benefits, if affirmed, should commence no earlier than May 2010, the month that claimant filed her subsequent claim. Employer's Brief at 30-31 n.12.

<sup>6</sup> Judge Tierney's Decision and Order denying claimant's 2001 survivor's claim was issued on September 16, 2003, and was filed with the district director on September 22, 2003. It, therefore, became final thirty days later, on October 22, 2003. *See* 20 C.F.R. §725.479(a).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed, as modified to reflect November 2003 as the date from which benefits commence.

SO ORDERED.

---

NANCY S. DOLDER, Chief  
Administrative Appeals Judge

---

ROY P. SMITH  
Administrative Appeals Judge

---

BETTY JEAN HALL  
Administrative Appeals Judge