

BRB No. 12-0305 BLA

SADIE M. BROWNING )  
(Widow of EDWARD BROWNING) )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 PEN COAL CORPORATION )  
 )  
 and )  
 )  
 WEST VIGINIA COAL WORKERS' ) DATE ISSUED: 01/11/2013  
 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 and Order of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

Sarah M. Hurley (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/carrier (employer) appeals the Decision and Order (2011-BLA-5718) of Administrative Law Judge Richard A. Morgan awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a survivor's claim filed on September 8, 2005.<sup>1</sup>

On March 23, 2010, amendments to the Act, affecting claims pending on or after January 1, 2005, were enacted. The amendments, in pertinent part, revive Section 932(*l*) of the Act, which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*).

On January 17, 2012, claimant moved for a summary decision in this case, based on the recent amendments to the Act. Employer responded, arguing against the application of Section 932(*l*) to this case, and urging the administrative law judge to adjudicate this case on its merits. The Director responded, asserting that he did not object to claimant's motion.

In a Decision and Order dated February 6, 2012, 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 law judge found that claimant is automatically entitled to survivor's benefits pursuant to amended Section 932(*l*).

On appeal, employer challenges the constitutionality of amended Section 932(*l*), its application to this claim, and the administrative law judge's determination that

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<sup>1</sup> Claimant is the widow of the miner, who died on August 9, 2005. Director's Exhibit 9. At the time of his death, the miner was receiving federal black lung benefits pursuant to a September 2, 2003 award on his lifetime claim. Decision and Order at 2. Claimant's survivor's claim was denied by an administrative law judge on June 25, 2008, because claimant did not establish that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c). Director's Exhibit 51. Pursuant to claimant's appeal, the Board affirmed the denial of survivor's benefits. *S.B. [Browning] v. Pen Coal Corp.*, BRB No. 08-0722 BLA (July 20, 2009)(unpub.); Director's Exhibit 63. Thereafter, claimant timely requested modification pursuant to 20 C.F.R. §725.310. Director's Exhibit 64.

claimant is an eligible survivor of the miner.<sup>2</sup> Employer further asserts that amended Section 932(l) may not be applied to modification requests. Finally, employer argues that, even if amended Section 932(l) applies, the administrative law judge erred by granting modification based on a change in the law. The Director and claimant respond in support of the administrative law judge's application of amended Section 932(l) to this case, and the 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>3</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe 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.<sup>4</sup> Employer 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 employer makes are identical to the ones that the United States Court of Appeals for the Fourth Circuit recently rejected.<sup>5</sup> *W. Va. CWP*

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<sup>2</sup> Employer does not challenge the administrative law judge's findings that claimant filed her claim after January 1, 2005; 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.

<sup>3</sup> The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibits 1, 5. 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).

<sup>4</sup> Employer's request that this case be held in abeyance pending the resolution of the constitutional challenges to other provisions of the Patient Protection and Affordable Care Act, Public Law No. 111-148, is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012); Employer's Brief at 3-10.

<sup>5</sup> Employer's request that this case be held in abeyance pending the United States Supreme Court's resolution of the petition for certiorari filed in *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), is also moot. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012); Employer's Brief at 10-11.

*Fund v. Stacy*, 671 F.3d 378, 383-89, 25 BLR 2-65, 2-74-85 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012); *see also B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 254-59, 25 BLR 2-13, 2-44-54 (3d Cir. 2011). For the reasons set forth in *Stacy*, we reject employer's arguments.

Additionally, employer argues that conflicting language contained in other sections of the Act requires a survivor to establish that the miner's death was due to pneumoconiosis, negating the automatic entitlement provision of amended Section 932(l). Employer's Brief at 11-20, 34-39. Employer asserts that because clamant did not establish that the miner's death was due to pneumoconiosis, she is not an eligible survivor of the miner. Employer's Brief at 34-39. Contrary to employer's contention, the plain language of Section 1556(c) mandates the application of the amendments to all claims filed after January 1, 2005, that are pending on or after March 23, 2010. *Mullins v. ANR Coal Co.*, 25 BLR 1-49, 1-53 (2012). Here, because claimant filed her claim after January 1, 2005, and timely requested modification such that the claim was pending on or after March 23, 2010, amended Section 932(l) applies to this claim. *Id.* Therefore, we reject employer's argument to the contrary.

In this case, the administrative law judge correctly found 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 on or after March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death. Therefore, we affirm the administrative law judge's determination that claimant is entitled to receive benefits pursuant to amended Section 932(l). 30 U.S.C. §932(l).

Accordingly the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge