

BRB No. 12-0411 BLA

SANDRA K. BREED)
(Widow of CURTIS L. BREED))
)
Claimant-Respondent)
)
v.)
) DATE ISSUED: 01/17/2013
MCWANE COAL COMPANY, Self-Insured)
Through UNITED STATES STEEL)
CORPORATION)
)
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 Awarding Benefits of Ralph A. Romano,
Administrative Law Judge, United States Department of Labor.

Abigail P. van Alstyne (Quinn, Connor, Weaver, Davies & Rouco, LLP),
Birmingham, Alabama, for claimant.

Will A. Smith (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for
employer.

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
BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-05518) of Administrative Law Judge Ralph A. Romano (the administrative law judge), rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves claimant's request for modification of the denial of her survivor's claim, which she originally filed on April 18, 2007.¹ Initially, Administrative Law Judge Adele H. Odegard denied benefits on January 27, 2010, finding that claimant failed to establish that the miner's death was due to pneumoconiosis. Director's Exhibit 52.

Thereafter, Congress amended the Act, 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, 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. Pub. L. No. 111-148, §1556(b), 124 Stat. 119 (2010) (codified at 30 U.S.C. §932(*l*)).

On April 12, 2010, claimant timely requested modification. 20 C.F.R. §725.310(a); Director's Exhibit 54. In his Decision and Order dated February 7, 2012, the administrative law judge found that the miner was determined to be eligible to receive benefits at the time of his death, that claimant is an eligible survivor of the miner, that claimant filed her survivor's claim after January 1, 2005, and that her claim was pending after March 23, 2010. The administrative law judge therefore determined that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(*l*). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the constitutionality of amended Section 932(*l*) and its application to this claim. Claimant and the Director, Office of Workers' Compensation Programs, have filed response briefs, urging affirmance of 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.² 33 U.S.C. §921(b)(3), as incorporated by 30

¹ Claimant is the widow of the miner, who died on March 20, 2007. Director's Exhibit 7. 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.

² The miner's most recent coal mine employment was in Alabama. Director's Exhibits 3, 4 (miner's claim). Accordingly, the Board will apply the law of the United

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer first argues that the recent amendment to Section 932(l) is not a proper basis for granting modification of the denial of benefits and therefore, does not apply to this case. Employer’s Brief at 3-5. Employer also argues that amended Section 932(l) does not apply to this case because the claim was initially denied on January 27, 2010, and was not pending on March 23, 2010, when the amendments were enacted. *Id.* at 5-7. The Board rejected substantially similar arguments in *Mullins v. ANR Coal Co.*, 25 BLR 1-49, 1-52-53 (2012), holding that amended Section 932(l) applies to a survivor’s claim that was filed after January 1, 2005, and which is pending after March 23, 2010, because of a timely request for modification. For the reasons set forth in *Mullins*, we reject employer’s arguments.

Next, employer argues that claimant is not eligible for survivor’s benefits because amended Section 932(l), when read in conjunction with 30 U.S.C. §§921 and 922, requires that she prove that the miner’s death was due to pneumoconiosis. Employer’s Brief at 9-12. This specific argument has also been rejected. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 389-91, 25 BLR 2-65, 2-85-88 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012) (No. 11-1342); *B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 247-53, 25 BLR 2-13, 2-35-44 (3d Cir. 2011); *Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-231 (2011). Therefore, we reject the argument here, for the reasons set forth in the cited cases.

Employer also argues that the retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005, violates employer’s right to due process, and is a taking of private property in violation of the Fifth Amendment to the United States Constitution. Employer’s Brief at 13-19. Employer further 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. *Id.* at 7-9. These arguments are virtually identical to those rejected by the United States Court of Appeals for the Fourth Circuit in *Stacy*, 671 F.3d at 383-89, 25 BLR at 2-74-85, *aff’g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *cert. denied*, 568 U.S. (2012) (No. 11-1342). *See also Campbell*, 662 F.3d at 253-63, 25 BLR at 2-44-61; *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 849-51, 24 BLR 2-385, 2-397-401 (7th Cir. 2011). For the reasons set forth in *Stacy*, we reject employer’s arguments.

States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

In this case, 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. We therefore affirm the administrative law judge's determination that claimant is derivatively entitled to receive survivor's benefits pursuant to amended Section 932(l). *See Mullins*, 25 BLR at 1-53.

Finally, we address the administrative law judge's determination of the date for the commencement of benefits. The administrative law judge determined that benefits are payable as of February 2010, the month after the previous administrative law judge initially denied this claim.³ When benefits are awarded under amended Section 932(l) upon a grant of modification of the denial of an initial survivor's claim, benefits are payable from the month of the miner's death, pursuant to 20 C.F.R. §725.503(c).⁴ *Surratt v. U.S. Steel Mining Co.*, 25 BLR 1-75, 1-79 (2012); *see also Dotson v. McCoy Elkhorn Coal Corp.*, 25 BLR 1-13, 1-18 (2011). We therefore modify the administrative law judge's determination of the date from which benefits commence to March 2007, the month in which the miner died. Director's Exhibit 7.

³ At the end of his decision, the administrative law judge ordered that benefits be paid as of November 2010. Decision and Order at 4. That date appears to have been a typographical error.

⁴ The administrative law judge relied on *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), to determine the date for the commencement of benefits. However, *Richards* addressed the date for the commencement of benefits in a survivor's subsequent claim, which is governed by 20 C.F.R. §725.309(d)(5). Under that regulation, benefits cannot be paid in a subsequent claim for any period prior to the date upon which the order denying the prior survivor's claim became final. Unlike the claim at issue in *Richards*, the claim in this case is claimant's initial claim for survivor's benefits. Thus, the order granting modification and awarding benefits is a new adjudication of the same claim, which supersedes the initial decision that denied survivor's benefits. *See* 20 C.F.R. §725.310; *Betty B Coal Company v. Director, OWCP [Stanley]*, 194 F.3d 491, 499, 22 BLR 2-1, 2-213 (4th Cir. 1999).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed, as modified to reflect March 2007 as the month from which benefits commence.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge