

BRB No. 13-0394 BLA

DOROTHY E. CUTRIGHT	)	
(Widow of GERALD L. CUTRIGHT)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 01/31/2014
	)	
SOUTH UNION COAL COMPANY	)	
	)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Barry H. Joyner (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, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-BLA-5238) of Administrative Law Judge Richard A. Morgan, 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 (2012) (the Act).

Claimant<sup>1</sup> filed her initial claim for survivor's benefits on November 25, 2005. Director's Exhibit 3. The district director denied benefits on August 2, 2006, finding that the evidence did not establish that the miner's death was due to pneumoconiosis or that claimant was dependent on the miner at the time of his death.<sup>2</sup> *Id.* Claimant did not pursue the claim further.

Claimant filed this subsequent claim on August 3, 2012. Director's Exhibit 5. The administrative law judge found claimant to be automatically entitled to receive benefits under amended Section 932(*l*) of the Act, 30 U.S.C. §932(*l*),<sup>3</sup> and awarded survivor's benefits commencing as of October 2006, the month after the month in which the denial of claimant's initial survivor's claim became final. Decision and Order at 6, n.7.

On appeal, employer argues that the denial of claimant's initial claim for survivor's benefits is *res judicata*, and precludes an award of survivor's benefits in this subsequent claim.<sup>4</sup> Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, urges affirmance of the award of benefits.

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<sup>1</sup> Claimant is the widow of the miner, who died on October 20, 2005. Director's Exhibit 9. At the time of his death, the miner was receiving federal black lung benefits pursuant to a final award on his lifetime claim. Director's Exhibit 1.

<sup>2</sup> In summarizing the district director's finding that claimant did not establish her dependency on the miner, the administrative law judge noted that an evidence summary attached to the district director's decision stated that claimant met the relationship and dependency requirements of an eligible survivor. Decision and Order at 3 n.1; Director's Exhibit 3. We note that notwithstanding the district director's finding that claimant did not establish dependency in the first claim, in the present claim, claimant's eligibility as a survivor of the miner is not in dispute.

<sup>3</sup> Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this case, Congress revived 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*) (2012).

<sup>4</sup> Employer does not challenge the administrative law judge's findings that claimant established 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. Decision

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>5</sup> 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).

Relying on the arguments raised before the United States Court of Appeals for the Fourth Circuit by the employer in *Union Carbide Corp. v. Richards*, 721 F.3d 307 (4th Cir. 2013), employer argues that the recent amendments to the Act do not void the res judicata effect of the denial of benefits in claimant's prior survivor's claim. Employer's Brief at 5. The Fourth Circuit rejected those arguments in *Richards*, holding that the amendments to the Act created a new cause of action, and that res judicata therefore does not bar an award of benefits pursuant to Section 932(l) in subsequent survivor's claims. *Richards*, 721 F.3d at 313-17. We reject employer's arguments for the reasons set forth by the Fourth Circuit in *Richards*.

Because claimant filed her subsequent 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 determination that claimant is entitled to receive survivor's benefits pursuant to amended Section 932(l) of the Act.

Benefits awarded under amended Section 932(l) are payable in a subsequent survivor's claim from the month after the month in which the denial of the prior claim became final. *See Richards*, 721 F.3d at 317 n.5. The district director denied claimant's initial claim on August 2, 2006, and the district director's decision became final thirty days thereafter, on September 1, 2006. 20 C.F.R. §725.419(d). Therefore, the administrative law judge properly ordered that benefits in this claim are payable as of October 2006.

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and Order at 4-5. Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

<sup>5</sup> The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibits 1, 7. 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).

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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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge