

BRB No. 10-0636 BLA

AUDREY H. ABSHIRE)	
(Widow of HOWARD R. ABSHIRE))	
)	
Claimant-Respondent)	
)	
v.)	
)	
EASTERN COAL CORPORATION)	
)	DATE ISSUED: 07/27/2011
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 on Remand – Award of Survivor Benefits: Automatic Entitlement, and the Denial of Motion for Reconsideration of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird), Pikeville, Kentucky, for employer.

Rita Roppolo (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 on Remand – Award of Survivor Benefits: Automatic Entitlement, and the Denial of Motion for Reconsideration (2006-

BLA-5546) of Administrative Law Judge Richard T. Stansell-Gamm, rendered on a survivor's claim filed on May 12, 2005, 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).¹ Following a hearing, in a Decision and Order issued on February 28, 2008, the administrative law judge denied claimant's survivor's claim for failure to establish that the miner's death was due to pneumoconiosis. On January 30, 2009, the Board vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c) and remanded the case for him to evaluate the medical opinions of record in light of the finding of legal pneumoconiosis in the miner's claim. *A.H.A. [Abshire] v. Eastern Coal Corp.*, BRB No. 08-0476 BLA, slip op. at 4-5 (Jan. 30, 2009) (unpub.). On September 14, 2009, the Board denied employer's request for reconsideration. *Abshire*, BRB No. 08-0476 BLA (Sept. 14, 2009) (unpub.). On March 23, 2010, amendments to the Act, pertaining to claims filed after January 1, 2005, became effective. The amendments, in pertinent part, revive Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that a 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).

In an Order issued on April 1, 2010, the administrative law judge directed the parties to show cause why benefits should not be awarded in the survivor's claim pursuant to Section 1556 of Public Law No. 111-148, in light of the award of benefits in the miner's claim. In response, claimant asserted that, pursuant to amended Section 932(l), she is automatically entitled to benefits, as the miner was receiving benefits pursuant to a final award on his claim at the time of his death, claimant filed her survivor's claim after January 1, 2005, and her claim was pending on March 23, 2010. Employer argued that the retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005, constitutes a violation of its due process rights and conflicts with other provisions of the Act. Employer alleged that claimant is not automatically entitled to survivor's benefits, based on the recent amendment to Section 932(l), as the operative date for determining eligibility for survivor's benefits is the date on which the miner's claim was filed, not the date of filing of the survivor's claim. The Director, Office of Workers' Compensation Programs (the Director), agreed that this claim meets the requirements for automatic entitlement and asserted that the administrative law judge should issue an order awarding benefits.

After considering the parties' responses, the administrative law judge issued his Decision and Order on Remand dated May 13, 2010, finding that the miner was receiving benefits at the time of his death, that the parties stipulated that claimant is an eligible

¹ Claimant is the widow of the miner, who died on April 24, 2005. Director's Exhibits 2, 12.

survivor under the Act, that she filed her survivor's claim after January 1, 2005, and that her claim was pending as of March 23, 2010. The administrative law judge found, therefore, that claimant satisfied the eligibility criteria for automatic entitlement to benefits, pursuant to amended Section 932(l) and, accordingly, awarded benefits. Employer filed a Motion for Reconsideration reiterating that the application of automatic entitlement in this case resulted in a manifest injustice, and violates its due process rights. The administrative law judge denied employer's Motion for Reconsideration on July 1, 2010.

On appeal, employer challenges the administrative law judge's application of amended Section 932(l) to this case. Both the Director and claimant respond, urging affirmance of the administrative law judge's award of benefits. Employer has replied to the response briefs filed by claimant and the Director, and contends that the Department of Labor is barred from applying amended Section 932(l), as the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (2010), of which the amendments were a part, was declared unconstitutional in a United States District Court. Employer's Reply Brief at 2, *citing Florida v. U.S. Dep't of Health & Human Servs.*, --- F.Supp. 2d ---, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011). Employer maintains that this ruling was the functional equivalent of an injunction against the application of the PPACA in its entirety. Finally, employer contends that under the circumstances of this case, liability should transfer to the Black Lung Disability Trust Fund.²

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.³ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We reject employer's contention regarding the operative filing date for determining eligibility pursuant to amended Section 932(l). The Board has held that the operative date for determining eligibility for survivors' 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. *Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (2010), *appeal docketed*, No.

² We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant filed her survivor's claim after January 1, 2005, that her claim was pending on March 23, 2010, and that, at the time of the miner's death, he was receiving benefits based on the claim he filed on August 8, 1994. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order on Remand at 2, 5.

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

11-1020 (4th Cir. Jan. 6, 2011). The Board specifically held that an eligible survivor, who files a claim after January 1, 2005, that is pending on or after the March 23, 2010 effective date of the Section 1556 amendments, is entitled to benefits, based solely on the miner's lifetime award without having to prove that the miner died due to pneumoconiosis. *Id.*; see 30 U.S.C. §932(l).

In addition, we reject employer's assertion that amended Section 932(l) is rendered unenforceable by language in Sections 411(a) and 412(a)(2) of the Act, 30 U.S.C. §§921(a), 922(a)(2). Those two sections provide, in relevant part, that benefits are to be paid at the applicable rate to a survivor when a miner was totally disabled due to pneumoconiosis at the time of his death, "except with respect to a claim filed under part C of this subchapter on or after the effective date of the Black Lung Benefits Amendments of 1981. . . ." 30 U.S.C. §§921(a), 922(a)(2). As the Board recently held in *Fairman v. Helen Mining Co.*, 24 BLR 1- , BRB No. 10-0494 BLA (Apr. 29, 2011), Section 932(l), as amended, is not rendered inapplicable by the language in Sections 921(a) and 922(a)(2). In Section 1556, Congress specifically amended Section 932(l) by striking its former language stating that the provision could not apply to claims filed on or after the effective date of the Black Lung Benefits Amendments of 1981, and mandated that the amendment "*shall apply* with respect to claims," such as this one, "filed under . . . Part C . . . after January 1, 2005, that are pending on or after the date of enactment of this Act." Pub. L. No. 111-148, §1556(c), 124 Stat. 119 (2010) (emphasis added). Thus, survivors' claims filed after January 1, 2005, in which the survivor has derivative entitlement, are not subject to the language that employer highlights in 30 U.S.C. §§921(a), 922(a)(2), to the extent that it may be inconsistent with amended Section 932(l). *Fairman*, BRB No. 10-0494 BLA, slip op. at 4.

Furthermore, we reject employer's contention that the ruling of the United States District Court in Florida was equivalent to an injunction barring application of amended Section 932(l). Although the Florida decision struck down the PPACA in its entirety, the ruling was stayed when the federal government filed its appeal in the United States Court of Appeals for the Eleventh Circuit. See *Florida v. U.S. Dep't of Health & Human Servs.*, --- F.Supp. 2d ---, 2011 WL 723117 (N.D. Fla. Mar. 31, 2011), *clarifying* --- F.Supp. 2d ---, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011), *appeal docketed*, No. 11-11021-HH (11th Cir. Mar. 9, 2011).

Finally, we hold that there is no merit in employer's additional argument that liability for benefits should transfer to the Black Lung Disability Trust Fund, as the application of amended Section 932(l) is unconstitutional. The constitutional violations alleged by employer are identical to the ones that the Board rejected in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (unpub. Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). We, therefore, reject them here for the reasons set forth in that case and affirm

the administrative law judge's determination that claimant is derivatively entitled to benefits pursuant to amended Section 422(l) of the Act. *See Stacy*, 24 BLR at 1-214.

Accordingly, the administrative law judge's Decision and Order on Remand – Award of Survivor's Benefits: Automatic Entitlement, and the Denial of Motion for Reconsideration, is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge