

BRB No. 11-0787 BLA

YVONNE C. FLOWERS )  
(Widow of PHILIP S. FLOWERS) )  
 )  
Claimant-Respondent )  
 )  
v. )  
 )  
U.S. STEEL MINING COMPANY, LLC )  
 ) DATE ISSUED: 07/27/2012  
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.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

Michelle S. Gerdano (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: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2010-BLA-5889) of Administrative Law Judge Richard A. Morgan, rendered on a survivor's claim filed 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). Claimant<sup>1</sup> filed this claim on June 22, 2010. Director's Exhibit 6.

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

While this case was pending before the administrative law judge, the Director, Office of Workers' Compensation Programs (the Director), moved for summary judgment, asserting that there was no genuine issue of material fact regarding claimant's entitlement to benefits under Section 932(l). In his Decision and Order dated July 20, 2011, the administrative law judge agreed, finding 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 survivor's claim. Claimant has not filed a response brief. The Director has filed a response brief, urging affirmance of the administrative law judge's 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>2</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).

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<sup>1</sup> Claimant is the widow of the miner, who died on June 8, 2009. Director's Exhibit 9. In 1987, the miner was awarded federal black lung benefits on his lifetime claim. Director's Exhibit 3.

<sup>2</sup> The miner's coal mine employment was in West Virginia. Director's Exhibit 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).

Employer argues on appeal that amended Section 932(l) is unconstitutional as a violation of due process, and as a taking of employer's property in violation of the Fifth Amendment to the United States Constitution.<sup>3</sup> Employer's Brief at 4. Employer also contends that the operative date for determining eligibility for survivor's benefits under amended Section 932(l) is the filing date of the miner's claim, not the survivor's claim. Employer's Brief at 8-10. 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 5-8. The United States Court of Appeals for the Fourth Circuit, however, recently rejected all of these same arguments. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383-91, BLR (4th Cir. 2011), *petition for cert. filed*, May 4, 2012 (No. 11-1342), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010); *see also B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 247-63, BLR (3d Cir. 2011). For the reasons set forth in *Stacy*, we reject employer's arguments.

Employer does not challenge the administrative law judge's findings that claimant established each fact necessary to demonstrate entitlement under amended Section 932(l): 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 she filed her claim after January 1, 2005; and that her claim was pending on or after March 23, 2010. Decision and Order at 3-5. Thus, we affirm those findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We therefore affirm the administrative law judge's determination that claimant is entitled to receive benefits pursuant to amended Section 932(l) of the Act. 30 U.S.C. §932(l).

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<sup>3</sup> Employer's request that this case be held in abeyance, pending the Supreme Court's resolution of the constitutional challenges to the Patient Protection and Affordable Care Act, is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566, 2012 WL 2427810 (June 28, 2012).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge