

BRB No. 11-0802 BLA

CYNTHIA H. CORDARO )  
(Widow of WILLIAM B. CORDARO) )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 CANTERBURY COAL COMPANY )  
 )  
 and )  
 )  
 OLD REPUBLIC GENERAL INSURANCE ) DATE ISSUED: 07/19/2012  
 CORPORATION )  
 )  
 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 Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick and Long), Ebensburg, Pennsylvania, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer/carrier.

Helen H. Cox (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/carrier (employer) appeals the Decision and Order Awarding Benefits (2011-BLA-5235) of Administrative Law Judge Michael P. Lesniak, 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 11, 2010. Director's Exhibit 3.

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 Office of Administrative Law Judges, the Director, Office of Workers' Compensation Programs (the Director), moved for a summary decision, 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 August 2, 2011, the administrative law judge agreed, finding that the miner was receiving benefits at the time of his death, that claimant filed her survivor's claim after January 1, 2005, and that claimant is an eligible survivor of the miner. 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.<sup>2</sup> Claimant and the Director have filed

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<sup>1</sup> Claimant is the widow of the miner, who died on July 9, 2008. Director's Exhibit 2. In 1998, the miner was awarded federal black lung benefits on his lifetime claim. Director's Exhibit 1.

<sup>2</sup> Employer requests 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, and the resolution, in the United States Courts of Appeals for the Third and Fourth Circuits, of constitutional challenges to the 2010 amendments to the Black Lung Benefits Act. Employer's request is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012); *B & G Constr. Co. v. Director*,

response briefs, urging affirmance of the administrative law judge's decision. Employer has filed a reply brief reiterating its contentions.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer argues 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. Because the miner in this case filed his claim before January 1, 2005, employer contends that amended Section 932(l) does not apply to claimant's survivor's claim. Employer's Brief at 3-5. Employer's argument is identical to the one that the United States Court of Appeals for the Fourth Circuit recently rejected. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 388-89, 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). For the reasons set forth in *Stacy*, we reject employer's argument.

Employer also argues that amended Section 932(l) effectively creates an irrebuttable presumption that a miner's death is due to pneumoconiosis. Such a presumption, employer contends, is unconstitutional in this case because there is no evidence of a rational connection between the miner's death and the presumption that his death was due to pneumoconiosis. Employer's Brief at 5-6. This argument, however, is foreclosed by *B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 253-55, BLR (3d Cir. 2011), in which the United States Court of Appeals for the Third Circuit found that amended Section 932(l) does not create an irrebuttable presumption, but instead permissibly provides that a survivor of a miner receiving benefits is entitled to survivor's benefits regardless of whether pneumoconiosis caused the miner's death, and held that the provision does not violate due process.

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*OWCP [Campbell]*, 662 F.3d 233, BLR (3d Cir. 2011); *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, BLR (4th Cir. 2011), *petition for cert. filed*, May 4, 2012 (No. 11-1342).

<sup>3</sup> The miner's coal mine employment was in Pennsylvania. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

Employer raises no other challenges to the application of amended Section 932(l). Nor does employer challenge the administrative law judge's findings that claimant established each fact necessary to demonstrate 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 and Order at 1-2. 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 derivatively entitled to benefits pursuant to amended Section 932(l) of the Act. 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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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge