

BRB No. 10-0671 BLA

FAYE WILSON)
(Widow of ELZA WILSON))
)
Claimant-Respondent)
)
v.)
)
CONSOLIDATION COAL COMPANY)
) DATE ISSUED: 06/17/2011
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 - Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Debra L. Henry (The Law Offices of Debra L. Henry), Greensburg, Pennsylvania, for claimant.

William S. Mattingly (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (09-BLA-5846) of Administrative Law Judge Daniel L. Leland 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 filed her claim on November 14, 2008.¹ Director's Exhibit 2. The relevant procedural history of this case is as follows.

Before the scheduled hearing, by Order dated June 21, 2010, the administrative law judge provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims filed after January 1, 2005. The amendments, in pertinent part, revived 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. 30 U.S.C. §932(l); Pub. L. No. 111-148, §1556(b), (c). In response, employer argued that retroactive application of Section 1556 of Public Law No. 111-148 is unconstitutional, conflicts with other provisions of the Act, and violates the Administrative Procedure Act (APA), 5 U.S.C. §§554, 556, 557, as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Employer urged the administrative law judge to hold the case in abeyance until certain legal challenges to Public Law No. 111-148 are resolved, and the Department of Labor promulgates implementing regulations. Claimant requested that an award of benefits be entered pursuant to amended Section 932(l), as claimant meets the eligibility criteria for automatic entitlement pursuant to amended Section 932(l). The Director, Office of Workers' Compensation Programs (the Director), did not file a response to the administrative law judge's order.

In a decision dated August 12, 2010, the administrative law judge found that the miner was receiving benefits at the time of his death, that claimant filed her survivor's claim after January 1, 2005, her claim was pending, and that she was an eligible survivor of the miner. The administrative law judge therefore found that claimant satisfied the eligibility criteria for automatic entitlement to benefits under amended Section 932(l). Accordingly, the administrative law judge awarded benefits in this survivor's claim, and canceled the hearing. Decision and Order at 2-3.

On appeal, employer challenges the administrative law judge's application of amended Section 932(l) to this case. Claimant and the Director respond, urging affirmance of the administrative law judge's award of benefits.

¹ Claimant is the widow of the miner, who died on September 28, 2008. Director's Exhibit 8. At the time of his death, the miner was receiving federal black lung benefits pursuant to a February 15, 1991 award by the district director on his lifetime claim. Decision and Order at 1; Unmarked Exhibit.

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

Employer contends that the operative date for determining eligibility pursuant to amended Section 932(l) is the date that the miner's claim was filed, not the date that the survivor's claim was filed. Employer's Brief at 5-12. Employer also asserts that retroactive application of amended Section 932(l) is unconstitutional, as it violates employer's due process rights and constitutes an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 12-18. Further, employer asserts that this case should be held in abeyance until sixty days after the Department of Labor issues guidelines or promulgates regulations implementing 30 U.S.C. §932(l), as amended, and made applicable by Section 1556 of Public Law No. 111-148. Employer's Brief at 19. Employer also argues that, because the constitutionality of Public Law No. 111-148 was challenged in a lawsuit filed in the United States District Court for the Northern District of Florida, this case should be held in abeyance. Employer's Brief at 19-20. Employer's arguments lack merit.

As the administrative law judge correctly noted, the recent amendment reviving Section §932(l) of the Act applies to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Pub. Law. No. 111-148, §1556(c); Decision and Order at 1. Contrary to employer's argument, in a recent case, the Board 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, 1-213 (2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011). Specifically, the Board held that, under amended Section 932(l), 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 receive benefits based solely on the miner's lifetime award, without having to prove that the miner died due to pneumoconiosis. *Stacy*, 24 BLR at 1-213; *see* 30 U.S.C. §932(l). Therefore, because claimant filed her survivor's claim after January 1, 2005, her claim was pending on March 23, 2010, and the miner was awarded benefits on his claim, we hold that the administrative law judge properly found that Section 932(l) applies to this case. *Stacy*, 24 BLR at 1-213.

² The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibit 2. 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*).

We also reject employer's arguments regarding the constitutionality of the amendment to Section 932(l), as applied to this case. As employer acknowledged, its arguments are identical to the ones that the Board rejected in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-198-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011) (unpub.); Employer's Brief at 12. We, therefore, reject them here for the reasons set forth in that case. *Mathews*, 24 BLR at 1-198-200; *see also Stacy*, 24 BLR at 1-214. Thus, claimant is derivatively entitled to survivor's benefits pursuant to 30 U.S.C. §932(l).

Further, as we did in *Mathews*, we reject employer's request that this case be held in abeyance until sixty days after the Department of Labor issues guidelines or promulgates regulations implementing amended Section 932(l). As we noted in *Mathews*, the mandatory language of amended Section 932(l) supports the conclusion that the provision is self-executing, and, therefore, that there is no need to hold this case in abeyance pending the promulgation of new regulations. *Mathews*, 24 BLR at 1-201. Finally, employer's request, that this case be held in abeyance pending resolution of the legal challenge to Public Law No. 111-148, is also denied. *See Mathews*, 24 BLR at 1-201.

Consequently, we affirm the administrative law judge's determination that claimant is derivatively entitled to benefits pursuant to amended Section 932(l), as she filed her survivor's claim after January 1, 2005, the claim was pending on March 23, 2010, and the miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(l); Pub. L. No. 111-148, §1556(b), (c).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge