

BRB No. 11-0632 BLA

ERNESTINE WORKMAN)
(Widow of WINFORD WORKMAN))
)
Claimant-Respondent)
)
v.)
)
H & J COAL COMPANY)
)
and)
)
WEST VIRGINIA COAL WORKERS') DATE ISSUED: 06/15/2012
PNEUMOCONIOSIS FUND)
)
Employer/Carrier-)
Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest)
) DECISION and ORDER

Appeal of the Order Awarding Survivor's Benefits of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

Amy Jo Holley and Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Emily Goldberg-Kraft (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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Order Awarding Survivor's Benefits (2011-BLA-5734) of Associate Chief Administrative Law Judge William S. Colwell (the administrative law judge), rendered on a subsequent survivor's claim¹ 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).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010). The amendments, in pertinent part, revive Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that the 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).

Claimant filed a subsequent survivor's claim on February 24, 2011. Director's Exhibit 5. On February 28, 2011, the district director issued a Proposed Decision and Order, wherein he found that claimant was derivatively entitled to benefits pursuant to amended Section 932(l). Director's Exhibit 12. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 16.

On April 26, 2011, employer filed a motion to dismiss claimant's subsequent survivor's claim or, in the alternative, to grant employer's motion for partial summary judgment, and declare that derivative entitlement under amended Section 932(l) is not available to claimant. The Director, Office of Workers' Compensation Programs (the Director), responded by moving for a summary decision, asserting that, pursuant to amended Section 932(l), and given the filing date of her claim, claimant was automatically entitled to benefits based on the award of benefits to her deceased husband.² Claimant did not respond to the motions by employer and the Director.

¹ Claimant is the widow of the miner, who died on April 6, 2008. Director's Exhibit 3. Claimant filed her initial claim for survivor's benefits on April 14, 2008, which was finally denied on October 22, 2008 by the district director. Claimant took no further action with respect to this claim. *Id.*

² The miner was receiving federal black lung benefits at the time of his death pursuant to a claim filed on June 7, 1982, which was awarded by Administrative Law Judge Robert L. Cox on November 12, 1987. Director's Exhibit 2.

In his Order Awarding Survivor's Benefits, the administrative law judge rejected employer's argument that amended Section 932(l) was inapplicable because the miner's claim was filed prior to January 1, 2005, and was not pending on or after March 23, 2010. The administrative law judge found that claimant satisfied the criteria for derivative entitlement pursuant to amended Section 932(l), and awarded benefits to commence as of November 2008, the month after the order denying claimant's prior claim became final.

On appeal, employer argues 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 an unconstitutional taking of private property. 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 subsequent claim was filed. Employer also contends that claimant is not eligible for derivative survivor's benefits under amended Section 932(l), because her prior claim was finally denied and her subsequent claim is barred pursuant to the fundamental principle of res judicata or claim preclusion. Lastly, employer asserts that any benefits awarded should not commence prior to the filing date of the subsequent claim. The Director responds, urging the Board to affirm the administrative law judge's award of benefits. However, the Director contends that the appropriate date for the commencement of benefits in this case is December 2008, the month after the month in which the denial of the prior survivor's claim became final. Claimant has not filed a brief in this appeal. Employer has filed a reply brief in support of its position.³

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.⁴ 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).

We reject employer's contention that retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005

³ On March 30, 2012, the Board denied employer's Motion to Hold Appeal in Abeyance pending resolution of the challenges to Public Law No. 111-148 in federal court. *Workman v. H & J Coal Co.*, BRB No. 11-0632 BLA (Mar. 30, 2012)(Order) (unpub.).

⁴ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner's last coal mine employment occurred in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3.

constitutes a due process violation and a taking of private property, for the same reasons the Board rejected substantially similar arguments in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011)(Order)(unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). *See also B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, BLR (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Further, the operative date for determining eligibility for survivor's 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. *West Virginia CWP Fund v. Stacy*, 671 F.3d 378, BLR (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010). For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary. We also reject employer's contention that claimant's subsequent claim is barred pursuant to the fundamental principle of res judicata, for the reasons set forth in *Richards v. Union Carbide Corp.*, BRB Nos. 11-0414 BLA & 11-0414 BLA-A, slip op. at 4-6 (Jan. 9, 2012)(en banc)(McGranery, J., concurring and dissenting)(Boggs, J., dissenting), *appeal docketed*, No. 12-1294 (4th Cir. Mar. 8, 2012). Because claimant filed her survivor's claim after January 1, 2005, her claim was pending on or 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 finding that claimant is entitled to receive survivor's benefits pursuant to amended Section 932(l).

Lastly, we reject employer's contention that an award of benefits in this case should commence no earlier than February 2011, the date of filing of claimant's subsequent survivor's claim. In *Richards*, the Board held that derivative benefits are payable in a subsequent survivor's claim filed within the time limitations set forth in Section 1556 of the PPACA from the month after the month in which the denial of the prior claim became final.⁵ *See Richards*, slip op. at 7. Consequently, as the order denying claimant's prior claim became final in November 2008, at the expiration of the thirtieth day after it was filed in the office of the district director, *see* 20 C.F.R. §725.309(d)(5), claimant's survivor's benefits under amended 932(l) in her subsequent claim properly commence as of December 2008, the month after the month in which claimant's prior denial of benefits became final, *see* 20 C.F.R. §725.309(d)(5).

⁵ The denial of claimant's prior survivor's claim was filed with the district director on October 22, 2008, and became final thirty days later, in November 2008. *See* 20 C.F.R. §§725.478, 725.479(a); Director's Exhibit 3.

Accordingly, the administrative law judge's Order Awarding Survivor's Benefits is affirmed, as modified to reflect December 2008 as the date from which benefits commence.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge