

BRB No. 11-0657 BLA

DOROTHY E. BEVERLY)	
(Widow of JAMES BEVERLY))	
)	
Claimant-Respondent)	
)	
v.)	
)	
EASTOVER MINING COMPANY,)	DATE ISSUED: 06/21/2012
C/O DUKE POWER COMPANY)	
)	
and)	
)	
UNDERWRITERS SAFETY & CLAIMS)	
)	
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 in a Subsequent Survivor's Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer.

Maia S. Fisher (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 appeals the Decision and Order Awarding Benefits in a Subsequent Survivor's Claim¹ (2011-BLA-5516) of Administrative Law Judge Larry S. Merck (the administrative law judge), rendered 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 initial claim for survivor's benefits on March 7, 2000, which the district director denied on June 26, 2000. Director's Exhibit 1A. Claimant took no further action until she filed a second claim on February 1, 2007, which the district director denied on May 7, 2007. Director's Exhibit 2.

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

Claimant filed her present subsequent claim on October 18, 2010. Director's Exhibit 6. In a Proposed Decision and Order awarding benefits dated November 12, 2010, the district director determined that, pursuant to Section 1556 of the PPACA, claimant is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. Director's Exhibits 12, 17. At employer's request, the case was transferred to the Office of Administrative Law Judges for a hearing and assigned to the administrative law judge.

The administrative law judge issued an Order to Show Cause why he should not award benefits to claimant pursuant to amended Section 932(l), without conducting a hearing. Employer responded, arguing that the automatic entitlement provisions of amended Section 932(l) are not applicable to this claim. The Director, Office of

¹ Claimant is the widow of the miner, James Beverly, who died on December 26, 1999. Director's Exhibit 9. In a Decision and Order dated February 26, 1988, Administrative Law Judge Karl H. Buschmann awarded benefits to the miner on a claim that he filed in 1983. Director's Exhibit 1. Employer did not appeal Judge Buschmann's decision. Thus, the miner received benefits pursuant to this award until the time of his death.

Workers' Compensation Programs (the Director), responded, arguing that claimant is entitled to automatic survivor's benefits because this subsequent claim falls within the class of survivor's claims affected by Section 1556(b) of the PPACA. The administrative law judge rejected employer's arguments and found that employer had not raised any genuine issues of fact necessitating a hearing, and that claimant is automatically entitled to survivor's benefits, based on the miner's lifetime award of benefits and the recent amendments to Section 932(l). Accordingly, the administrative law judge awarded survivor's benefits, commencing on March 23, 2010, the effective date of the PPACA.

On appeal, employer argues that the retroactive application of amended Section 932(l) violates its right to due process because it had no incentive to seek modification of the award of benefits to the miner, as his federal black lung benefits were fully offset by a state award. Employer also asserts that this subsequent claim is barred pursuant to 20 C.F.R. §725.309 and the principle of *res judicata*. Employer further 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, which was prior to January 1, 2005.

The Director and claimant respond and urge the Board to reject employer's arguments and affirm the award of survivor's benefits. The Director also contends, however, that benefits should commence as of July 2007, the month after the month in which claimant's prior denial of benefits became final. Employer has replied and reiterates its initial arguments and requests that the Board hold this case in abeyance, pending resolution of the legal challenges to the PPACA.

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 argues initially that the retroactive application of amended Section 932(l) violated its right to due process, as the miner's award of federal black lung benefits was completely offset by a state award, thereby depriving employer of any incentive to challenge the award of benefits in the federal claim. Employer's argument is a variation on the arguments that the Board addressed 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), to the effect

² The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

that retroactive application of amended Section 923(l) constitutes a due process violation because it subjects employer to a financial burden that it could not have foreseen. The Board held in *Mathews*, however, that Congress legitimately exercised its authority to “adjust the burdens and benefits of economic life,” in amending Section 932(l) and making it applicable to claims filed after January 1, 2005. *Mathews*, 24 BLR at 1-200, quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 3 BLR 2-36, 2-43 (1975); see also *B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-16 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Therefore, for the reasons set forth in *Mathews*, we reject employer’s allegation of a due process violation in this case.

Employer’s also argues that the operative date for determining eligibility for survivor’s benefits under amended Section 932(l) is the date that the miner’s claim was filed. We reject employer’s argument. The Board has held that 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. See *Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *aff’d sub nom. West Virginia CWP Fund v. Stacy*, 671 F. 3d 378, 388-89, 25 BLR 2-69, 2-83-84 (4th Cir. 2011). For the reasons set forth in *Stacy*, we reject employer’s arguments to the contrary. We also reject employer’s request to hold this case in abeyance, pending resolution of legal challenges to the PPACA. See *Mathews*, 24 BLR at 1-201; *Fairman v. Helen Mining Co.*, 24 BLR 1-225 (2011).

Employer next alleges that the principles of res judicata expressed in 20 C.F.R. §725.309 bar this subsequent claim, as claimant’s prior claim for survivor’s benefits was denied and that denial became final. We reject employer’s contention. The terms of 20 C.F.R. §725.309, which require that a subsequent claim be denied unless a change in an applicable condition of entitlement is established, do not apply to a survivor’s subsequent claim filed within the time limitations set forth under Section 1556 of the PPACA, as entitlement thereunder is not tied to relitigation of the prior finding that the miner’s death was not due to pneumoconiosis. *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). Contrary to employer’s contention, therefore, the automatic entitlement provisions of amended Section 932(l) are available to an eligible survivor who files a subsequent claim within the time limitations established in Section 1556 of the PPACA. *Id.*

Finally, we hold, as a matter of law, that the proper date for the commencement of benefits in this case is July 1, 2007. In *Richards*, the Board determined that, because the PPACA does not authorize the reopening of a previously denied claim, the denial of the prior survivor’s claim must be given effect. *Richards*, slip op. at 7-8. The Board further reasoned that, in order to do so, the provisions of 20 C.F.R. §725.309(d)(5) must be

applied in a subsequent survivor's claim to bar the payment of benefits from a date prior to the date upon which the denial of the prior claim became final. *Id.* In the present case, the denial of claimant's prior survivor's claim was issued on May 7, 2007, and became final on June 7, 2007. 20 C.F.R. §725.419(d); Director's Exhibit 2. Based upon our decision in *Richards*, therefore, we modify the administrative law judge's designation of March 23, 2010, as the date from benefits commence, to July 1, 2007, the first day of the month after the month in which the prior denial of benefits became final. *See* 20 C.F.R. §§725.309(d)(5), 725.419(d).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in a Subsequent Survivor's Claim is affirmed, as modified, to reflect July 1, 2007, 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