

BRB No. 11-0744 BLA

NATALIE M. COLLINS)	
(Widow of OTIS L. COLLINS))	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: 06/22/2012
)	
CLINCHFIELD COAL COMPANY)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Order of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Timothy W. Gresham (Penn Stuart & Eskridge), Abingdon, Virginia, for employer.

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 appeals the Order (2011-BLA-5701) of Administrative Law Judge William S. Colwell (the administrative law judge) awarding benefits on a 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). This case involves a subsequent survivor's claim filed on May 25, 2010.

Claimant¹ filed her initial claim for survivor's benefits on October 1, 1996. Director's Exhibit 1. On March 11, 1999, Administrative Law Judge John C. Holmes denied benefits, because he found that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *Id.* The Board affirmed Judge Holmes' denial on April 6, 2000. *See Collins v. Clinchfield Coal Co.*, BRB No. 99-0697 BLA (Apr. 6, 2000) (unpub.). Administrative Law Judge Edward T. Miller denied claimant's petition for modification of the denial of benefits on May 6, 2004. Director's Exhibit 1.

On March 23, 2010, amendments to the Act, affecting claims pending on or after January 1, 2005, were enacted. The amendments, in pertinent part, revive Section 422(l) of the Act, 30 U.S.C. §932(l), 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).

Claimant filed a subsequent survivor's claim on May 25, 2010. Director's Exhibit 3. On July 8, 2010, 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 9. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibits 10, 14.

On May 31, 2011, the Director, Office of Workers' Compensation Programs (the Director), moved for a summary decision, arguing that there was no genuine issue of material fact concerning whether claimant was automatically entitled to benefits pursuant to amended Section 932(l). Employer filed a response in opposition to the Director's motion for a summary decision on June 16, 2011.

In an Order dated June 27, 2011, the administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended 932(l). Accordingly, the administrative law judge awarded survivor's benefits, commencing as of June 2004, the month following the month in which claimant's request for modification of her initial survivor's claim was denied.

¹ Claimant is the widow of the miner, who died on September 10, 1996. Director's Exhibit 8. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim. Director's Exhibit 2.

On appeal, employer challenges the constitutionality of amended Section 932(l), and its application to this claim.² The Director and claimant respond in support of the administrative law judge's application of amended Section 932(l) to this case. The Director further contends that the appropriate date for the commencement of benefits in this case is July 2004, the month after the month in which the denial of the prior survivor's claim became final.

The Board's scope of review is defined by statute. The administrative law judge's Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.³ 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 retroactive application of amended Section 932(l) is unconstitutional, as a violation of employer's due process rights and as an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. Employer also contends that the operative date for determining eligibility under amended Section 932(l) is the date the miner's claim was filed, not the date the survivor's claim was filed. The arguments employer makes are virtually identical to the ones that the United States Court of Appeals for the Fourth Circuit rejected in *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383-89, 25 BLR 2-65, 2-74-85 (4th Cir. 2011), *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, 254-63, 25 BLR 2-13, 2-44-61 (3d Cir. 2011). For the reasons set forth in *Stacy*, we reject employer's arguments.

We also reject employer's request that this case be held in abeyance pending resolution of the legal challenges to Public Law No. 111-148. *See Stacy*, 671 F.3d at 383 n.2, 25 BLR at 2-74 n.2; *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011) (unpub.).

² Employer does not challenge that claimant satisfied her burden to establish each fact necessary to demonstrate her 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 after March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death.

³ The record reflects that the miner's last coal mine employment was in Virginia. Director's Exhibits 1, 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

Employer next 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 fundamental principles of res judicata or claim preclusion. We disagree. The Board recently held that the principles of res judicata addressed in 20 C.F.R. §725.309, requiring that a subsequent claim be denied unless a change is established, are not implicated in the context of a subsequent survivor's claim filed within the time limitations set forth under Section 1556, because 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). The Board, therefore, held that 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. *Id.*

Finally, we agree with the Director that the administrative law judge erred in setting the commencement date for benefits as June 2004, the month after the month in which claimant's petition for modification of her initial survivor's claim was denied. Director's Brief at 6, n.4. The Board recently adopted the position taken by the Director, holding that derivative benefits are payable in a subsequent survivor's claim filed within the time limitations set forth in Section 1556 from the month after the month in which the denial of the prior claim became final. *See Richards*, slip op. at 7. As the order denying claimant's prior claim became final in June 2004 at the expiration of the thirtieth day after it was issued by Judge Miller, *see* 20 C.F.R. §725.419(d), claimant's survivor's benefits under amended Section 932(l) in her subsequent claim properly commence as of July 2004, the month after the month in which the denial of claimant's prior claim became final.

Accordingly, the administrative law judge's Order awarding benefits is affirmed, as modified to reflect July 2004 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