

BRB No. 11-0766 BLA

ETHEL D. ECKMAN)	
(Widow of JOHN H. ECKMAN))	
)	
Claimant-Respondent)	
)	
v.)	
)	
MARMON COAL COMPANY)	DATE ISSUED: 06/27/2012
)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-5304) of Administrative Law Judge Richard A. Morgan rendered on a subsequent survivor's claim filed on September 10, 2010, 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*).

On February 23, 2011, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision, arguing that under amended Section 932(*l*), and given the filing date of her claim, claimant¹ was entitled to benefits based on the award of benefits to her deceased husband.² In response, employer argued that claimant's subsequent survivor's claim should be summarily denied because her prior survivor's claim was finally denied. Employer also argued that the case should be held in abeyance pending the final determination of the constitutionality of the PPACA and amended Section 932(*l*). Claimant did not file a response to the Director's motion. In reply to employer's response, the Director urged the administrative law judge to reject employer's arguments.³

¹ Claimant is the widow of the miner, who died on May 2, 2002. Director's Exhibits 2, 4. She filed her first survivor's claim on May 7, 2002. Director's Exhibit 2. On June 14, 2005, Administrative Law Judge Daniel L. Leland issued a Decision and Order denying benefits, which the Board affirmed. *Eckman v. Marmon Coal Co.*, BRB No. 05-0884 BLA (Mar. 28, 2006) (unpub.). Because it was not challenged, the denial became final. She filed this survivor's claim on September 10, 2011. Director's Exhibit 3.

² The miner filed a claim on October 17, 1985. Director's Exhibit 1. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim. *Id.*

³ Employer filed a Motion to Hold Proceedings in Abeyance or Issue A Briefing Order on March 8, 2011. The Director, Office of Workers' Compensation Programs (the Director), argued that employer's request to hold the case in abeyance pending the final determination of the constitutionality of the Patient Protection and Affordable Care Act should be denied, but he did not object to the issuance of a briefing order. In its Response to Director's Opposition to Abeyance, employer argued that the Director did not cite to a single valid reason to deny a stay, and that there were none. By Order dated May 9, 2011, Administrative Law Judge Richard A. Morgan denied employer's request to hold the case in abeyance.

In his Decision and Order Awarding Benefits, 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 April 1, 2006, the month after the month in which the prior survivor's claim was denied.

On appeal, employer challenges the constitutionality of amended Section 932(l), and its application to this claim. The Director responds in support of the administrative law judge's application of amended Section 932(l) to this case. The Director, however, contends that the appropriate date for the commencement of benefits in this case is June 2006, 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.

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'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, 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 recently rejected. *West Virginia CWP Fund v. Stacy*, 671 F.3d 378, 388-89, 25 BLR 2-69, 2-82-85 (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, 2-45-60 (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 383-84 n.2, 25 BLR at 2-74 n.2; *see also Stacy*, 24 BLR at 1-215; *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.); *Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-229 (2011).

⁴ The record indicates that the miner was employed in the coal mining industry in Pennsylvania. Director's Exhibits 1, 2. Accordingly, the law of the United States Court of Appeals for the Third Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

Employer next contends that, because claimant's prior claim for survivor's benefits was denied and the denial became final, fundamental principles of res judicata or claim preclusion set forth in 20 C.F.R. §725.309 bar her subsequent claim. We disagree. The principles of res judicata addressed in 20 C.F.R. §725.309, requiring that a subsequent claim be denied unless a change in an applicable condition of entitlement is established, are not implicated in the context of a survivor's subsequent claim filed within the time limitations set forth under Section 1556 of Public Law No. 111-148, 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.*, BLR , 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). Therefore, contrary to employer's contention, 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.*

Because claimant filed her survivor's claim after January 1, 2005, her claim was pending 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 Section 422(l) of the Act, 30 U.S.C. §932(l). Director's Exhibits 1-3.

Finally, the Director argues that the administrative law judge erred in setting the benefits commencement date as April 2006. Noting that benefits on a subsequent claim may not commence until the month after the prior denial became final, *see* 20 C.F.R. §725.309(d)(5), the Director argues that claimant is entitled to benefits commencing in June 2006, rather than in April 2006. The Board recently adopted the Director's position, holding that 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. *Richards*, slip op. at 7. Here, the decision of the Board affirming the denial of claimant's prior claim became final on May 27, 2006, which is 60 days after the decision was issued on March 28, 2006. *See Youghioghney & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 951-53, 22 BLR 2-46, 2-60-64 (6th Cir. 1999). Consequently, we modify the administrative law judge's determination of the commencement date for benefits to June 2006. *See* 20 C.F.R. §725.309(d)(5).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed, as modified to reflect June 2006 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