

BRB No. 11-0484 BLA

EMMA J. CHARLES)
(Widow of GLEN L. CHARLES))
)
Claimant-Respondent)
)
v.)
)
SLAB FORK COAL COMPANY) DATE ISSUED: 03/20/2012
)
and)
)
WEST VIRGINIA COAL WORKERS')
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 Summary Decision and Order Granting Motion for Summary Decision and Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

Ann Marie Scarpino (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 Decision and Order Granting Motion for Summary Decision and Awarding Benefits (2011-BLA-5216) of Administrative Law Judge Thomas M. Burke, 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). The district director issued a Proposed Decision and Order awarding benefits on July 29, 2010. At employer's request, the case was transferred to the Office of Administrative Law Judges for a hearing. In response to a Motion for Summary Decision filed by the Director, Office of Workers' Compensation Programs (the Director), the administrative law judge issued an Order advising the parties of the potential applicability of the Patient Protection and Affordable Care Act (PPACA) to the claim and directed them to respond to the Director's motion.² Employer responded to the Order, arguing that the Director's motion should be denied. Employer argued that claimant is not automatically entitled to survivor's benefits because the requirements of amended Section 932(l) are not satisfied in this case, based on the filing date of the miner's claim and because her subsequent claim is barred pursuant to fundamental principles of res judicata or claim preclusion and 20 C.F.R. §725.309(d)(3). The administrative law judge rejected employer's arguments and found that claimant is automatically entitled to survivor's benefits, based on the miner's lifetime award of

¹ Claimant is the widow of the miner, Glen L. Charles, who filed his lifetime claim for benefits on February 17, 1984. Director's Exhibit 1. On June 28, 1985, the United States Department of Labor, Office of Workers' Compensation Programs, awarded benefits in the miner's claim. *Id.* Employer did not appeal and paid benefits. *Id.* The miner died on August 31, 2005. Director's Exhibits 1, 2. Claimant filed her initial claim for survivor's benefits on September 2, 2005, which was denied on August 16, 2007, by Administrative Law Judge Richard A. Morgan. Director's Exhibit 2. The Board affirmed the denial of the initial survivor's claim. *E.J.C. v. Slab Fork Coal Co.*, BRB No. 07-0987 BLA (July 30, 2008), *recon. denied*, (Oct. 1, 2008) (Order) (unpub.). Claimant filed her present subsequent claim on May 17, 2010. Director's Exhibit 4.

² The Patient Protection and Affordable Care Act (PPACA) 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.

benefits and the recent amendments to Section 932(l). Accordingly, the administrative law judge awarded survivor's benefits commencing as of September 1, 2008.

On appeal, employer challenges the constitutionality of amended Section 932(l), and its application to this subsequent survivor's claim, and requests that the Board hold the case in abeyance, pending resolution of the constitutionality of the PPACA and the severability of the non-health care provisions. Employer asserts that the subsequent claim is barred pursuant to fundamental principles of res judicata or claim preclusion and 20 C.F.R. §725.309(d)(3). In addition, employer contends that any benefits awarded should not commence prior to the date of the filing of the subsequent claim. The Director responds and argues that amended Section 932(l) is applicable to the subsequent survivor's claim, and that benefits should commence as of December 2008, the month after the month in which claimant's prior denial of benefits became final. Claimant did not file a response brief.

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.³ 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).

As an initial matter, 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, 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 United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has affirmed the Board's holding 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. *Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *aff'd sub. nom. W. Va. CWP Fund v. Stacy*, F. 3d , BLR , No. 11-1020, 2011 WL 6396510 (4th Cir. Dec. 21, 2011). For the reasons set forth in our decision in *Stacy*, we reject employer's arguments to the contrary and, consistent with our reasoning in *Mathews*, we also reject employer's request to hold this

³ The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 1. 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 (1989) (en banc).

case in abeyance pending resolution of the constitutional challenges to the PPACA and the severability of the non-health care provisions. *Stacy*, 24 BLR at 1-214; *Mathews*, 24 BLR at 1-201.

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, by operation of the doctrine of res judicata, and by 20 C.F.R. §725.309(d)(3), her subsequent claim is barred. Employer argues that allowing automatic entitlement to benefits in a subsequent survivor's claim under amended Section 932(l) renders meaningless the time limitations established by Congress in Section 1556; nullifies the prior final decision denying entitlement; ignores the governing language of 20 C.F.R. §725.2 and the applicable provisions at 20 C.F.R. §725.309(d)(3); and sanctions the Director's disregard of the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), 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).

The Director asserts, in response, that nothing in Section 1556 of the PPACA prohibits application of its provisions to subsequent claims. The Director argues that, by its terms, amended Section 932(l) is applicable when any claim, including a subsequent survivor's claim, meets the filing date and pendency requirements established under Section 1556. *Id.* The Director further contends that the automatic entitlement provisions of amended Section 932(l) create a "different type of 'change' that justifies, for a limited class of survivors, adjudication of a subsequent claim—a new condition of entitlement that is wholly independent of the miner's cause of death." Director's Response Brief at 7. In addition, the Director maintains that "concerns addressed by Section 725.309 are not implicated in this context because the survivor's entitlement is not tied to reconsideration of any prior-claim finding that the miner's death was not due to pneumoconiosis." *Id.*

In *Richards v. Union Carbide Corp.*, BLR , BRB Nos. 11-0414 BLA and 11-0414 BLA-A (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 recently addressed and rejected arguments substantially similar to those raised by employer in this case. In *Richards*, the majority of the Board agreed with the Director's position, that Section 932(l) of the Act, as amended by Section 1556 of the PPACA, permits the application of amended Section 932(l) to all claims filed after January 1, 2005, that are pending on or after March 23, 2010. The majority further held that, by restoring the derivative entitlement provisions of Section 932(l), Congress effectively created a "change" that established a new condition of entitlement unrelated to whether the miner died due to pneumoconiosis. The majority determined, therefore, that amended Section 932(l) provides a basis for establishing a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d) in a subsequent survivor's claim. Accordingly, we reject

employer's arguments concerning res judicata in the present case for the reasons set forth in *Richards*.

Finally, employer contends that the administrative law judge erred in selecting September 1, 2008, as the date from which benefits commence and in finding that September 1, 2008 was the first day of the month after the prior denial became final. Employer asserts that, because the Board affirmed the prior denial of survivor's benefits on July 30, 2008, and denied reconsideration on October 1, 2008, the denial of the prior survivor's claim became final on either October 1 or November 1, 2008. In addition, employer maintains that the date of onset for payment of benefits is the date of filing of the subsequent claim, not the month after the prior denial became final. Employer reasons that, because the recent amendments apply only with respect to claims filed after January 1, 2005, that are pending on or after March 23, 2010, the appropriate date for the commencement of benefits is the filing date of the subsequent claim, as an earlier date would render meaningless the retroactive limitations set by Congress.

The Director also alleges that the administrative law judge did not select the proper date for the commencement of benefits. The Director agrees with employer that the administrative law judge erred in finding that September 2008 was the month after the denial of the prior survivor's claim became final. The Director maintains that benefits may commence on December 1, 2008, which is sixty days after October 1, 2008, the date the Board denied claimant's request for reconsideration of the prior denial. In support of the Director's position, he notes, *inter alia*, that Section 1556 is silent as to the appropriate commencement date for automatic entitlement to benefits and that Section 725.309(d)(5) prohibits the payment of benefits in a subsequent claim for any period prior to the date upon which the order denying the prior claim became final.

We agree with employer and the Director that the administrative law judge erred in designating September 1, 2008 as the proper date for the commencement of benefits. The Board addressed the identification of the appropriate date for the commencement of benefits in a subsequent survivor's claim awarded pursuant to amended Section 932(l) 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.* Based upon our decision in *Richards*, we hold that, in the present case, as the denial of claimant's prior claim became final on November 30, 2008, which is sixty days after the issuance of the Board's October 1, 2008 Order denying reconsideration, claimant's survivor's benefits properly commence as of December 1, 2008, the first day of the month after the month in which claimant's prior denial of benefits became final. *See* 20 C.F.R. §§725.309(d)(5), 802.406; *E.J.C. v. Slab Fork Coal Co.*, BRB No. 07-0987 BLA (Oct. 1, 2008) (Order) (unpub.)

Accordingly, the administrative law judge's Decision and Order Granting Motion for Summary Decision and Awarding Benefits is affirmed, as modified to reflect December 1, 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