

BRB No. 11-0495 BLA

DELLA OBERLECHNER)
(Widow of FRANK OBERLECHNER))
)
Claimant-Respondent)
)
v.)
)
U.S. STEEL CORPORATION)
) DATE ISSUED: 03/20/2012
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania for claimant.

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, for employer.

Helen H. Cox (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 (2010-BLA-5771) of Administrative Law Judge Thomas M. Burke rendered on a survivor's 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). At the hearing, the administrative law judge acknowledged employer's objections, for appellate purposes, to the constitutionality and validity of Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, and determined that the sole issue for resolution was whether amended Section 422(l) of the Act, 30 U.S.C. §932(l), was applicable to this case.¹ The administrative law judge determined that the miner was receiving benefits at the time of his death; that claimant² filed her survivor's claim on December 18, 2009; and that claimant is an eligible survivor of the miner. Thus, the administrative law judge concluded that claimant met the eligibility criteria for automatic entitlement to benefits under amended Section 932(l), and awarded benefits.

On appeal, employer asserts that, because the PPACA was found to be unconstitutional in *Florida ex rel. Bondi v. U. S. Dept. of Health and Human Services*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011), the award of benefits should be vacated and the case remanded to the district director for a determination of whether the miner's death was due to pneumoconiosis. Employer also 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 a taking of private property. Employer further contends that Section 1556 of the PPACA violates the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), because the amendments create irreconcilable inconsistencies within the Act, and improperly relieve claimant of her burden of proof. Alternatively, employer requests that further proceedings or actions related to this claim be held in abeyance, pending the promulgation of implementing regulations. Lastly, employer maintains that the operative date for determining eligibility

¹ 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), Pub. L. No. 111-148, 124 Stat. 119 (2010). The amendments, in pertinent part, revive Section 422(l) of the Act, 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).

² Claimant is the widow of the miner, who died on December 1, 2009. Director's Exhibit 7. At the time of his death, the miner was receiving benefits pursuant to a final award issued on May 21, 1987. Director's Exhibit 15.

pursuant to amended Section 932(l) is the date that the miner's claim was filed, not the date that the survivor's claim was filed.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. 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).

As the Director correctly notes, the decision cited by employer, declaring the individual mandate of the PPACA unconstitutional, has no effect on the instant case, as an order was issued staying that decision, pending appeal, and the United States Court of Appeals for the Eleventh Circuit severed the litigation on the individual mandate from the litigation on the remainder of the Act. *See Florida ex rel. Bondi v. U.S. Dept. of Health and Human Services*, 648 F.3d 1235 (11th Cir. 2011); *Florida ex rel. Bondi v. U.S. Dept. of Health and Human Services*, 780 F. Supp. 2d 1307 (N.D. Fla. 2011). 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]*, F.3d , BLR , No. 10-4179, 2011 WL 5068092 (3d Cir. Oct. 26, 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Further, as we did in *Fairman v. Helen Mining Co.* 24 BLR 1-225, 1-229-30 (2011), *appeal docketed*, No. 11-2445 (3d Cir. May 31, 2011), we reject employer's assertions that amended Section 932(l) creates irreconcilable inconsistencies in the Act and violates the APA, and we also reject employer's request that this case be held in abeyance pending promulgation of implementing regulations. *See Mathews*, 24 BLR at 1-201; *Fairman*, 24 BLR at 1-229. Likewise, 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. *Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *aff'd sub nom. West Virginia CWP Fund v. Stacy*, F. 3d , BLR , No. 11-1020, 2011 WL 6396510 (4th Cir. Dec. 21, 2011). For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary.

³ We decline to address, as beyond the scope of our jurisdiction, employer's arguments regarding the constitutionality of various provisions of the PPACA that are unrelated to the Act. *See Herrington v. Savannah Machine & Shipyard Co.*, 17 BRBS 196 (1985).

Because claimant, an eligible survivor of the miner, filed her survivor's claim after January 1, 2005, her claim was pending on 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 determination that claimant is entitled to receive survivor's benefits pursuant to amended Section 932(l).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge