

BRB No. 11-0503 BLA

WANDA L. SKORCZEWSKI)	
(Widow of JOHN SKORCZEWSKI))	
)	
Claimant-Respondent)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	DATE ISSUED: 03/23/2012
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Order Awarding Survivor's Benefits of William S. Colwell, Administrative Law Judge, United States Department of Labor.

William S. Mattingly and Amy Jo Holley (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Awarding Survivor's Benefits (2011-BLA-5384) of Administrative Law Judge William S. Colwell, rendered on a survivor's claim filed on November 22, 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).¹ On March 23, 2010, amendments to the Act affecting claims filed after January 1, 2005, were enacted. The amendments to the Act changed the entitlement criteria for certain claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this survivor's claim, amended Section 422(l) of the Act, 30 U.S.C. §932(l), 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.²

While this case was pending before the administrative law judge, the Director, Office of Workers' Compensation Programs (the Director), filed a motion for summary decision and asserted that there is no genuine issue as to any material fact concerning whether claimant is entitled to benefits pursuant to amended Section 932(l). The Director requested, therefore, that the administrative law judge issue a decision awarding

¹ Claimant is the surviving spouse of the miner, John Skorczewski, who died on November 10, 2010. Director's Exhibits 2-4. At the time of his death, the miner was receiving federal black lung benefits pursuant to a Decision and Order Awarding Benefits issued by Administrative Law Judge Glenn Robert Lawrence, on February 8, 1993. Director's Exhibit 1. That award became final when the Board granted employer's motion to withdraw its appeal. *Skorczewski v. Consolidation Coal Co.*, BRB No. 93-1176 BLA (Mar. 24, 1993)(unpub. Order); Director's Exhibit 1.

² As it existed prior to March 23, 2010, Section 422(l) provided that:

In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner, except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981, [sic].

30 U.S.C. §932(l). On March 23, 2010, Section 1556 of Public Law No. 111-148 amended Section 422(l) as follows: "(b) Continuation of Benefits – Section 422(l) of the Black Lung Benefits Act (30 U.S.C. §932(l)) is amended by striking 'except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981'." Pub. L. No. 111-148, §1556(b), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §932(l)). Section 1556 further provides that "[t]he amendments made by this section shall apply with respect to claims filed under part B or part C of the Black Lung Benefits Act (30 U.S.C. 921 et seq., 931 et seq.) after January 1, 2005, that are pending on or after the date of enactment of this Act." Pub. L. No. 111-148, §1556(c).

survivor's benefits to claimant. Employer responded and argued that the Director's motion and should be denied because the Patient Protection and Affordable Care Act (PPACA), has been declared unconstitutional and its individual provisions are not severable. Employer also contended that retroactive application of the amendments is unconstitutional and that amended Section 932(l) is not applicable to this case, based on the filing date of the miner's claim.

The administrative law judge held that amended Section 932(l) removed any requirement for claimant to establish independently that the miner's death was due to pneumoconiosis if the miner was finally awarded benefits on a lifetime claim. Citing *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), the administrative law judge further determined that claimant satisfied the requirements for automatic entitlement set forth in amended Section 932(l), and that "it is the date of filing of the survivor's claim, not the filing date of the miner's claim, which controls applicability of the amendments." Order Awarding Survivor's Benefits at 2. Thus, the administrative law judge awarded survivor's benefits, commencing November 2010, the month in which the miner died. *Id.*

Employer appeals, arguing in its initial brief and reply brief, that the recent amendments to the Act are not severable if all, or portions, of the PPACA are found to be unconstitutional. Employer further contends that retroactive application of the recent amendments is unconstitutional, as it denies employer due process and constitutes a taking of private property, and that amended Section 932(l) is not applicable to this case, based on the filing date of the miner's claim. Employer requests that this case be held in abeyance until the constitutional challenges to the PPACA are finally resolved. Claimant did not file a response brief. The Director responds, urging the Board to reject employer's arguments and affirm the award of benefits.

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'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

As employer concedes, the question of the constitutionality of the PPACA and the severability of its provisions has been presented to, but not finally resolved by, the federal courts. Accordingly, we decline to reach the issue at this time. *See Andrews v.*

³ The record reflects that the miner's coal mine employment was in Illinois. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

Petroleum Helicopters, Inc., 16 BRBS 160, 162 (1982). 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) (unpub. Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). *See also Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011); *B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, BLR (3d Cir. 2011).

We also affirm the administrative law judge's determination that the operative date for determining eligibility pursuant to amended Section 932(l) is the date of filing of the survivor's claim, as it is in accordance with our decision in *Stacy*, 24 BLR at 1-214. Order Awarding Survivor's Benefits at 2; *see also Stacy*, 2011 WL 6396510 at *3-9. Furthermore, consistent with our reasoning in *Mathews*, we reject employer's argument that this case should be held in abeyance pending resolution of the constitutional challenges to the PPACA in federal court. *Mathews*, 24 BLR at 1-198-200; *see also Stacy*, 2011 WL 6396510 at *3 n.2; *Fairman v. Helen Mining Co.*, 24 BLR 1-225 (2011), *appeal docketed*, No. 11-2445 (3d Cir. May 31, 2011).

Regarding the administrative law judge's determination that claimant met the prerequisites for the application of amended Section 932(l), we affirm, as unchallenged on appeal, the administrative law judge's findings that claimant filed her survivor's claim after January 1, 2005, that the claim was pending on March 23, 2010, and that the miner was receiving benefits at the time of his death. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Order Awarding Survivor's Benefits at 2; Director's Exhibits 1, 2. Therefore, we affirm the administrative law judge's finding that claimant is derivatively entitled to benefits pursuant to amended Section 932(l) of the Act.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge