

BRB No. 11-0508 BLA

WANDA D. BILLUPS)
(Widow of JAMES B. BILLUPS))
)
Claimant-Respondent)
)
v.)
)
PERRY & HYLTON, INCORPORATED)
)
and)
)
WEST VIRGINIA COAL WORKERS') DATE ISSUED: 03/29/2012
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 Order of William S. Colwell, Administrative Law Judge,
United States Department of Labor.

Amy Jo Holley (Jackson Kelly PLLC), Morgantown, West Virginia, for
employer/carrier.

Paul L. Edenfield (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 (11-BLA-5432) 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 December 7, 2010.

Claimant¹ filed her initial claim for survivor's benefits on November 9, 2000. Director's Exhibit 1 (miner's claim). In a Decision and Order dated July 31, 2003, Administrative Law Judge Gerald M. Tierney 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.*

On March 23, 2010, amendments to the Act, affecting claims filed 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 December 7, 2010. Director's Exhibit 3. On December 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 10. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing.

On February 10, 2011, employer filed a motion to dismiss claimant's subsequent survivor's claim or, in the alternative, to grant its motion for partial summary judgment, and declare that claimant is not entitled to derivative entitlement pursuant to amended Section 932(*l*) of the Act. The Director, Office of Workers' Compensation Programs (the Director), responded by moving for a summary decision, asserting that, pursuant to amended Section 932(*l*), claimant was automatically entitled to benefits as a matter of law, and that there was no genuine issue as to any material fact concerning her entitlement. Employer filed a response in opposition to the Director's motion for a summary decision.

In an Order dated March 30, 2011, the administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to

¹ Claimant is the surviving spouse of the deceased miner, who died on October 29, 2000. Director's Exhibit 9 (miner's claim).

amended Section 932(l). Accordingly, the administrative law judge awarded survivor's benefits, commencing as of October 2000, the month in which the miner died.

On appeal, employer challenges the constitutionality of amended Section 932(l), and its application to this subsequent survivor's claim. Employer also challenges the administrative law judge's determination regarding the onset date of benefits, contending that any benefits awarded should not precede the filing date of the subsequent claim. The Director responds in support of the administrative law judge's application of amended Section 932(l) to this case. However, the Director contends that the appropriate onset date for benefits in this case is October 2003, the month after the month in which the denial of the prior survivor's claim became final. In a response brief, employer reiterates its previous contentions.²

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).

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*, No. 11-1020, 2011 WL 6396510, at *3-9 (4th Cir. Dec. 21, 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 (3d Cir. 2011). For the reasons set forth in *Stacy*, we reject employer's arguments.

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 on March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death.

³ The miner's last coal mine employment was in West Virginia. Director's Exhibit 19 (miner's claim). Accordingly, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

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*, No. 11-1020, 2011 WL 6396510 at *3 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.).

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, employer contends that the administrative law judge erred in setting the commencement date for benefits as October 2000, the month of the miner's death. Employer asserts that an award of benefits in this case should commence no earlier than December 2010, the month that claimant filed her subsequent claim. The Director also disagrees with the administrative law judge's commencement of benefits determination, arguing that claimant is entitled to benefits commencing in October 2003, the month after the month in which the denial of the prior claim became final.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. Consequently, we modify the administrative law judge's onset determination to October 2003. 20 C.F.R. §725.309(d)(5).

⁴ The denial of claimant's prior survivor's claim was filed with the district director on August 5, 2003, and became final thirty days later, in September 2003. *See* 20 C.F.R. §§725.478, 725.479(a); Director's Exhibit 1.

Accordingly, the administrative law judge's Order awarding benefits is affirmed, as modified to reflect October 2003 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