

BRB No. 12-0381 BLA

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| IRENE J. GIBSON |) | |
| (Widow of HERBERT GIBSON) |) | |
| |) | |
| Claimant-Respondent |) | |
| |) | |
| v. |) | |
| |) | |
| QUEEN MOUNTAIN MINING |) | DATE ISSUED: 03/11/2013 |
| CORPORATION |) | |
| |) | |
| 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 - Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

H. Brett Stonecipher (Ferreri & Fogle, PLLC), Lexington, Kentucky, for employer.

Rita Roppolo (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 - Award of Benefits (2011-BLA-5248) of Administrative Law Judge Daniel F. Solomon rendered on a subsequent survivor's claim¹ filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (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* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §§921(c)(4) and 932(l)). 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).

Claimant filed a subsequent survivor's claim on July 19, 2010. Director's Exhibit 3. On August 4, 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).² Director's Exhibit 5. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 13.

In his Decision and Order, the administrative law judge found that claimant's subsequent survivor's claim was not barred under 20 C.F.R. §725.309(d), that claimant satisfied the criteria for derivative entitlement pursuant to amended Section 932(l), and that there was no genuine issue as to any material fact concerning claimant's entitlement. Consequently, the administrative law judge awarded benefits, to commence as of June 2004, the month in which the miner died.

On appeal, employer argues that the retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005 deprives it of the opportunity for a meaningful hearing and constitutes a violation of its due process rights and an unconstitutional taking of private property. Employer contends

¹ Claimant is the widow of the miner, who died on June 14, 2004. Claimant filed her initial claim for survivor's benefits on July 20, 2004, and the district director denied benefits on May 31, 2005. Claimant took no further action with respect to this claim. Director's Exhibit 2.

² The miner was receiving federal black lung benefits at the time of his death pursuant to a claim filed on February 10, 1992, which was ultimately awarded, on the miner's request for modification, by Administrative Law Judge Edward Terhune Miller on June 3, 1998. The award of benefits was affirmed by the Board on July 2, 1999. *See Gibson v. Queen Mountain Mining*, BRB No. 98-1308 BLA (July 2, 1999)(unpub.).

that the operative date for determining eligibility pursuant to amended Section 932(l) is the date that the miner's claim was filed, not the date that the survivor's subsequent claim was filed. Employer also 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 the doctrine of res judicata. The Director responds, urging the Board to affirm the administrative law judge's award of benefits. However, the Director contends that the appropriate date for the commencement of benefits in this case is July 2005, the month after the month in which the denial of the prior survivor's claim became final. Claimant responds in support of the award of benefits.

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).

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). See also *Vision Processing, LLC v. Groves*, F.3d , No. 11-3702, 2013 WL 332082 (6th Cir. Jan. 30, 2013); *B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Further, 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. See *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), cert. denied, 568 U.S. (2012). For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary. We also reject employer's contention that claimant's subsequent claim is barred under the doctrine of res judicata, for the reasons set forth in *Richards v. Union Carbide Corp.*, 25 BLR 1-31 (2012)(en banc)(McGranery, J., concurring and dissenting) (Boggs, J., dissenting), appeal docketed, No. 12-1294 (4th Cir. Mar. 8, 2012). Because claimant filed her subsequent survivor's claim after January 1, 2005, her claim was pending on or after March 23, 2010, and the miner was receiving benefits as the time of his death, we affirm the administrative law judge's finding that claimant is entitled to receive survivor's benefits pursuant to amended Section 932(l).

³ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner's last coal mine employment occurred in Tennessee. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 1.

Lastly, in *Richards*, the Board held that derivative benefits are payable in a subsequent survivor's claim filed within the time limitations set forth in Section 1556 of Public Law No. 111-148 from the month after the month in which the denial of the prior claim became final.⁴ *See Richards*, 25 BLR at 1-39. Consequently, as the order denying claimant's prior claim became final in June 2005, at the expiration of the thirtieth day after it was filed in the office of the district director, claimant's survivor's benefits under amended 932(l) in her subsequent claim properly commence as of July 2005, the month after the month in which claimant's prior denial of benefits became final. *See* 20 C.F.R. §725.309(d)(5).

Accordingly, the administrative law judge's Decision and Order - Award of Benefits is affirmed, as modified to reflect July 2005 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

⁴ The denial of claimant's prior survivor's claim was filed with the district director on May 31, 2005, and became final thirty days later, in June 2005. *See* 20 C.F.R. §725.419; Director's Exhibit 2.