

BRB No. 11-0546 BLA

MARGARET LUCAS)
(Widow of JENNINGS O. LUCAS))
)
Claimant-Respondent)
)
v.)
)
PERRY & HYLTON INCORPORATED) DATE ISSUED: 05/17/2012
)
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 Decision and Order - Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

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

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/carrier (employer) appeals the Decision and Order - Awarding Benefits (2011-BLA-5530) of Administrative Law Judge Daniel L. Leland, 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). Claimant filed her initial claim for survivor's benefits on October 26, 2005. By Order issued May 7, 2007, Administrative Law Judge Richard A. Morgan, dismissed the claim because claimant did not respond to his order to show cause why her claim should not be dismissed for failure to appear at the hearing. Claimant did not appeal.

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 adopted. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010). 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).

On April 20, 2010, claimant filed a subsequent survivor's claim. Director's Exhibit 5. The district director issued a Proposed Decision and Order awarding benefits, based on the application of amended Section 932(l). Director's Exhibit 13. Employer requested a hearing and the case was transferred to the Office of Administrative Law Judges and assigned to Administrative Law Judge Daniel L. Leland (the administrative law judge). Director's Exhibits 13, 15. Employer filed a motion requesting dismissal of claimant's subsequent claim on the ground that it is barred by 20 C.F.R. §725.309(d). Employer argued, in the alternative, that amended Section 932(l) does not apply, as the miner's claim was filed before January 1, 2005. The Director, Office of Workers' Compensation Programs (the Director), filed a motion for summary judgment, contending that claimant is automatically entitled to benefits, based on the miner's lifetime award and amended Section 932(l). The administrative law judge issued a Decision and Order in which he granted the Director's motion for summary judgment. Accordingly, the administrative law judge awarded survivor's benefits commencing on October 1, 2005, the first day of the month of the miner's death.

¹ Claimant is the widow of the miner, Jennings O. Lucas, who died on October 9, 2005. Director's Exhibits 3, 11. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim. Director's Exhibits 1, 2.

Employer appealed and in its Brief in Support of Petition for Review, employer challenges the constitutionality of amended Section 932(l), and its application to this subsequent survivor's claim. Employer further argues that the subsequent claim is barred by the principles of res judicata, or claim preclusion, and 20 C.F.R. §725.309(d)(3). Employer also maintains that the operative date for determining eligibility for survivor's benefits under amended Section 932(l) is the date that the miner's claim was filed, not the date that the survivor's claim was filed. In addition, employer contends that any benefits awarded should not precede the date of the filing of the subsequent claim.

The Director has responded to employer's appeal and argues that amended Section 932(l) is applicable to the subsequent survivor's claim, and that benefits should commence as of June 2007, the month after the month in which claimant's prior denial of benefits became final. Claimant did not file a response brief. Employer has submitted a reply brief in which it reiterates its position that this subsequent claim is barred.

Employer subsequently filed a separate motion, requesting that the Board hold this case in abeyance, pending the United States Supreme Court's resolution of the constitutionality and severability of the individual mandate set forth in the PPACA and the Court's disposition of employer's petition for certiorari in *W. Va. CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Corp.*, 24 BLR 1-207 (2010). Neither the Director nor claimant has responded to employer's motion.

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.² 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

² 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).

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*, 24 BLR at 2-214. For the reasons set forth in our decision in *Stacy*, we hold that employer's arguments to the contrary are without merit. We also deny employer's motion to hold this case in abeyance pending resolution of the constitutional challenges to the PPACA, including the severability of the provisions that are unrelated to health insurance, and of employer's petition for certiorari in *Stacy*. See *Stacy* 671 F.3d at 383 n.2; *Stacy*, 24 BLR at 1-214; *Mathews*, 24 BLR at 1-201.

Employer next contends that, based on the denial of claimant's initial survivor's claim, she is ineligible for derivative survivor's benefits under amended Section 932(l), by operation of the doctrine of res judicata and 20 C.F.R. §725.309(d)(3). Employer maintains 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. The Director further contends that the automatic entitlement provisions of amended Section 932(l) created 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 6. In addition, the Director maintains, "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 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 the application of res judicata in the present case for the reasons set forth in *Richards*.

Finally, employer contends that the administrative law judge erred in setting the commencement date for benefits as October 1, 2005, the first day of the month in which the miner died. Employer asserts that an award of benefits in this case should commence no earlier than April 1, 2010, the first day of the month in which claimant filed her subsequent claim. The Director also challenges the administrative law judge's commencement of benefits determination and argues that claimant is entitled to benefits commencing June 1, 2007, the first day of the month after the month in which the denial of the prior claim became final.

We concur with employer, and the Director, that the administrative law judge's designation of October 1, 2005, as the date for the commencement of benefits was in error. The Board determined in *Richards* 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.* In the present case, the denial of claimant's prior claim became final on June 6, 2007 – thirty days after the issuance of Judge Morgan's Order of Dismissal on May 7, 2007. Based upon our decision in *Richards*, we hold that claimant's survivor's benefits properly commence as of July 1, 2007, 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.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed, as modified to reflect July 1, 2007, 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