

BRB No. 11-0580 BLA

LORINE COPLEY)
(Widow of ANDREW JACKSON COPLEY))
)
 Claimant-Respondent)
)
 v.)
)
 PERRY BRANCH COAL COMPANY) DATE ISSUED: 05/07/2012
)
 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 Summary Decision Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Francesca Tan and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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 Summary Decision Awarding Benefits (2011-BLA-5373) of Administrative Law Judge Michael P. Lesniak, rendered on a survivor's claim filed on November 25, 2008,¹ 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). Prior to the hearing, the Director, Office of Workers' Compensation Programs (the Director), submitted a Motion for Summary Decision, asserting that claimant was automatically entitled to benefits, based on the recent amendments to the Act contained in the Patient Protection and Affordable Care Act (PPACA).² Claimant did not respond to the motion. Employer opposed the motion, contending that the recent amendments were not applicable. In his Summary Decision Awarding Benefits, issued on April 26, 2011, the administrative law judge found that, pursuant to amended Section 422(l), 30 U.S.C. §932(l), claimant is automatically entitled to benefits, based on an award of benefits issued to the miner during his lifetime, which became final on June 1, 1992. Summary Decision at 1; Director's Exhibit 2.

On appeal, employer asserts that the retroactive application of amended Section 932(l) to this claim is unconstitutional, as it results in a violation of substantive due process and constitutes an unlawful taking of property under the Fifth Amendment. Employer maintains that Section 932(l) is not applicable, as the operative date for determining eligibility for survivor's benefits, pursuant to amended Section 932(l), is the date the miner's claim was filed, not the date the survivor's claim was filed. Alternatively, employer asks that the Board hold in abeyance any further proceedings or actions related to this claim, pending resolution of the constitutional challenges to the PPACA, or that the Board remand the case to the administrative law judge in order to give employer the opportunity to present additional evidence relevant to its constitutional arguments. Claimant has not filed a response brief. The Director responds, urging affirmance of the award pursuant to amended Section 932(l).

¹ Claimant is the widow of the miner, Andrew Jackson Copley, who died on October 27, 2008. Director's Exhibits 3, 5.

² Section 1556 of the Patient Protection and Affordable Care Act included amendments to the Black Lung Benefits Act (the Act), affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. 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). In pertinent part, the amendments revived Section 422(l) of the Act, 30 U.S.C. §932(l), providing 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.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.³ 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).

We reject employer's assertion that if any portion of the PPACA is declared unconstitutional, the amendments to the Black Lung Benefits Act contained therein, which include amended Section 932(l), must also be declared invalid. *See West Virginia CWP Fund v. Stacy*, 671 F. 3d 378, 383 n.2 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010). We also 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 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 Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011).⁴

Furthermore, there is no merit to employer's assertion that Section 932(l) is not applicable, based on the filing date of the miner's claim. The United States Court of Appeals for the Fourth Circuit, within whose 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. *See Stacy*, 671 F. 3d at 388-89. Lastly, for the reasons set forth in *Mathews*, we decline to hold this case in abeyance. *See Mathews*, 24 BLR at 1-201. Because claimant 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 finding that claimant is

³ Because the miner's coal mine employment was in West Virginia, 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); Director's Exhibit 2.

⁴ We also decline to remand this case for development of evidence relevant to the economic impact of amended Section 932(l), since employer's constitutional argument with regard to the Takings Clause of the Fifth Amendment has been rejected by the Board and the Fourth Circuit. *See West Virginia CWP Fund v. Stacy*, 671 F. 3d 378 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010).

entitled to receive survivor's benefits pursuant to Section 422(l) of the Act, 30 U.S.C. §932(l).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge