

BRB No. 11-0590 BLA

HELEN RUTH WOLFE)
(Widow of EDEN E. WOLFE))
)
 Claimant-Respondent)
)
 v.)
)
 KING POWELLTON MINING COMPANY) DATE ISSUED: 05/22/2012
)
 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 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Carrier appeals the Summary Decision Awarding Benefits (2011-BLA-5346) of Administrative Law Judge Michael P. Lesniak, 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 January 14, 2008, which was denied by the district director on August 12, 2008. Director's Exhibit 2. Claimant took no further action with regard to the denial and the case was administratively closed.

On March 23, 2010, amendments to the Act, contained in the Patient Protection and Affordable Care Act (PPACA), were passed, which affect claims filed after January 1, 2005, that were pending on or after March 23, 2010. *See* Section 1556 of the PPACA, Public Law No. 111-148 (2010). In pertinent part, the amendments revive 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. *See* 30 U.S.C. §932(l).

On August 23, 2010, claimant filed her subsequent claim. Director's Exhibit 4. In a Proposed Decision and Order issued on October 27, 2010, the district director awarded benefits pursuant to amended Section 932(l). Director's Exhibit 13. Employer requested a hearing and the case was forwarded to the Office of Administrative Law Judges and assigned to Judge Lesniak (the administrative law judge). In a Notice of Contested Issues, employer requested dismissal of claimant's subsequent claim on the ground that it was barred by 20 C.F.R. §725.309(d)(3). Employer also challenged the constitutionality of amended Section 932(l). The Director, Office of Workers' Compensation Programs (the Director), filed a motion for summary judgment, asserting that there was no genuine issue of material fact concerning whether claimant is entitled to benefits.² In his Summary Decision Awarding Benefits, the administrative law judge found that claimant was entitled to survivor's benefits under amended Section 932(l), based on the miner's lifetime award of benefits, commencing September 1, 2008, the first day of the month in which the denial of the prior claim became final.

¹ Claimant is the widow of the miner, Eden E. Wolfe, who died on September 20, 2007. Director's Exhibits 9, 10. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award issued on his lifetime claim, which became final on September 4, 1992. Director's Exhibit 1.

² Employer asserts in its Brief in Support of Petition for Review that it did not receive a copy of the motion for summary judgment but does not make any argument that it has been prejudiced.

On appeal, carrier challenges the constitutionality of amended Section 932(l), and its application to this subsequent survivor's claim. Carrier requests that the Board hold this case in abeyance, pending review by the United States Court of Appeals of the Fourth Circuit of the Board's decision in *Stacy v. Olga Coal Corp.*, 24 BLR 1-207 (2010),³ or resolution of the constitutionality and severability of the individual mandate set forth in the PPACA by the United States Supreme Court. Employer further argues that the subsequent claim is barred by 20 C.F.R. §725.309(d)(3) and the principles of res judicata and stare decisis. 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.

The Director responds, urging the Board to reject employer's arguments regarding the constitutionality of amended Section 932(l) and its application to this subsequent claim. The Director contends that the award of benefits should be affirmed. Claimant has not filed a response brief. In its reply brief, employer reiterates its argument that the subsequent claim is barred and also contends that the administrative law judge erred in finding that benefits commence as of September 1, 2008, the first day of the month in which the denial of the prior claim became final. Employer contends that any benefits awarded should not precede the date of the filing of the subsequent claim.

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.⁴ 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

³ Subsequent to the briefing in this case, the United States Court of Appeals for the Fourth Circuit affirmed the Board's decision in *Stacy*. *See 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).

⁴ 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).

(3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011).⁵ Further, 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. *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 *Stacy* and the constitutional challenges to the PPACA. 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 20 C.F.R. §725.309(d)(3) and of the doctrines of res judicata and stare decisis. However, 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 that the subsequent claim is barred by 20 C.F.R. §725.309(d) and principles of res judicata and stare decisis, for the reasons set forth in *Richards*.

Finally, although we reject employer's argument that benefits must commence as of the date of the filing of the subsequent claim, we agree, on an alternate ground, that the administrative law judge erred in determining the date for commencement of benefits. In *Richards*, the Board addressed the identification of the appropriate date for the commencement of benefits in a subsequent survivor's claim awarded pursuant to amended Section 932(l). The Board determined 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

⁵ We also deny employer's request to remand this case for development of evidence relevant to its constitutional arguments.

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.* Based upon our decision in *Richards*, we hold that, in the present case, because the denial of claimant's prior claim became final on September 11, 2008, which is thirty days after the district director's August 12, 2008 Proposed Decision and Order, survivor's benefits properly commence as of October 1, 2008, 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), 725.418, 725.419; Director's Exhibit 2.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed, but is modified to reflect October 1, 2008 as the date from which benefits commence.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge