

BRB No. 11-0594 BLA

TERESSA LOFTIS)	
(Widow of KENNETH E. LOFTIS))	
)	
Claimant-Respondent)	
)	
v.)	
)	
LAUREL COAL CORPORATION)	DATE ISSUED: 05/10/2012
)	
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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

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

Emily Goldberg-Kraft (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 Summary Decision (11-BLA-5382) of Administrative Law Judge Michael P. Lesniak 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 survivor's subsequent claim filed on September 21, 2010.

Claimant¹ filed her initial claim for survivor's benefits on March 7, 2006. Director's Exhibit 2. On October 30, 2006, the district director 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 this subsequent claim on September 21, 2010. Director's Exhibit 4. The district director awarded benefits to claimant pursuant to amended Section 932(*l*), and employer requested a hearing. Director's Exhibits 9, 11.

On March 8, 2011, the Director, Office of Workers' Compensation Programs (the Director), moved 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 disagreed, and requested that the case be held in abeyance pending resolution of legal challenges to Public Law No. 111-148. Employer further argued that the operative date for determining eligibility for survivor's benefits pursuant to amended Section 932(*l*) is the date on which the miner's claim was filed, not the date on which the survivor's claim was filed. Employer also contended that, because claimant's prior claim for survivor's benefits was denied and the denial became final, her subsequent claim was barred by 20 C.F.R. §725.309. In a reply brief, the Director reiterated his arguments in support of an award of benefits.

In his Decision and Order, the administrative law judge found that claimant

¹ Claimant is the surviving spouse of the miner, who died on July 28, 2005. Director's Exhibit 7. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim. Director's Exhibit 1.

satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l). Accordingly, the administrative law judge awarded survivor's benefits, commencing as of July 2005, the month in which the miner died.

On appeal, employer challenges the constitutionality of amended Section 932(l), and its application to this claim. The Director responds in support of the administrative law judge's application of amended Section 932(l) to this case.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 recently rejected. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383-89 (4th Cir. 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. We further 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*, 671 F.3d at 383 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.).

² Employer does not challenge the administrative law judge's findings that claimant established 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. Therefore, those findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ The miner's coal mine employment was in West Virginia. Director's Exhibit 5. 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, 1-202 (1989) (en banc).

Employer next contends that, because claimant's prior claim for survivor's benefits was denied and the denial became final, fundamental principles of res judicata or claim preclusion set forth in 20 C.F.R. §725.309 bar her subsequent claim. We disagree. The principles of res judicata addressed in 20 C.F.R. §725.309, requiring that a subsequent claim be denied unless a change in an applicable condition of entitlement is established, are not implicated in the context of a survivor's subsequent claim filed within the time limitations set forth under Section 1556 of Public Law No. 111-148, 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.*, BLR , 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). Therefore, contrary to employer's contention, 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, we hold that the administrative law judge erred in setting the benefits commencement date as July 2005, the month of the miner's death. Subsequent to the filing of the briefs in this appeal, the Board held that 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.⁴ *Richards*, slip op. at 7. As the order denying claimant's prior claim became final in November 2006 at the expiration of the thirtieth day after it was issued by the district director, *see* 20 C.F.R. §725.419(d), claimant's survivor's benefits under amended Section 932(l) in her subsequent claim properly commence as of December 2006, the month after the month in which the denial of claimant's prior claim became final. Consequently, we modify the administrative law judge's determination of the commencement date for benefits to December 2006. *See* 20 C.F.R. §725.309(d)(5).

⁴ The Director, Office of Workers' Compensation Programs, argued for this approach in his Motion for Summary Decision, contending that benefits should commence from the month after the month in which the denial of the prior claim became final. Director's Motion for Summary Decision at 7.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed, as modified to reflect December 2006 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