

BRB No. 11-0618 BLA

NORMA F. DAVIS)	
(Widow of CARL J. DAVIS))	
)	
Claimant-Respondent)	
)	
v.)	
)	
CLINCHFIELD COAL COMPANY)	DATE ISSUED: 05/24/2012
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Order Awarding Survivor's Benefits of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

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

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Awarding Survivor's Benefits (2011-BLA-5676) of Associate Chief Administrative Law Judge William S. Colwell rendered on a 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).

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* 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, 2011, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision, asserting that no material issue of fact was contested and that, under amended Section 932(l), and given the filing date of her claim, claimant was entitled to benefits, based on the award of benefits to her deceased husband.² In response, employer argued that claimant is not automatically entitled to survivor's benefits under amended Section 932(l), because the miner's claim was not pending on or after March 23, 2010. Alternatively, employer requested this case be held in abeyance pending resolution of the challenges to the PPACA in federal court.³ Claimant did not file a response to the Director's motion.

In his Order Awarding Survivor's Benefits, the administrative law judge rejected employer's argument, that Section 932(l) was inapplicable because the miner's claim was

¹ Claimant is the widow of the miner, who died on May 28, 2007. Director's Exhibit 8. Claimant filed her survivor's claim on July 30, 2010. Director's Exhibit 3. On August 4, 2010, the district director determined that claimant was entitled to derivative benefits pursuant to amended Section 422(l) of the Act, 30 U.S.C. §932(l). Employer subsequently requested a hearing. Director's Exhibits 11, 12.

² The miner was receiving federal black lung benefits at the time of his death pursuant to a claim filed on April 23, 2007, which was awarded by the district director on January 14, 2008. Employer did not contest liability. Director's Exhibit 2.

³ Employer also requested that a hearing be held to present evidence on the economic impact of the amendments. The administrative law judge determined, however, that he was without statutory or regulatory authority to hear and decide claims for damages. Order Awarding Survivor's Benefits at 3.

not pending on or after March 23, 2010. Finding that claimant satisfied the criteria for derivative entitlement pursuant to amended Section 932(l), the administrative law judge declined to hold the case in abeyance, and awarded benefits to commence as of May 2007, 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 constitutes a violation of its due process rights and an unconstitutional taking of private property. Employer also contends 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 claim was filed. Employer requests that further proceedings or actions related to this claim be held in abeyance, pending the resolution of the constitutional challenges to the PPACA in federal court and the promulgation of implementing regulations by the Secretary of Labor. Claimant and the Director respond, urging the Board to reject employer's contentions and affirm the administrative law judge's 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.⁴ 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 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 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. *West Virginia CWP Fund v. Stacy*, 671 F.3d 378, BLR (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010). For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary and, consistent with our

⁴ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner's last coal mine employment occurred in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibits 1, 4.

reasoning in *Mathews*, we reject employer's request to hold this case in abeyance pending promulgation of implementing regulations or resolution of the legal challenges to the PPACA.⁵ See *Mathews*, 24 BLR at 1-201; *Fairman v. Helen Mining Co.*, 24 BLR 1-225 (2011), *appeal docketed*, No. 11-2445 (3d Cir. May 31, 2011).

Because claimant filed her survivor's claim after January 1, 2005, her claim was pending on or after 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 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 Order Awarding Survivor's Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁵ We reject employer's assertion that if any portion of the PPACA is declared unconstitutional, the amendments to the Act, including amended Section 932(l), must also be declared invalid. Employer's Brief at 4-8; see *West Virginia CWP Fund v. Stacy*, 671 F.3d 378, BLR (4th Cir. 2011).