

BRB No. 12-0485 BLA

CLARA MAE WHITT)
(Widow of TOLBERT RAMON WHITT))
)
Claimant-Respondent)
)
v.)
)
DALE COAL, INCORPORATED) DATE ISSUED: 05/14/2013
)
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 Granting Director's Motion for Summary Decision and Awarding Survivor's Benefits of Adele H. Odegard, Administrative Law Judge, United States Department of Labor.

Amy Jo Holley and Ashley M. Harman (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting Director's Motion for Summary Decision and Awarding Survivor's Benefits (2012-BLA-05176) of Administrative Law Judge Adele H. Odegard, rendered on a survivor's claim filed on August 15, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).¹ The administrative law judge determined that claimant is automatically entitled to benefits under amended 30 U.S.C. §932(l) of the Act, based on the award of benefits in the miner's claim.² Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the constitutionality of amended Section 932(l), and asserts, in the alternative, that it does not apply to the present claim, based on the filing date of the miner's claim. In addition, employer contends that claimant is not an "eligible survivor" as defined by amended Section 932(l) and that a change in law is not a proper ground for granting claimant's request for modification. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, responds, asserting that the administrative law judge properly awarded benefits under amended Section 932(l).³

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,

¹ Claimant is the widow of the miner, Tolbert Ramon Whitt, who died on June 3, 2011. Director's Exhibit 9. At the time of his death, the miner was receiving federal black lung benefits pursuant to a March 5, 2002 Order of Remand issued on his lifetime claim by Administrative Law Judge Gerald M. Tierney. Director's Exhibit 3.

² Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, amended Section 932(l) provides that a survivor of a miner who was determined to be 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), *amended by* Pub. L. No. 111-148, §1556(b), 124 Stat. 119, 260 (2010).

³ Employer's request to hold the case in abeyance pending resolution of the constitutional challenges to the PPACA and the severability of non-health care provisions is moot. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012).

and is 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).

Employer asserts that the retroactive application of amended Section 932(l) to this claim constitutes a violation of its due process rights and an unconstitutional taking of private property. Employer also maintains that the operative date for determining eligibility for survivor’s benefits 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.

The constitutional arguments raised by employer are virtually identical to the ones that the United States Court of Appeals for the Fourth Circuit rejected in *W. Va. CWP Fund v. Stacy*, 671 F. 3d 378, 25 BLR 2-65 (4th Cir. 2011), *aff’g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *cert. denied*, 568 U.S. (2012); *see also B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). For the reasons set forth in *Stacy*, we reject employer’s arguments. In addition, the court in *Stacy* 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*, 671 F.3d at 388-89, 25 BLR at 2-82-83. We hold that there is no merit, therefore, in employer’s contention to the contrary.

We also reject employer’s assertion that claimant is not an “eligible survivor” within the meaning of amended Section 932(l) because she did not prove that pneumoconiosis caused, or contributed to, the miner’s death. Contrary to employer’s contention, the automatic entitlement provision of amended Section 932(l) provides benefits to a survivor without the requirement that she prove that the miner’s death was due to pneumoconiosis.⁵ *See Campbell*, 662 F.3d at 249-50, 25 BLR at 2-38-39; *Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-231 (2011). With respect to the administrative law judge’s findings under amended Section 932(l), the administrative law

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner’s coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director’s Exhibit 3.

⁵ Although the Fourth Circuit did not render a holding on this issue in *Stacy*, the court indicated its agreement with the decision of the United States Court of Appeals for the Third Circuit in *B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011). *W. Va. CWP Fund v. Stacy*, 671 F. 3d 378, 389-91, 25 BLR 2-65, 2-85-88 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012).

judge determined correctly that: Claimant filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending after March 23, 2010; and the miner was receiving benefits at the time of his death. Decision and Order at 3-4; *see* Director's Exhibits 3, 4. Therefore, we affirm the administrative law judge's determination that claimant is entitled to receive benefits pursuant to amended Section 932(l) of the Act. 30 U.S.C. §932(l).

Accordingly, the administrative law judge's Decision and Order Granting Director's Motion for Summary Decision and Awarding Survivor's Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge