

BRB No. 12-0619 BLA

NOLA M. GARRISON)
(Widow of HUBERT GARRISON))
)
Claimant-Respondent)
)
v.)
)
BLACK WARRIOR MINERALS,)
INCORPORATED)
)
and) DATE ISSUED: 05/16/2013
)
AMERICAN RESOURCES INSURANCE)
COMPANY)
)
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 of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Abigail P. van Alstyne (Quinn, Connor, Weaver, Davies & Rouco, LLP), Birmingham, Alabama, for claimant.

Anthony K. Finaldi and Matthew J. Zanetti (Fogle Keller Purdy, PLLC), Louisville, Kentucky, for employer/carrier.

Jeffrey S. Goldberg (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 Decision and Order (12-BLA-5616) of Administrative Law Judge Theresa C. Timlin awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). This case involves a survivor's claim filed on November 30, 2011.

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 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*).

On December 1, 2011, the district director issued a Proposed Decision and Order, wherein she found that claimant was derivatively entitled to benefits pursuant to amended Section 932(*l*). At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing.

On July 23, 2012, the administrative law judge ordered the parties to show cause, why an order awarding survivor's benefits should not be entered. Employer responded by challenging the application of amended Section 932(*l*) to this case, and requesting that the case be held in abeyance. Neither claimant nor the Director, Office of Workers' Compensation Programs (the Director), filed a response to the administrative law judge's Order.

In a Decision and Order dated August 7, 2012, the administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(*l*). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 932(*l*) to this case. Claimant¹ and the Director respond in support of the administrative law judge's award of benefits.

¹ Claimant is the widow of the miner, who died on November 1, 2011. 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. *See* Unmarked Exhibit.

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.² 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363 (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 Courts of Appeals for the Third, Fourth, Sixth, and Seventh Circuits have rejected. *See 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, 388, 25 BLR 2-65, 2-83 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *cert. denied*, 568 U.S. (2012); *Vision Processing, LLC v. Groves*, 705 F.3d 551, BLR (6th Cir. 2013); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). For the reasons set forth in *Campbell*, *Stacy*, *Groves*, and *Keene*, we reject employer's arguments.

In this case, claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under amended Section 932(l): She filed her claim after January 1, 2005; she is an eligible survivor of the miner; that her claim was pending after March 23, 2010; and the miner was determined to be eligible to receive benefits at the time of his death. Therefore, we affirm the administrative law judge's determination that claimant is derivatively entitled to benefits pursuant to amended Section 932(l). 30 U.S.C. §932(l).

² The record reflects that the miner's coal mine employment was in Alabama. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge