

BRB No. 13-0514 BLA

BRENDA J. SLONE)
(Widow of TAYLOR SLONE))
)
 Claimant-Respondent)
)
 v.)
)
 EASTERN COAL INCORPORATED,)
 c/o WELLS FARGO DISABILITY)
 MANAGEMENT)
)
 and)
)
 PITTSON COMPANY, c/o TPA WELLS) DATE ISSUED: 05/07/2014
 FARGO DISABILITY MANAGEMENT)
)
 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 - Award of Survivor's Benefits in a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

Richard A. Seid (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: HALL, Acting Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Award of Survivor's Benefits in a Subsequent Claim (2011-BLA-6013) of Administrative Law Judge Larry S. Merck (the administrative law judge), rendered on a claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(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), Pub. L. 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 June 26, 2013, the administrative law judge issued an Order Regarding Automatic Entitlement to Benefits in a Survivor's Claim, requesting the parties to file a position statement to show cause why claimant should not be awarded benefits pursuant to amended Section 932(l) in this claim. In response, claimant filed a letter arguing that, under amended Section 932(l), and given the filing date of her claim, she was entitled to derivative survivor's benefits based on the prior award to her deceased husband.² Employer filed a Position Statement Opposing Automatic Entitlement, acknowledging that the United States Court of Appeals for the Fourth Circuit affirmed the Board's decision in *Richards v. Union Carbide Corp.*, 25 BLR 1-31 (2012) (en banc) (McGranery, J., concurring and dissenting) (Boggs, J., dissenting), holding that amended

¹ Claimant, Brenda J. Slone, is the widow of the miner, Taylor Slone, who died on April 22, 2006. Director's Exhibit 8. Claimant filed her first claim for survivor's benefits on April 27, 2006. Director's Exhibit 1. On November 17, 2006, the district director denied benefits because claimant failed to establish that the miner's death was due to pneumoconiosis. *Id.* The record does not demonstrate that claimant further pursued this claim. On March 21, 2011, claimant filed a subsequent claim for benefits, which is pending herein on appeal. Director's Exhibit 3.

² At the time of his death, the miner was receiving federal black lung benefits pursuant to a Decision and Order issued by Administrative Law Judge Rudolf L. Jansen on March 21, 1995. Director's Exhibit 1.

Section 932(l) applies to all claims that comply with the time limitations set forth in Section 1556 of the PPACA, including subsequent survivor's claims. *Union Carbide Corp. v. Richards*, 721 F.3d 307, BLR (4th Cir. 2013). Employer asserted, however, that because this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit,³ which had not rendered a decision on this issue, the automatic entitlement provisions set forth in amended Section 932(l) are inapplicable to this subsequent survivor's claim. The Director, Office of Workers' Compensation Programs (the Director), did not file a response.

The administrative law judge found that, pursuant to amended Section 932(l), derivative benefits are available to an eligible survivor of a miner who was eligible to receive lifetime benefits at the time of his death, if the claim was filed after January 1, 2005 and was pending on or after March 23, 2010. The administrative law judge found that the provisions of 20 C.F.R. §725.309 are inapplicable to claimant's subsequent claim because claimant is not required to file a claim in order to receive benefits under amended Section 932(l). Finding that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l), the administrative law judge awarded survivor's benefits, commencing as of January 2007.

On appeal, employer contends that the doctrine of res judicata bars an award of benefits under the automatic entitlement provisions of amended Section 932(l) in this subsequent survivor's claim, where claimant's earlier claim was finally denied. Claimant and the Director respond, urging the Board to 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. 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).

Subsequent to the filing of employer's brief on appeal, the United States Court of Appeals for the Sixth Circuit affirmed the award of automatic derivative survivor's benefits under amended Section 932(l) in a subsequent survivor's claim that complied with the time limitations set forth in Section 1556 of the PPACA. *Consolidation Coal Co. v. Maynes*, 739 F.3d 323, BLR (6th Cir. 2014). The court explained that the widow could establish entitlement in her original claim only by proving that the miner's

³ As the miner's last coal mine employment was in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1.

death was due to pneumoconiosis, whereas entitlement in her subsequent claim hinged upon the administrative fact of whether the miner had received benefits during his lifetime. Because the widow's subsequent claim was based on a different statutory basis for benefits eligibility than her prior claim, and because her subsequent claim did not undermine either the factual or legal conclusions resulting in the denial of her earlier claim, the court held that "the doctrine of res judicata is not implicated." *Maynes*, 739 F.3d at 327, BLR . Consequently, in the present case, we reject employer's arguments to the contrary.

Because claimant filed her subsequent survivor's claim after January 1, 2005, her claim was pending 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 amended Section 422(l) of the Act, 30 U.S.C. §932(l).

Accordingly, the Decision and Order - Award of Survivor's Benefits in a Subsequent Claim of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge