

BRB No. 12-0138 BLA

DEBORAH K. CLINE)
(Widow of WILLIAM B. CLINE))
)
 Claimant-Respondent)
)
 v.)
)
 PRIDE COAL COMPANY,)
 INCORPORATED)
)
 and)
)
 WEST VIRGINIA COAL WORKERS') DATE ISSUED: 11/07/2012
 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 Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

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

Kevin T. Gillen and Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Maia S. Fisher (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 (carrier) appeals the Decision and Order Awarding Benefits (2011-BLA-5251) of Administrative Law Judge Richard A. Morgan (the administrative law judge) rendered on modification of a survivor's 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 were enacted, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §§921(c)(4) and 932(l)). 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).

In a Decision and Order dated October 20, 2009, the administrative law judge denied benefits in claimant's survivor's claim, finding that the evidence was insufficient to establish the existence of pneumoconiosis and that the miner's death was due to pneumoconiosis. Director's Exhibit 61. On April 19, 2010, claimant filed a timely request for modification pursuant to 20 C.F.R. §725.310.² Director's Exhibit 62. In a Proposed Decision and Order dated June 29, 2010, the district director determined that claimant was entitled to an automatic award of benefits under amended Section 932(l), finding that claimant is an eligible survivor of a miner who was receiving benefits at the

¹ Claimant is the widow of the miner, who died on July 13, 2006. Director's Exhibit 8. On May 4, 1995, Administrative Law Judge Lawrence E. Gray awarded benefits in the living miner's claim. After the miner's death, claimant filed a claim for survivor's benefits on October 10, 2006. Director's Exhibit 2.

² Pursuant to 20 C.F.R. §725.310(a), a claimant may, at any time before one year after the denial of a claim, file a request for modification of the denial of benefits on the grounds that a change in conditions has occurred or because a mistake in a determination of fact was made in the prior decision, including the ultimate fact of entitlement. 20 C.F.R. §725.310; *see Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

time of his death. Director's Exhibit 65. Carrier requested a hearing, and the case was transferred to the Office of Administrative Law Judges.

On October 12, 2011, carrier filed a motion for summary judgment, asserting that modification is not in the interest of justice, as claimant failed to establish a mistake in a determination of fact in the prior decision and failed to offer any evidence in support of her modification request. Carrier further argued that a change of law is not a proper ground for modification. Claimant responded in opposition to carrier's motion, and on October 13, 2011, filed a motion for an automatic award of benefits, asserting that claimant was entitled to benefits under amended Section 932(l). Carrier opposed the motion, arguing that claimant was not derivatively entitled to benefits. The Director, Office of Workers' Compensation Programs (the Director), responded to both motions, asserting that modification was appropriate in this case and that benefits should be awarded under amended Section 932(l).

On November 17, 2011, the administrative law judge determined that the cause of the miner's death was not a material issue under amended Section 932(l), and that claimant satisfied the issues of relationship and dependency. Decision and Order 4-7. Rejecting carrier's argument, that the operative date of filing is that of the miner's claim, rather than that of the survivor's claim,³ the administrative law judge denied carrier's request to hold the case in abeyance, and found that claimant was automatically entitled to survivor's benefits pursuant to amended Section 932(l).

On appeal, carrier challenges the constitutionality of amended Section 932(l), and its application to this survivor's claim. Carrier 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. Carrier also contends that the administrative law judge erred in applying the provisions of amended Section 932(l) to modify the denial of benefits into an award, as claimant's survivor's claim was finally denied in 2009, prior to the effective date of the amendments, and claimant has failed to establish a mistake in a determination of fact in the prior decision, as required pursuant to 20 C.F.R. §725.310. Carrier further asserts that a change in law is not a proper ground for modification.⁴ Claimant and the Director respond, urging the Board to reject carrier's contentions and affirm the administrative law judge's award of benefits.

³ The administrative law judge noted that carrier also asserted various constitutional arguments. Decision and Order at 3.

⁴ Carrier's request, that this case be held in abeyance pending resolution of the constitutional challenges to the Patient Protection and Affordable Care Act and the severability of its non-health care provisions, is moot. *See Nat'l Fed'n of Indep. Bus. v.*

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.⁵ 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).

Initially, we reject carrier'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 an unlawful 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 *W.Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012); *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). Furthermore, the United States Court of Appeals for the Fourth Circuit has 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, 25 BLR at 2-83. For the reasons set forth in *Stacy*, we reject carrier's arguments to the contrary.

We also reject carrier's argument that amended Section 932(l) does not apply to a request for modification of the denial of a survivor's claim. In *Mullins v. ANR Coal Co., LLC*, 25 BLR 1-49 (2012), *recon. denied*, BRB No. 11-0251 BLA (June 14, 2012) (Order)(unpub.), the Board addressed and rejected arguments substantially similar to those raised by carrier in this case. In applying amended Section 932(l) to a survivor's request for modification, the Board held that the language of Section 1556(c) of the PPACA mandates the application of amended Section 932(l) to all claims filed after January 1, 2005, that are pending on or after March 23, 2010, and provides that a survivor of a miner who was eligible to receive benefits at the time of his death is now automatically entitled to survivor's benefits, without having to establish that the miner's

Sebelius, 567 U.S. , 132 S.Ct. 2566 (2012); see also *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012).

⁵ The law of the United States Court of Appeals for the Fourth Circuit is applicable, as the miner was employed in the coal mining industry in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

death was due to pneumoconiosis. Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(codified at 30 U.S.C. §§921(c)(4) and 932(l)); *Mullins*, 25 BLR at 1-53; *see also Richards v. Union Carbide Corp.*, 25 BLR 1-31 (2012)(en banc)(McGranery, J., concurring and dissenting)(Boggs, J., dissenting), *appeal docketed*, No. 12-1294 (4th Cir. Mar. 8, 2012). Because claimant filed her claim after January 1, 2005, timely requested modification such that the 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 derivatively entitled to survivor's benefits pursuant to amended Section 932(l).

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