

BRB No. 11-0221 BLA

MARY MAYFIELD VANCE)
(Widow of JOHN LOUIS VANCE))
)
 Claimant-Respondent)
)
 v.)
)
 ITMANN COAL COMPANY) DATE ISSUED: 10/24/2011
)
 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 Williams S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

Mary Mayfield Vance, Afton, Tennessee, *pro se*.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Awarding Survivor's Benefits (2010-BLA-5787) of Associate Chief Administrative Law Judge William S. Colwell on a survivor's claim

filed on November 2, 2009, 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).¹ Recent amendments to the Act changed the entitlement criteria for certain claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this survivor's claim, amended Section 422 (l) of the Act, 30 U.S.C. §932(l), 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.

Subsequent to the enactment of the amendments, the administrative law judge issued an Order, instructing the parties to file statements as to why benefits should not be awarded in the survivor's claim, based upon the award of benefits in the miner's claim.² The Director, Office of Workers' Compensation Programs (the Director), submitted a position statement in favor of claimant's derivative entitlement to benefits. Employer argued in its position statement that the amendments to the Act are unconstitutional and, in the alternative, that the date on which the miner's claim was filed is the date relevant to the applicability of amended Section 932(l). Claimant did not file a position statement.

In the administrative law judge's Decision and Order, he found that employer did not challenge claimant's status as a dependent survivor of the miner. Order Awarding Survivor's Benefits at 1. The administrative law judge further noted that the miner was finally awarded benefits in a lifetime claim and that, under amended Section 932(l), claimant was not required to independently establish that the miner's death was due to pneumoconiosis. *Id.* at 2. Citing *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-198-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (unpub. Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011), the administrative law judge rejected employer's constitutional arguments and its argument regarding the relevant filing date. *Id.* The administrative law judge concluded that claimant satisfied the eligibility criteria for automatic entitlement to benefits, pursuant to amended Section 932(l), and awarded benefits commencing October 2009 – the month in which the miner died. *Id.*

On appeal, employer reiterates the arguments it raised before the administrative law judge and requests that this case be held in abeyance until the constitutional challenges to Public Law 111-148, and the appeal of the Board's decision in *Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6,

¹ Claimant is the surviving spouse of the miner, who died on October 9, 2009. Director's Exhibits 1, 7-9.

² The miner was awarded benefits by Administrative Law Judge Frederick D. Neusner in a Decision and Order issued on May 23, 1996. Director's Exhibit 2.

2011), are finally decided. Claimant has not responded. The Director responds and urges affirmance of the administrative law judge's award of benefits.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 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'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We reject employer's arguments regarding the constitutionality of the amendments, as applied in this case. As the administrative law judge determined, the allegations employer makes regarding the violation of its right to due process and the unlawful taking of its property are virtually identical to the ones that the Board rejected in *Mathews*. We, therefore, reject them here for the reasons set forth in that decision. *Mathews*, 24 BLR at 1-198-200; *see also Stacy*, 24 BLR at 1-214; *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011).

We also reject employer's contention regarding the filing date relevant to the application of amended Section 932(l). The Board has held that the operative date for determining eligibility for survivors' 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. *See Stacy*, 24 BLR at 1-214. In this case, therefore, the administrative law judge correctly determined that each fact that is necessary to demonstrate claimant's entitlement under amended Section 932(l) was established: That claimant filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending on March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(l); Order Awarding Survivor's Benefits at 1-2. Thus, we affirm the administrative law judge's determination that claimant is derivatively entitled to benefits pursuant to amended Section 932(l) of the Act.

In addition, we deny employer's request that this case be held in abeyance pending resolution of the legal challenges to Public Law No. 111-148. *See Stacy*, 24 BLR at 1-

³ We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant filed her survivor's claim after January 1, 2005, that her claim was pending on March 23, 2010, and that, at the time of the miner's death, he was receiving benefits based on the claim he filed on October 2, 1992. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Order Awarding Survivor's Benefits at 1-2.

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 2.

214-15; *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). Employer's request, that this case be held in abeyance pending a decision by the Fourth Circuit in *Stacy*, is also denied.

Accordingly, the administrative law judge's Order 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