

BRB No. 11-0259 BLA

PEGGY GRIFFITH	)	
(Widow of CLYDE GRIFFITH)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 10/27/2011
	)	
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 William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

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

George E. Roeder, III (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Emily Goldberg-Kraft (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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Awarding Survivor's Benefits (2010-BLA-5728) of Associate Chief Administrative Law Judge William S. Colwell, rendered on a survivor's claim filed on May 21, 2010, 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).<sup>1</sup> On March 23, 2010, amendments to the Act affecting claims filed after January 1, 2005, were enacted. The 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.<sup>2</sup>

Subsequent to the enactment of the amendments, on October 28, 2010, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision, asserting that claimant was automatically entitled to benefits pursuant to amended Section 932(l). On November 2, 2010, the administrative law judge

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<sup>1</sup> Claimant is the surviving spouse of the miner, Clyde Griffith, who died on February 17, 2010. Director's Exhibit 10. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award of benefits issued by the district director, on May 20, 1991, with regard to his lifetime claim. Director's Exhibit 1.

<sup>2</sup> As it existed prior to March 23, 2010, Section 422(l) provided that:

In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner, except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981, [*sic*].

30 U.S.C. §932(l). On March 23, 2010, Public Law No. 111-148 amended Section 422(l) as follows: "(b) Continuation of Benefits – Section 422(l) of the Black Lung Benefits Act (30 U.S.C. §932(l)) is amended by striking 'except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981'." Pub. L. No. 111-148, §1556(b), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §932(l)). Section 1556 of Public Law No. 111-148 provides further that "[t]he amendments made by this section shall apply with respect to claims filed under part B or part C of the Black Lung Benefits Act (30 U.S.C. 921 et seq., 931 et seq.) after January 1, 2005, that are pending on or after the date of enactment of this Act." Pub. L. No. 111-148, §1556(c).

issued an Order, which instructed the parties to file position statements addressing why an award of benefits should not be issued with respect to the survivor's claim. Employer responded, asserting that, because the miner's claim was filed before January 1, 2005 and was not pending on or after March 23, 2010, claimant is not eligible for the automatic entitlement provision at amended Section 932(l). The Director, however, maintained that claimant is entitled to derivative benefits, based on the filing date of her claim and the fact that the miner was receiving benefits when he died. Claimant did not file a position statement.

In his December 23, 2010 Order, the administrative law judge noted employer's concession that claimant is the surviving widow of the miner. Order Awarding Survivor's Benefits at 2. The administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement to benefits, pursuant to amended Section 932(l). *Id.* Accordingly, the administrative law judge granted the Director's Motion for Summary Decision and awarded benefits, commencing February 2010, the month in which the miner died. *Id.*

On appeal, employer asserts that retroactive application of the amendments is unconstitutional. Employer contends that amended Section 932(l) is not applicable to this case, based on filing date of the miner's claim. Employer further 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, 2011), are finally decided. Claimant and the Director respond, urging affirmance of the 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.<sup>3</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer asserts that retroactive application of amended Section 932(l) violates employer's due process rights and constitutes 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 pursuant to amended Section 932(l) is the date that the miner's claim was filed, not the date that the survivor's claim

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<sup>3</sup> The record reflects that the miner's coal mine employment was in Virginia. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

was filed. Employer further argues that this case should be held in abeyance pending the resolution of legal challenges to Public Law No. 111-148.

We reject employer's arguments regarding the constitutionality of amended Section 932(l), as applied to this case. The arguments employer makes are virtually identical to the ones that the Board rejected in *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). We, therefore, reject them here for the reasons set forth in that decision. *Id.*; *see also Stacy*, 24 BLR at 1-214.

We further reject employer's argument that the date of filing of the miner's claim is the operative date for determining whether amended Section 932(l) applies to the survivor's claim. In *Stacy*, the Board held 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*, 24 BLR at 1-211. We also reject employer's request that this case be held in abeyance pending resolution of the legal challenges to Public Law No. 111-148. *See Mathews*, 24 BLR at 1-201.

We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings 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 his death, the miner was receiving benefits, based on a claim he filed on April 4, 1990. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Order Awarding Survivor's Benefits at 2. Because employer does not otherwise challenge the administrative law judge's determination that claimant is entitled to receive benefits pursuant to amended Section 932(l), we affirm the administrative law judge's decision.

Accordingly, the administrative law judge's Order Awarding Survivor's Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge