

BRB No. 12-0031 BLA

PEGGY GILBERT)	
(Widow of GRANT GILBERT))	
)	
Claimant-Respondent)	
)	
v.)	
)	
ISLAND CREEK COAL COMPANY)	DATE ISSUED: 10/12/2012
)	
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.

Amy Jo Holley and William S. Mattingly (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Order Awarding Survivor's Benefits (2011-BLA-5946) of Associate Chief Administrative Law Judge William S. Colwell rendered on a claim filed 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).

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), Public Law No. 111-148 (2010). The amendments, in pertinent part, revive Section 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 April 26, 2010, claimant filed a timely request for modification of the denial of her survivor's claim.¹ 20 C.F.R. §725.310; Director's Exhibit 69. In a Proposed Decision and Order dated July 30, 2010, the district director determined that claimant is an eligible survivor of a miner who was receiving benefits at the time of his death and, therefore, is entitled to an automatic award of benefits under amended Section 932(l). Director's Exhibit 74. At employer's request, the case was transferred to the Office of Administrative Law Judges for a hearing. Director's Exhibit 75.

On July 29, 2011, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision, asserting that, pursuant to amended Section 932(l), claimant was automatically entitled to benefits as a matter of law, and that there was no genuine issue as to any material fact concerning her entitlement. Claimant joined the Director's Motion for Summary Decision. In response, employer opposed the Director's motion, challenging the constitutionality and retroactive application of amended Section 932(l) to this survivor's claim. Employer also argued that the operative date for determining eligibility for survivor's benefits under amended Section 932(l) is the date that the miner's claim was filed, which was prior to January 1, 2005.

In his Order Awarding Survivor's Benefits, the administrative law judge rejected employer's challenges to the Director's motion and found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section

¹ Claimant is the widow of the miner, who died on March 29, 2005. Director's Exhibit 9. Claimant filed her survivor's claim on April 11, 2005, which was awarded by Administrative Law Judge Daniel F. Solomon on July 10, 2007. Director's Exhibits 2, 55. However, by Decision and Order dated July 25, 2008, the Board reversed Judge Solomon's award of benefits. *P.G. [Gilbert] v. Island Creek Coal Co.*, BRB No. 07-0850 BLA (July 25, 2008)(unpub.); Director's Exhibit 66. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, affirmed the denial of benefits by decision dated April 29, 2009. *Gilbert v. Island Creek Coal Co.*, 324 Fed.Appx. 252, 2009 WL 1144145 (4th Cir. 2009); Director's Exhibit 67.

932(l). Specifically, the administrative law judge found that the miner was receiving benefits at the time of his death due to a final award and that the survivor's claim was filed after January 1, 2005 and was pending after March 23, 2010, based on claimant's modification request.² Accordingly, the administrative law judge awarded survivor's benefits, commencing as of March 2005, the month in which the miner died.

On appeal, employer contends that the retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005 constitutes a violation of its due process rights and an unconstitutional taking of private property.³ Employer's Brief at 16-25. 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 was filed. *Id.* at 26-29. Employer further argues that the PPACA does not provide a basis for the relitigation of the denial of a survivor's claim under 20 C.F.R. §725.310. *Id.* at 37-41. Lastly, employer contends that claimant is not an "eligible survivor" because amended Section 932(l), when read in conjunction with 30 U.S.C. §§921 and 922, requires that she prove either that the miner's death was due to pneumoconiosis or that the miner had complicated pneumoconiosis. *Id.* at 41-46. The Director responds, urging the Board to reject employer's contentions and to affirm the administrative law judge's award of benefits. Claimant has not filed a response brief.

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,

² The miner was receiving federal black lung benefits at the time of his death pursuant to a claim filed on January 12, 1993, which was awarded by Administrative Law Judge Edith Barnett on March 14, 1995. Director's Exhibit 1a.

³ Employer also requests that the Board hold this case in abeyance, pending a final decision by the United States Court of Appeals for the Fourth Circuit of the Board's decision in *Stacy v. Olga Coal Corp.*, 24 BLR 1-207 (2010). Employer further notes that challenges to the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010), of which the amendments to the Black Lung Benefits Act are a part, may affect the viability of amended Section 932(l). Subsequent to the briefing in this case, the United States Supreme Court upheld the constitutionality of the PPACA, and the Fourth Circuit affirmed the Board's decision in *Stacy*. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012); *West Virginia CWP Fund v. Stacy*, 671 F. 3d 378, 25 BLR 2-69 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *petition for cert. filed*, No. 11-1342 (U.S. May 4, 2012). Employer's request that this case be held in abeyance is, therefore, moot.

and in accordance with applicable law.⁴ 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).

Employer argues that retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005 is unconstitutional, as a violation of employer’s due process rights and as a taking of private 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 Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, recently rejected.⁵ *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *aff’g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *petition for cert. filed*, U.S.L.W. (U.S. May 4, 2012)(No. 11-1342); *see also B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011). For the reasons set forth in *Stacy*, we reject employer’s arguments.

Moreover, we reject employer’s argument that the recent amendments to Section 932(l) do not apply to a request for modification of the denial of a survivor’s claim. Section 22 of the Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a), permits the reopening and readjudication of a denied survivor’s claim within one year of the order denying benefits, based on a showing of a mistake in a determination of fact, including the ultimate fact of entitlement. *See* 20 C.F.R. §725.310; *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Mullins v. ANR Coal Co.*, 25 BLR 1-49 (2012), *recon. denied* (June 14, 2012) (Order)(unpub.). 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 receiving benefits at the time of his or her death is now automatically entitled to

⁴ As the miner was last employed in the coal mining industry in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director’s Exhibits 3, 6.

⁵ We also deny employer’s alternative request to remand this case for development of evidence relevant to the economic impact of amended Section 932(l), as employer’s argument with regard to the Takings Clause of the Fifth Amendment has been rejected by the Fourth Circuit and the Board. *Stacy*, 671 F. 3d at 387, 25 BLR at 2-75; *Stacy*, 24 BLR at 1-214.

survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. Pub. L. No. 111-148, §1556(c) (2010); 30 U.S.C. §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).

Lastly, employer contends that claimant is not an "eligible survivor" within the meaning of amended Section 932(l) because she did not prove that pneumoconiosis caused, or contributed to, the miner's death. Employer's Brief at 41-46. However, as we did in *Fairman v. Helen Mining Co.*, 24 BLR 1-225 (2011), we find no merit to employer's contention that amended Section 932(l) is limited by earlier provisions of the Act. *Fairman*, 24 BLR at 1-231. Thus, we reject employer's assertion that claimant is not an "eligible survivor" within the meaning of amended Section 932(l).

As claimant filed her survivor's claim after January 1, 2005, timely requested modification such that her claim was pending after March 23, 2010, and the miner was found to be eligible to receive benefits at the time of his death by a final award of benefits, *see n.2, supra*, we affirm the administrative law judge's finding that claimant is derivatively entitled to survivor's benefits pursuant to amended Section 932(l). *See Mullins*, 25 BLR at 1-53.

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