

BRB No. 13-0329 BLA

DELORIS E. MAY )  
(Widow of WILLIAM G. MAY) )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 PEABODY COAL COMPANY ) DATE ISSUED: 10/18/2013  
 )  
 and )  
 )  
 PEABODY ENERGY CORPORATION )  
 )  
 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 Peter B. Silvain, Jr., Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., 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 (employer) appeals the Decision and Order Awarding Benefits (2011-BLA-6251) of Administrative Law Judge Peter B. Silvain, Jr. (the administrative law judge) rendered on a subsequent survivor's claim<sup>1</sup> filed on April 12, 2010 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 March 11, 2013, the administrative law judge issued an Order to Show Cause why the subsequent survivor's claim is not subject to the automatic entitlement provisions set forth in amended Section 422(*l*). No response was received by the March 25, 2013 deadline set by the administrative law judge.

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,<sup>2</sup> if the claim was filed after January 1, 2005 and was pending on or after March 23, 2010. 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 December 2007.

On appeal, employer challenges the administrative law judge's award of survivor's benefits, arguing that the doctrine of *res judicata* bars an award of benefits under the automatic entitlement provisions of amended Section 932(*l*) in this subsequent

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<sup>1</sup> Claimant is the widow of the miner, William May, who died on December 4, 2007. Director's Exhibit 13. Claimant filed her first claim for survivor's benefits on December 31, 2007, which was denied by the district director in a Proposed Decision and Order issued on August 13, 2008. Director's Exhibit 1. The record does not show that claimant further pursued this claim.

<sup>2</sup> The miner was determined to be eligible to receive lifetime benefits at the time of his death pursuant to a Decision and Order – Award of Benefits issued by Administrative Law Judge Daniel F. Solomon on December 2, 2009. Employer appealed Judge Solomon's decision to the Board, but withdrew its appeal. *May v. Peabody Coal Co.*, BRB No. 10-0240 BLA (Mar. 19, 2010)(unpub. Order).

survivor's claim, where claimant's previously filed claim was denied. In the alternative, employer requests that the Board hold this case in abeyance. Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs, responds, urging the Board to reject employer's arguments and affirm the administrative law judge's award of benefits. In its reply brief, employer reiterates its request to hold the case in abeyance, pending a decision by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, in *Hill v. Peabody Coal Co.*, BRB No. 12-0026 BLA (Sept. 26, 2012)(unpub.), *appeal docketed, Peabody Coal Co. v. Director, OWCP [Hill]*, No. 12-4366 (6<sup>th</sup> Cir. Nov. 19, 2012).

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).

We reject employer's contention that, based upon the denial of claimant's initial survivor's claim, she is ineligible for derivative survivor's benefits under amended Section 932(l), by operation of 20 C.F.R. §725.309(d)(3), and by the doctrine of res judicata, for the reasons set forth by the Board in *Richards v. Union Carbide Corp.*, 25 BLR 1-31 (2012)(en banc)(McGranery, J., concurring and dissenting)(Boggs, J., dissenting), *aff'd Union Carbide Corp. v. Richards*, 721 F.3d 307, BLR (4th Cir. 2013); *see also Marmon Coal Co. v. Director, OWCP [Eckman]*, F.3d , No. 12-3388 (3d Cir. Aug. 8, 2013). Therefore, contrary to employer's contention, the automatic entitlement provision of amended Section 932(l) is available to an eligible survivor who files a subsequent claim within the time limitations established in Section 1556 of the PPACA.<sup>3</sup>

Because claimant filed her subsequent survivor's claim after January 1, 2005, her claim was pending after March 23, 2010, and the miner was entitled to 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).

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<sup>3</sup> We deny employer's motion to hold this case in abeyance pending disposition of the appeal in *Hill v. Peabody Coal Co.*, BRB No. 12-0026 BLA (Sept. 26, 2012)(unpub.), *appeal docketed, Peabody Coal Co. v. Director, OWCP [Hill]*, No. 12-4366 (6<sup>th</sup> Cir. Nov. 19, 2012).

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge