

BRB No. 11-0821 BLA

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| SHELVIE J. BARTON |) | |
| (Widow of EMMETT R. BARTON) |) | |
| |) | |
| Claimant-Respondent |) | |
| |) | |
| v. |) | DATE ISSUED: 09/06/2012 |
| |) | |
| SEA "B" MINING COMPANY |) | |
| |) | |
| Employer-Respondent |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Petitioner |) | DECISION and ORDER |

Appeal of the Order of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Timothy W. Gresham (Penn Stuart & Eskridge), Abingdon, Virginia, for employer.

Paul L. Edenfield (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:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Order (2011-BLA-5576) of Administrative Law Judge Alan L. Bergstrom (the administrative law judge) denying benefits 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). This case involves a survivor's subsequent claim filed on January 3, 2011.¹

Claimant filed her initial claim for survivor's benefits on November 17, 1998. Director's Exhibit 1. On September 19, 2001, Administrative Law Judge Richard T. Stansell-Gamm denied benefits, finding that claimant did not establish that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(c); Director's Exhibit 1. The Board affirmed Judge Stansell-Gamm's denial on June 28, 2002. *Barton v. Sea "B" Mining Co.*, BRB No. 02-0148 BLA (June 28, 2002) (unpub.).

On March 23, 2010, amendments to the Act affecting claims filed after January 1, 2005, were enacted. The amendments, in pertinent part, revive Section 932(l) of the Act, which provides that a survivor of a miner who was determined to be 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. Pub. L. No. 111-148, §1556(b) (to be codified at 30 U.S.C. §932(l)).

Claimant filed her subsequent claim on January 3, 2011. Director's Exhibit 2. The district director awarded benefits to claimant pursuant to amended Section 932(l), and employer requested a hearing. Director's Exhibits 10, 11, 14.

On July 22, 2011, claimant moved for a summary decision, arguing that there was no genuine issue of material fact concerning whether she was automatically entitled to benefits pursuant to amended Section 932(l). Employer did not file a response.

In an Order dated July 29, 2011, the administrative law judge found that claimant's subsequent claim must be denied pursuant to 20 C.F.R. §725.309(d), because she did not establish a change in an applicable condition of entitlement unrelated to the miner's physical condition at the time of his death. *See* 20 C.F.R. §§725.212, 725.309(d); Order at 4. Because the administrative law judge determined that claimant did not establish a change in an applicable condition of entitlement, he found that claimant was ineligible to receive survivor's benefits pursuant to amended Section 932(l). Accordingly, the administrative law judge denied benefits.

On appeal, the Director contends that the administrative law judge erred in not applying amended Section 932(l) to this case. The Director urges the Board to reverse the denial of benefits and hold, as a matter of law, that claimant is entitled to receive

¹ Claimant is the widow of the miner, who died on September 16, 1998. Director's Exhibit 8. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim. Director's Exhibits 1, 2.

benefits under Section 932(l), commencing as of September 2002, the month after the month in which the denial of the prior survivor's claim became final. Claimant responds in support of the Director's position. Employer responds, urging affirmance of the administrative law judge's denial of benefits pursuant to 20 C.F.R. §725.309(d).

The Board's scope of review is defined by statute. The administrative law judge's Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.² 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Director argues that the administrative law judge erred in determining that claimant's subsequent claim must be denied pursuant to 20 C.F.R. §725.309(d), because she did not establish a change in an applicable condition of entitlement unrelated to the physical condition of the miner at the time of his death. Director's Brief at 3-9. We agree. The Board recently held that the principles of res judicata addressed in 20 C.F.R. §725.309, requiring that a subsequent claim be denied unless a change is established, are not implicated in the context of a survivor's subsequent claim filed within the time limitations set forth under Section 1556 of Public Law No. 111-148, because entitlement under amended Section 932(l) is not tied to relitigation of the prior finding that claimant did not establish that the miner's death was due to pneumoconiosis. *Richards v. Union Carbide Corp.*, BLR , BRB Nos. 11-0414 BLA & 11-0414 BLA-A, slip op. at 4-6 (Jan. 9, 2012) (en banc) (McGranery, J., concurring and dissenting) (Boggs, J., dissenting), *appeal docketed*, No. 12-1294 (4th Cir. Mar. 8, 2012). Therefore, contrary to the administrative law judge's analysis, the automatic entitlement provisions of amended Section 932(l) are available to an eligible survivor who files a subsequent claim within the time limitations established in Section 1556. *Id.*

In this case, the administrative law judge found, and employer does not challenge, that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under amended Section 932(l): That she filed her claim after January 1, 2005;³ that she is an eligible survivor of the miner; that her claim was pending after

² The record reflects that the miner's coal mine employment was in Virginia. Director's Exhibit 3. 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).

³ In response to the Director's brief, employer 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 Fourth Circuit has rejected that argument. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 388-89, 25 BLR 2-65, 2-82-85 (4th Cir. 2011), *petition for cert. filed*, U.S.L.W. (U.S. May 4, 2012) (No. 11-1342), *aff'g*

March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death. Therefore, claimant is entitled to receive benefits pursuant to Section 932(l). Accordingly, we reverse the administrative law judge's Order denying benefits.

Finally, we agree with the Director and claimant that the commencement date for benefits is September 2002. Director's Brief at 7, n.4; Claimant's Brief at 3. The Board recently held that derivative benefits are payable in a survivor's subsequent claim filed within the time limitations set forth in Section 1556 of Public Law No. 111-148, from the month after the month in which the denial of the prior claim became final. *Richards*, slip op. at 7. The Board's Decision and Order affirming the denial of claimant's prior claim became final in August 2002, sixty days after it was issued. *See* 20 C.F.R. §802.406. Therefore, claimant is entitled to receive benefits under amended Section 932(l) as of September 2002, the month after the month in which the denial of her prior claim became final.

Stacy v. Olga Coal Co., 24 BLR 1-207 (2010). For the reasons set forth in *Stacy*, we reject employer's argument.

Accordingly, the administrative law judge's Order denying benefits is reversed, and this case is remanded to the district director for the entry of an appropriate order reflecting September 2002 as the date from which benefits commence.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge