

BRB No. 11-0276 BLA

JANIE SUE DeLUNG)	
(Widow of VERNON K. DeLUNG))	
)	
Claimant-Respondent)	
)	
v.)	
)	
MILBURN COLLIERY COMPANY)	DATE ISSUED: 01/18/2012
)	
Employer-Petitioner)	
)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Granting Motion for Summary Decision and Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

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

Jonathan Rolfe (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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Motion for Summary Decision and Awarding Benefits (2010-BLA-5795) of Administrative Law Judge Thomas M. Burke, rendered on a survivor's claim filed on December 7, 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 On March 23, 2010, amendments to the Act, included in the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, were enacted. The amendments, in pertinent part, 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, the amendments revive Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that a 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.²

On November 23, 2010, while this case was pending before the administrative law judge, the Director, Office of Workers' Compensation Programs (the Director), filed a motion for summary decision, asserting that there is no genuine issue as to any material

¹ Claimant is the surviving spouse of the miner, Vernon K. DeLung, who died on October 31, 2009. Director's Exhibit 1. The miner was receiving federal black lung benefits at the time of his death, pursuant to a claim he filed on February 27, 1997, which was awarded by Administrative Law Judge Daniel F. Sutton on September 13, 2001. Director's Exhibit 11; *see DeLung v. Milburn Colliery Co.*, BRB No. 02-0124 BLA (Sept. 27, 2002) (unpub.), *petition for review denied, Milburn Colliery Co. v. Director, OWCP [DeLung]*, No. 02-223 (4th Cir. July 15, 2003) (unpub.).

² 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, the Patient Protection and Affordable Care Act (PPACA), 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).

fact concerning whether claimant is entitled to benefits pursuant to amended Section 932(l). Specifically, the Director explained that claimant is a dependent survivor of the miner, that the miner was finally awarded benefits in a lifetime claim, and that claimant was not required to independently establish that the miner's death was due to pneumoconiosis in light of amended Section 932(l). Employer, however, opposed the motion, maintaining that the requirements of amended Section 932(l) are not satisfied in this case, based on the filing date of the miner's claim.

In his Summary Decision and Order, the administrative law judge rejected employer's argument that amended Section 932(l) was inapplicable because the miner's claim was filed prior to January 1, 2005, and was not pending on or after March 23, 2010. Summary Decision and Order at 2. The administrative law judge found that claimant satisfied the eligibility criteria for derivative entitlement pursuant to amended Section 932(l), and awarded benefits effective October 2009, the month in which the miner died. *Id.* at 2-3.

On appeal, employer asserts that retroactive application of the amendments is unconstitutional and that amended Section 932(l) is not applicable to this case, based on the filing date of the miner's claim. Employer also requests that this case be held in abeyance until the constitutional challenges to the PPACA are finally decided. *See Florida v. U.S. Dept. of HHS*, 648 F.3d 1235 (11th Cir. 2011), *cert. granted* 2011 WL 5515164 (U.S. Nov. 14, 2011) (No. 11-398). Claimant has not filed a response brief. The Director responds, urging the Board to reject employer's arguments and affirm 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.³ 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. We disagree. Employer's arguments in this appeal are virtually identical to the ones that the Board rejected in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-198-200 (2010), *recon.*

³ The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 8. 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*).

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.* at 1-198-200; *see also Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (2010), *aff'd sub nom. West Virginia CWP Fund v. Stacy*, F.3d , No. 11-1020, 2011 WL 6396510 (4th Cir. Dec. 21, 2011).

We reject employer's contention that the operative date for determining eligibility pursuant to amended Section 932(l) is the date of filing of the miner's claim. In *Stacy*, the United States Court of Appeals for the Fourth Circuit recently affirmed the Board's holding 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 and not the date that the miner's claim was filed. *Stacy*, 2011 WL 6396510. Furthermore, we deny employer's request to hold this case in abeyance pending resolution of the legal challenges to the PPACA, Public Law No. 111-148.⁴ *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. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Summary Decision and Order at 1-2. Thus, we affirm the administrative law judge's finding that claimant is entitled to benefits pursuant to amended Section 932(l).

⁴ We reject employer's assertion that if any portion of the PPACA is declared unconstitutional, the amendments to the Black Lung Benefits Act, including amended Section 932(l), must also be declared invalid. *See West Virginia CWP Fund v. Stacy*, F.3d , 2011WL 6396510 (4th Cir. Dec. 21, 2011).

Accordingly, the administrative law judge's Decision and Order Granting Motion for Summary Decision and Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge