

BRB No. 12-0477 BLA

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| BETTY Jael MAYNOR             | ) |                         |
| (Widow of HARLESS R. MAYNOR)  | ) |                         |
|                               | ) |                         |
| Claimant-Respondent           | ) |                         |
|                               | ) |                         |
| v.                            | ) |                         |
|                               | ) |                         |
| WESTMORELAND COAL COMPANY     | ) | DATE ISSUED: 05/15/2013 |
|                               | ) |                         |
| 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, in Part, Director's Motion for Summary Decision; and Awarding Survivor's Benefits of Adele H. Odegard, Administrative Law Judge, United States Department of Labor.

Paul E. Frampton and Thomas M. Hancock (Bowles Rice, LLP), Charleston, West Virginia, for employer.

Sarah M. Hurley (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 appeals the Decision and Order Granting, in Part, Director's Motion for Summary Decision; and Awarding Survivor's Benefits (2012-BLA-05223) of Administrative Law Judge Adele H. Odegard (the administrative law judge) rendered on a subsequent survivor's claim filed pursuant to the provisions of the Black Lung Benefits

Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). Claimant filed this subsequent survivor's claim on August 16, 2011.<sup>1</sup>

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 February 3, 2012, prior to the case being assigned to the administrative law judge, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision, arguing that under amended Section 932(*l*), and given the filing date of the survivor's subsequent claim, there was no genuine issue of material fact concerning whether claimant was automatically entitled to benefits pursuant to amended Section 932(*l*). Employer filed a response in opposition to the Director's motion, arguing that claimant's subsequent survivor's claim should be denied as a matter of law. Following assignment of this case, the administrative law judge provided the Director the opportunity to respond to employer's opposition to the Director's Motion for Summary Decision. In response, the Director reiterated his prior arguments.

In her Decision and Order Granting, in Part, Director's Motion for Summary Decision; and Awarding Survivor's Benefits, dated May 16, 2012, the administrative law judge rejected employer's contention that this subsequent survivor's claim must be denied, as a matter of law, under 20 C.F.R. §725.309(d). The administrative law judge also rejected employer's challenges to the PPACA and to its request to hold the case in abeyance. Rather, the administrative law judge determined that Section 1556 of the PPACA reinstates the automatic eligibility for survivors of miners who had been awarded benefits under the Act, and, therefore, she awarded benefits. The administrative law judge found that claimant satisfied the criteria for derivative entitlement pursuant to

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<sup>1</sup> Claimant is the widow of the miner, who died on September 7, 1992. Director's Exhibit 11. Claimant filed her initial claim on November 9, 1992, which was dismissed by Administrative Law Judge Sheldon Lipson on March 21, 1994 because claimant failed to attend the scheduled hearing. Director's Exhibit 3. Claimant filed a second claim for benefits on October 14, 1997, which was denied on May 13, 1999 by Administrative Law Judge Daniel F. Sutton, on the basis that it was a duplicate survivor's claim. *Id.* Claimant filed a third claim on March 8, 2006, which was denied by the district director on September 25, 2006, based on the determination that claimant failed to meet the subsequent claim criteria set forth at 20 C.F.R. §725.309. Director's Exhibit 4.

amended Section 932(l), because her claim was filed after January 1, 2005, the claim was pending after March 23, 2010, and the miner was receiving benefits at the time of his death pursuant to a claim filed during his lifetime.<sup>2</sup> Accordingly, the administrative law judge awarded benefits on the subsequent survivor's claim, commencing as of October 2006.

On appeal, in its initial and reply briefs, employer challenges the administrative law judge's finding of automatic entitlement to benefits pursuant to amended Section 932(l). Specifically, employer asserts that the operative date for determining eligibility for survivor's benefits under amended Section 932(l) is the date that claimant's original survivor's claim was filed, not the date that claimant's most recent survivor's claim was filed. Employer also asserts that the subsequent claim is barred pursuant to 20 C.F.R. §725.309(d)(3), based on the principles of res judicata and stare decisis. Additionally, employer argues that claimant is not an "eligible survivor" as defined by amended Section 932(l). The Director responds, urging the Board to affirm the administrative law judge's award of benefits. However, the Director contends that the appropriate date for the commencement of benefits in this case is November 2006, the month after the month in which the denial of the prior survivor's claim became final.<sup>3</sup> Claimant has not filed a response to employer's appeal.

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>4</sup> 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).

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<sup>2</sup> The miner was receiving federal black lung benefits at the time of his death pursuant to a claim filed on September 7, 1983. The district director's April 9, 1986 Award of Benefits was based on employer's Agreement to Pay Benefits dated January 10, 1986. Director's Exhibit 1. The miner's federal black lung benefits, however, were offset by a West Virginia state benefits award, as well as the recoupment of an overpayment of benefits. Director's Exhibit 1.

<sup>3</sup> The district director issued his proposed Decision and Order denying claimant's third survivor's claim on September 25, 2006. Director's Exhibit 4.

<sup>4</sup> As the miner was last employed in the coal mining industry in West 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 1, 2.

Initially, we reject employer's argument that the filing date of the original survivor's claim, rather than the most recent claim date, is controlling, and that this subsequent survivor's claim does not, therefore, meet the filing date requirements at amended Section 932(l). Employer's Brief at 4-8. Employer's position is meritless. The Board has held, with respect to the relevant filing date, both that the operative date for determining eligibility under amended Section 932(l) is the date the survivor's claim was filed,<sup>5</sup> *Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-211 (2010), *aff'd sub. nom. W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012), and that amended Section 932(l) applies also to subsequent claims that meet the filing and pendency requirements of the PPACA. *Richards v. Union Carbide Corp.*, 25 BLR 1-31, 1-36-37 (2012)(en banc)(McGranery, J., concurring and dissenting)(Boggs, J., dissenting), *appeal docketed*, No. 12-1294 (4th Cir. Mar. 8, 2012). Therefore, we affirm the administrative law judge's application of amended Section 932(l) to this subsequent survivor's claim.

We also 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 Section 725.309(d)(3), and by the doctrines of res judicata and stare decisis. Employer's Brief at 8-9. In *Richards*, the Board addressed and rejected arguments substantially similar to those raised by employer in this case. In *Richards*, the Board held that Section 932(l) of the Act, as amended by Section 1556 of the PPACA, permits the application of amended Section 932(l) to all claims filed after January 1, 2005, that are pending on or after March 23, 2010. *Id.* at 1-36-37. The Board further held that, by restoring the derivative entitlement provisions of Section 932(l), Congress effectively created a "change" that established a new condition of entitlement unrelated to whether the miner died due to pneumoconiosis. *Id.* The Board determined, therefore, that amended Section 932(l) provides a basis for establishing a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d) in a subsequent survivor's claim. Consequently, we reject employer's arguments that the subsequent survivor's claim is barred by Section 725.309(d) and the principles of res judicata and stare decisis, for the reasons set forth in *Richards*.

Additionally, we reject employer's assertion 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 9-13. Amended Section 932(l) provides benefits to a survivor without requiring proof that the miner's death was due to pneumoconiosis. *Fairman v. Helen Mining Co.*, 24 BLR 1-225,

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<sup>5</sup> Employer also states that it was "possible that Congress intended the [m]iner's claim date be on or after January 1, 2005 for automatic eligibility to attach." Employer's Brief at 5 n.2.

1-231 (2011); *see also* *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 389-91, 25 BLR 2-65, 2-85-88 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012); *B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 249-50, 25 BLR 2-13, 2-38-39 (3d Cir. 2011). Because claimant filed her subsequent survivor's claim after January 1, 2005, her claim was pending on or after March 23, 2010, and the miner was eligible to receive benefits 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 932(l).

Lastly, employer contends that the administrative law judge improperly held that benefits are retroactive to October 2006, the month after the denial of claimant's prior survivor's claim, arguing that the administrative law judge's decision in this regard is contrary to law. The Director also argues that the administrative law judge erred in setting the commencement date for benefits as October 2006. Noting that benefits on a subsequent claim may not commence until the month after the month in which the prior denial became final, *see* 20 C.F.R. §725.309(d)(5), the Director argues that claimant is entitled to benefits commencing in November 2006, rather than in October 2006. The Board recently adopted the Director's position, holding that benefits are payable in a subsequent survivor's claim filed within the time limitations set forth in Section 1556 of the PPACA from the month after the month in which the denial of the prior claim became final. *Richards*, 25 BLR at 1-39. As the order denying claimant's prior claim became final in October 2006, at the expiration of the thirtieth day after it was issued by the district director on September 25, 2006, *see* 20 C.F.R. §725.419(d), claimant's survivor's benefits under amended Section 932(l) in her subsequent claim properly commence as of November 2006, the month after the month in which the denial of claimant's prior claim became final. Consequently, we modify the commencement date for benefits to November 2006. 20 C.F.R. §725.309(d)(5).

Accordingly, the administrative law judge's Decision and Order Granting, in Part, Director's Motion for Summary Decision; and Awarding Survivor's Benefits is affirmed, as modified to reflect November 2006 as the date from which benefits commence.

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