Breeskin

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 11-0414 BLA
and 11-0414 BLA-A

PUBLISHED

VIRGINIA E. RICHARDS (Widow of ARLIE C. RICHARDS)	)	
Claimant-Respondent Cross-Respondent	)	
v.	)	
UNION CARBIDE CORPORATION	)	DATE ISSUED: JAN - 9 2012
Employer-Petitioner Cross-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Respondent Cross-Petitioner	)	DECISION and ORDER EN BANC

Appeals of the Summary Decision – Awarding Benefits and the Decision on Motion for Reconsideration of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Kathy L. Snyder and Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, 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, McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals, and the Director cross-appeals, the Summary Decision – Awarding Benefits and the Decision on Motion for Reconsideration (2010-BLA-5248) of Administrative Law Judge Michael P. Lesniak rendered on a subsequent survivor's claim[1] 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).

Prior to the hearing in this case, amendments to the Act were enacted, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010. *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 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*).

By Order dated April 8, 2010, the administrative law judge advised the parties of the applicability of the amendments to this claim, and directed the parties to submit position statements addressing why an order awarding benefits should not be entered. All parties responded. The administrative law judge issued his Summary Decision – Awarding Benefits on November 18, 2010, finding that claimant is automatically entitled to survivor's benefits based on the miner's lifetime award of benefits and the recent amendments to Section 932(*l*). Accordingly, the administrative law judge awarded survivor's benefits commencing as of May 2009, the month that claimant filed her subsequent survivor's claim. Upon Motion for Reconsideration by the Director, Office of

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[1] Claimant is the widow of the miner, who filed his lifetime claim for benefits on November 28, 1983. On September 11, 1987, Administrative Law Judge R.S. Heyer awarded benefits in the miner's claim. Employer withdrew its appeal to the Board on May 13, 1988, and paid benefits. Director's Exhibit LM 1/1. The miner died on January 22, 1994. Claimant filed her initial claim for survivor's benefits on February 18, 1994, which was ultimately denied on May 9, 2006 by Administrative Law Judge Janice K. Bullard. Director's Exhibit 2. Claimant filed her present claim on May 21, 2009. Director's Exhibit 4.

Workers' Compensation Programs (the Director), suggesting that the proper commencement date for benefits is July 2006, the month after the month that claimant's prior denial became final, the administrative law judge found no basis to alter his award of benefits.

On appeal, employer challenges the constitutionality of amended Section 932(*l*), and its application to this subsequent survivor's claim. The Director responds, asserting that amended Section 932(*l*) is applicable, and cross-appeals, alleging that benefits should commence as of July 2006, the month after the month in which claimant's prior denial of benefits became final. Claimant responds to employer's appeal and the Director's cross-appeal, agreeing with the Director's position. Employer responds to the Director's cross-appeal, asserting that an award, if any, should not commence prior to May 2009, the month in which claimant filed her subsequent survivor's claim. Employer has also filed a combined reply brief in support of its position.

On July 22, 2011, the Board granted employer's Motion for Oral Argument En Banc with respect to the issues of whether a survivor is automatically entitled to benefits in her subsequent claim, based on the amendments to the Act contained in the PPACA, when the denial of her prior claim for survivor's benefits became final in 2006, and, if claimant is automatically entitled to benefits, the date on which the benefits should commence. *Richards v. Union Carbide Corp.*, BRB Nos. 11-0414 BLA and 11-0414 BLA-A (July 22, 2011)(Order)(unpub.). Oral argument was held in Pittsburgh, Pennsylvania on September 15, 2011.

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.[2] 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 initially contends that the retroactive application of amended Section 932(*l*) to this claim constitutes a violation of its due process rights and an unconstitutional taking of private property. Employer also maintains that the operative date for determining eligibility for survivor's benefits pursuant to amended Section 932(*l*) is the date the miner's claim was filed, not the date the survivor's claim was filed. Employer requests that further proceedings or actions related to this claim be held in abeyance, pending resolution of the constitutional challenges to the PPACA in federal court.

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[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibits 5, 6.

We reject employer's contention that retroactive application of the automatic entitlement provisions of amended Section 932(*l*) to claims filed after January 1, 2005 constitutes a due process violation and a taking of private property, for the same reasons the Board rejected substantially similar arguments in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order) (unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). *See also B&G Constr. Co. v. Director, OWCP* [*Campbell*], 662 F.3d 233, BLR (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Further, the Board has held 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, not the date that the miner's claim was filed. *Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *aff'd sub nom. West Virginia CWP Fund v. Stacy*, F.3d , BLR , No. 11-1020, 2011 WL 6396510 (4th Cir. Dec. 21, 2011). For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary and, consistent with our reasoning in *Mathews*, we reject employer's request to hold this case in abeyance pending resolution of legal challenges to the PPACA.

Employer next contends that claimant is not eligible for derivative survivor's benefits under amended Section 932(*l*), because her prior claim was finally denied and her subsequent claim is barred pursuant to fundamental principles of res judicata or claim preclusion. Employer maintains that "a new method of demonstrating entitlement to survivor's benefits" under the PPACA does not create a "new cause of action" for purposes of the application of res judicata. Rather, employer argues, the PPACA has only amended the conditions of entitlement for a pre-existing cause of action, *i.e.*, a claim for survivor's benefits. Employer asserts that, because the original survivor's claim and the subsequent survivor's claim arise out of an identical "transaction" or "common nucleus of operative facts" with the death of the miner, the subsequent survivor's claim is barred under the doctrine of res judicata. Moreover, as claimant has failed to establish a change in at least one condition unrelated to the miner's physical condition at the time of his death, employer maintains that 20 C.F.R. §725.309(d)(3) bars an award of benefits in her subsequent claim.[3] Employer also contends that neither a "change in the law" nor a "public policy" exception defeats the preclusive effect of the final judgment in claimant's initial survivor's claim, as her subsequent claim is not based on any new factual circumstances that have arisen since the denial of her prior claim. Further, employer asserts that, unlike prior amendments to the Act, the PPACA does not contain a Congressional mandate to override the res judicata effect of previously denied claims.

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[3] Employer notes that the plain language of the regulations provides that the prohibition on subsequent survivors' claims under 20 C.F.R. §725.309(d)(3) is applicable "to all claims filed, and all benefits payments made, after January 19, 2001." 20 C.F.R. §725.2(c); Employer's OA Brief at 19-20.

Lastly, employer argues that allowing automatic entitlement to benefits in a subsequent survivor's claim under amended Section 932(*l*) renders meaningless the time limitations set by Congress in Section 1556 of the PPACA; nullifies the prior final decision denying entitlement; and ignores the governing language of 20 C.F.R. §725.2 and the applicable provisions at Section 725.309(d)(3). Employer's Brief at 29-43; Employer's Oral Argument Brief and Response on Cross-Appeal (Employer's OA Brief) at 9-22; Employer's Reply Brief at 2-25; Oral Argument (OA) Hearing Transcript at 8-16.

The Director counters that nothing in Section 1556 of the PPACA prohibits application of its provisions to subsequent claims; rather, amended Section 932(*l*) is applicable when *any* claim, including a subsequent survivor's claim, meets the filing date and pendency requirements established under Section 1556. The Director argues that the automatic entitlement provisions of amended Section 932(*l*) create a "change" by establishing a new condition of entitlement that is wholly independent of the miner's cause of death, and that justifies, for a limited class of survivors, application of Section 932(*l*) to a subsequent claim. Because claimant, in this subsequent survivor's claim, is asserting rights under the PPACA that did not exist at the time of the denial of the prior claim, the Director maintains that the claim preclusion concepts embodied in Section 725.309[4] are not implicated, because the survivor's entitlement is not tied to the finding in the prior claim that the miner's death was not due to pneumoconiosis. Director's Response Brief at 5-12; OA Hearing Transcript at 25-29.

Claimant agrees with the position of the Director, and asserts that the Director's interpretation is consistent with the plain language and intent of the amendments, and is entitled to deference. Claimant's Response Brief at 23-34; OA Hearing Transcript at 18-23.

We agree with the position taken by claimant and the Director. Since the Director is charged with administration of the Act, deference is generally granted to his position on issues involving the interpretation or application of the Act. *Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-132 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007)(en banc); *see also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984); *Cadle v. Director, OWCP*, 19 BLR 1-55, 1-62 (1994). As noted by the Director, Section 932(*l*), as amended by Section 1556, does not prohibit its application to subsequent survivor's claims. Pub. L. No. 111-148, §1556 (2010). In fact, the language of Section 1556(c) mandates the application of amended

[4] Section 725.309(d)(3) states, in part, that "[a] subsequent claim filed by a surviving spouse . . . shall be denied unless the applicable conditions of entitlement in such claim include at least one condition unrelated to the miner's physical condition at the time of his death." 20 C.F.R. §725.309(d)(3).

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 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*). By restoring the derivative entitlement provisions of Section 932(*l*), Congress has effectively created a "change," establishing a new condition of entitlement unrelated to whether the miner died due to pneumoconiosis. Thus, as correctly noted by the Director, the principles of res judicata addressed in Section 725.309,[5] requiring that a subsequent claim be denied unless a change is established, are not implicated in the context of a subsequent survivor's claim filed within the time limitations set forth under Section 1556, because entitlement thereunder is not tied to relitigation of the prior finding that the miner's death was not due to pneumoconiosis. *See Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 328 (1955). Accordingly, we hold that 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 of the PPACA.

Turning to the issue presented on cross-appeal, the Director contends that the administrative law judge erred in setting the commencement date for benefits as May

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[5] In its 1997 comments to the proposed regulation at 20 C.F.R. §725.309, the Department of Labor stated:

> Initially, the Department acknowledges that the principles of claim preclusion are applicable to claims under the Act. *Pittston Coal Group v. Sebben,* 488 U.S. 105, 122-23 (1988). That applicability, however, is limited in two important respects. First, §22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 922, as incorporated into the Black Lung Benefits Act by 30 U.S.C. 932(a), permits the reopening and readjudication of a denied claim within one year of the order denying benefits, based on a showing of either a mistake in a determination of fact or a change in conditions. This reopening provision, commonly called the right to modification, is a Congressionally mandated exception to the application of res judicata. Second, and more important for purposes of the Department's treatment of subsequent claims, claim preclusion bars only an attempt to relitigate a cause of action that was previously resolved; it has no effect on the litigation of a cause of action which did not exist at the time of the initial adjudication. *Lawlor v. National Screen Serv. Corp.,* 349 U.S. 322, 328 (1955); ''Restatement (Second) of Judgments'' §24 cmt. f (1982).

62 Fed. Reg. 3352 (Jan. 22, 1997).

2009, the month when claimant filed her subsequent claim. Noting that Section 1556 is silent as to the appropriate commencement date for automatic entitlement to benefits, that 20 C.F.R. §725.503(c) provides that a survivor is entitled to benefits from the month of the miner's death, and that Section 725.309(d)(5) prohibits payment of benefits in a subsequent claim for any period prior to the date upon which the order denying the prior claim became final, the Director maintains that the appropriate date for the commencement of benefits is July 2006, the month after the month in which the denial of the prior claim became final. *See* 20 C.F.R. §725.309(d)(5). Director's Petition for Review and Brief on Cross-Appeal at 4-6; Director's Response Brief at 5-12; OA Hearing Transcript at 25-32.

Claimant substantially agrees with the Director's position, that Section 725.309(d)(5) is applicable to this case, but asserts that benefits should commence as of June 2006, the month in which claimant's prior denial became final. Claimant's Response Brief at 35-36; OA Hearing Transcript at 23-25.

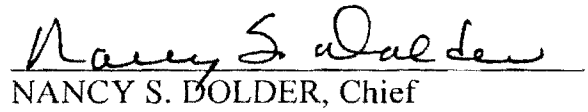
Employer disagrees with the positions of claimant and the Director, asserting that the administrative law judge correctly determined that benefits are not payable prior to May 2009, the date that claimant filed her subsequent claim. Employer reasons that, because the recent amendments apply only with respect to claims filed after January 1, 2005 that are pending on or after March 23, 2010, and because claimant's subsequent claim was the only pending claim meeting those requirements, the appropriate date for the commencement of benefits is the filing date of the subsequent claim, as an earlier date would render meaningless the retroactive limitations set by Congress. Employer's OA Brief at 22-28; OA Hearing Transcript at 16-18.

We agree with the position taken by the Director, that derivative benefits are payable in a subsequent survivor's claim filed within the time limitations set forth in Section 1556 from the month after the month in which the denial of the prior claim became final. While Section 1556 is silent as to the appropriate commencement date for the payment of derivative benefits in survivor's claims or subsequent survivor's claims, and we have recently held that benefits are payable from the month of the miner's death to eligible survivors filing initial survivor's claims under amended Section 932(*l*), *see Dotson v. McCoy Elkhorn Coal Corp.*, BLR , BRB No. 10-0706 BLA (Nov. 15, 2011) (en banc); 20 C.F.R. §725.503(c), the PPACA does not authorize the reopening of a previously denied claim. Thus, the final denial of claimant's original claim must be given effect, so as to prevent the payment of benefits from the date of the miner's death in her subsequent survivor's claim. *See Pittston Coal Group v. Sebben*, 488 U.S. 105, 12 BLR 2-89 (1988). Consequently, we hold that the provisions of Section 725.309(d)(5) are applicable to bar payment of benefits in a subsequent survivor's claim "for any period prior to the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d)(5). As the order denying claimant's prior claim became final in June 2006,

at the expiration of the thirtieth day after it was filed in the office of the district director, *see* 20 C.F.R. §725.479(a), claimant's survivor's benefits under amended Section 932(*l*) in her subsequent claim properly commence as of July 2006, the month after the month in which claimant's prior denial of benefits became final, *see* 20 C.F.R. §725.309(d)(5).

Accordingly, the administrative law judge's Summary Decision – Awarding Benefits and his Decision on Motion for Reconsideration are affirmed, as modified to reflect July 2006 as the date from which benefits commence.

SO ORDERED.



NANCY S. DOLDER, Chief
Administrative Appeals Judge

We concur.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's decision insofar as it rejects employer's constitutional arguments and holds that the date of the survivor's claim provides the operative date for determining eligibility for the survivor's benefits. I also agree with the majority that amended 30 U.S.C §932(*l*) applies to all survivors' claims, and that a prior, final denial of a survivor's claim pursuant to 20 C.F.R. §725.309, does not bar a subsequent survivor's claim pursuant to amended Section 932(*l*); but I respectfully dissent from the majority's determination that 20 C.F.R. §725.309 bars the payment of survivor's benefits for the period prior to the date upon which the order denying the prior claim became final. Since the amended Act provides for the continuation of black lung benefits for all eligible survivors, I would hold that benefits should commence in a subsequent survivor's claim

consistent with our decision in *Dotson v. McCoy Elkhorn Coal Corp.*, BLR , BRB No. 10-0706 BLA (Nov. 15, 2011)(en banc), regarding an original survivor's claim. Hence, I would affirm the award of survivor's benefits, but modify the date for commencement of benefits pursuant to 20 C.F.R. §725.503(c) to be as of January 1994, the month in which the miner died.

Claimant is the widow of a man employed as a coal miner for at least eighteen years. At the time of his death he was receiving federal black lung benefits pursuant to a claim filed under the Black Lung Benefits Act. On February 18, 1994, claimant filed a claim for survivor's benefits under the Act. That claim was finally denied on May 9, 2006, for failing to show that the miner had suffered and died from pneumoconiosis. On May 21, 2009, claimant filed a second survivor's claim that was pending on the date on which Section 932(*l*) was amended. As an eligible survivor of a miner eligible to receive benefits at the time of his death, she is automatically entitled to benefits by operation of amended Section 932(*l*).

I agree with the majority and the Director, Office of Workers' Compensation Programs (the Director), that nothing in the language of the amendment precludes an award of benefits in a subsequent survivor's claim filed after January 1, 2005, that is pending on or after March 23, 2010. Section 1556 of the PPACA removed the language preventing application of the derivative benefits provision to claims filed on or after January 1, 1982, but limited application of the derivative provision to "claims" filed after January 1, 2005:

> Effective Date - the amendments made by this section shall apply with respect to claims filed under part B or C of the Black Lung Benefits Act...after January 1, 2005, that are pending on or after the date of enactment of this Act.

Pub. L. No. 111-148, §1556(c) (2010).

The United States Courts of Appeals for both the Third and Fourth Circuits have construed the word "claims" in amended Section 932(*l*) and agreed with the Director that it means all claims. *B & G Constr. Co. v. Director, OWCP* [*Campbell*], 662 F.3d 233, BLR (3d Cir. 2011); *accord West Virginia CWP Fund v. Stacy*, F.3d , BLR , No. 11-1020, 2011 WL 6396510 (4th Cir. Dec. 21, 2011). The Third Circuit explained:

> [I]n order for section 932(*l*), as amended by section 1556(b) of the PPACA, to have any meaning at all with respect to claims of survivors, it must operate to ensure that any eligible survivor of a deceased miner who was eligible to receive benefits at the time of his death does not have to file a new claim or otherwise establish that pneumoconiosis was a cause of the

> miner's death in order to continue receiving benefits. Therefore, we will proceed on the basis of our conclusion that section 932(*l*) automatically awards benefits to eligible survivors of miners who were eligible to receive benefits at the time of their deaths....

Campbell, 662 F.3d at 253, BLR at . Thus, the statute makes no distinction between survivors who have previously filed a claim and those who have not.

Moreover, the stated limitations do not purport to bar subsequent survivors' claims. They simply provide a temporal framework for the orderly implementation of the amended Act. The Director is presumed to be aware of all pending claims and, as the administrator of the Act, is required to apply the amended Act to those claims as appropriate. He is, however, relieved of the burden of finding claimants who previously became eligible survivors or those whose survivors' claims were previously denied.

I also agree with the majority and the Director that res judicata, or claim preclusion, provided in 20 C.F.R. §725.309, cannot bar subsequent survivors' claims filed pursuant to amended Section 932(*l*), because a decision in the prior survivor's claim has no effect on the litigation of a cause of action that did not exist at the time of the initial adjudication. *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 328 (1955). As the Director persuasively argues, "the survivor's inability to show a change in an applicable element of entitlement, as required by Section 725.309(d)(3), has become irrelevant in adjudicating the limited class of subsequent survivors' claims affected by Section 1556 and does not mandate a denial." Director's Brief at 5.

I am puzzled that the majority and the Director recognize that the substance of Section 725.309 has no application to the subsequent survivor's claim under amended Section 932(*l*), yet they apply the date provided in 20 C.F.R. §725.309(d)(5) to preclude commencement of benefits until after the prior, "irrelevant" denial became final. If Section 725.309 does not bar a claim brought under amended Section 932(*l*), logically, it cannot bar receipt of any benefits paid under amended Section 932(*l*).

I am also puzzled by the Director's insistence that Section 1556 is silent as to the appropriate date for commencement of benefits in survivors' claims since Section 1556 is entitled "Equity for Certain Eligible Survivors," and section (b) specifically is titled "CONTINUATION OF BENEFITS." Director's Brief at 5. The Third Circuit observed, in *Campbell*, that this was a clue to Congress's intent, citing *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("the title of a statute or section can aid in resolving an ambiguity in the legislative text."). *Campbell*, 662 F.3d at 250-1, BLR at . The conclusion is inescapable: When an eligible miner has a survivor, the miner's death does not interrupt the payment of black lung benefits.

The retroactive application of amended Section 932(*l*) reflects Congress's determination that survivors are equal in deserving benefits. As the Fourth Circuit observed in *Stacy*, "the wholly rational and legitimate purpose for applying amended §932(*l*) retroactively is to compensate the survivors of deceased miners 'for the effects of disabilities bred in the past'", quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18 (1976). *Stacy*, F.3d at , BLR at , 2011 WL 6396510 at *4. For all survivors who receive automatic entitlement to benefits under amended Section 932(*l*), it is irrational to interpose an "irrelevant" decision as an obstacle to receipt of benefits by some of those survivors.

Finally, the Director's interpretation of the amended Act, insisting that benefits be denied for a period in subsequent survivors' claims, is not entitled to deference, because the Act makes no distinction between new and subsequent survivors' claims, and explicitly provides for all, "CONTINUATION OF BENEFITS." The well-established law is that deference is not due if Congress has made its intent clear. *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 646 (2007). The United States Supreme Court has declared, "[e]ven for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *General Dynamics Land Systems, Inc. v. Cline*, 540 US. 581, 600 (2004), *citing INS v. Cardozo-Fonseca*, 480 U.S. 421, 446-448 (1987); *accord Chevron U.S.A., Inc v. National Resources Reference Counsel, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

In sum, in amending Section 932(*l*), Congress has provided that all eligible survivors of eligible miners are automatically entitled to benefits if their claims are pending on or after March 23, 2010. Since Congress made plain its intent to provide for a continuation of benefits for all such survivors, the amended Act provides no support for the majority's determination to deny benefits on subsequent survivor's claims for the period prior to the date on which the prior decision denying benefits became final. Moreover, it is irrational to give such effect to a decision that the Director concedes is irrelevant to a claim under the amended Act. Because the Director's statutory interpretation regarding the commencement of benefits in subsequent survivors' claims under the amended Act is both unnecessary and, more importantly, inconsistent with the statute, it is entitled to no deference. The statute makes no distinction between those who previously filed a survivor's claim and those who had not; their entitlement to benefits is

the same. They are, therefore, equally entitled to a continuation of black lung benefits, uninterrupted by a prior decision denying survivor's benefits.

Regina C. McGranery

REGINA C. McGRANERY
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the administrative law judge's holding that the provisions of amended Section 932(*l*) are applicable to claimant's subsequent survivor's claim. In my opinion, the language chosen by Congress in Section 1556 of the PPACA, in conjunction with the statutory structure of the Act and the clear intent expressed through Congressional Record remarks, does not provide a means to disturb the finality of such a previously-denied claim.

Section 932(*l*),[6] which pertains to the process of obtaining survivor's benefits, was amended by Section 1556(b) to provide that eligible survivors are no longer required to file a new claim for benefits. Section 1556(c), in turn, specifies the claims to which amended Section 932(*l*) applies. It provides that:

> [t]he amendments made by this section shall apply with respect to claims filed under part B or C of the [Act] . . . after January 1, 2005, that are pending on or after the date of enactment of this Act.

Pub. L. No. 111-148, § 1556(c) (2010).

The majority takes the position that Section 1556(c) applies to all claims, including a subsequent claim filed by a survivor whose previous claim was finally denied prior to the enactment of the PPACA and is not otherwise susceptible to either administrative or judicial consideration. I disagree.

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[6] Section 932(*l*) provides that:

> In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner.

30 U.S.C. §932(*l*).

This section was originally enacted as part of the 1978 Amendments to the Act. *See* Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 7(h), 92 Stat. 95, 100 (1978). In 1981, language was added so that the section did not apply to claims filed on or after the effective date of the Black Lung Benefits Amendments of 1981. *See* Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, § 203(a)(6), 95 Stat. 1635, 1644 (1981). Section 1556 removed the language added by the 1981 Amendments, reinstating application of the provision.

Nothing in Section 1556 suggests that Congress contemplated disturbing such finally-denied survivors' claims outside of the statutorily-established modification process. Indeed, comments entered into the Congressional Record by Senator Byrd, who sponsored the amendment, recognize its application only to eligible survivors' claims initially filed after January 1, 2005, that are pending on or after the date of the PPACA's enactment. Senator Byrd stated:

> It is clear that the section will apply to all claims that will be filed henceforth, including many claims filed by miners whose prior claims were denied *or by widows who never filed for benefits following the death of a husband.* But Section 1556 will also benefit all of the claimants *who have recently filed a claim, and are awaiting or appealing a decision or order, or who are in the midst of trying to determine whether to seek a modification of a recent order.*
>
> *Section 1556 applies immediately to all pending claims, including claims that were finally awarded or denied prior to the date of enactment of the [PPACA], for which the claimant seeks to modify a denial, or for which other actions are taken in order to modify an award or denial, in accordance with 20 C.F.R. §§725.309(c) or 725.310.* Section 1556 applies even if a final order is modified, or actions are taken to bring about the modification of an order, subsequent to the date of enactment of the [PPACA], in accordance with the sections of Part 725 that I mentioned.

156 Cong. Rec. S2083–84 (daily ed. March 25, 2010) (statement of Sen. Robert Byrd)(emphasis added).

Senator Byrd thus clearly stated that the universe of claims to which Section 1556(b) applies is composed of claims filed by survivors who never previously filed for benefits after the death of the miner, claims still in the adjudicatory process or susceptible to administrative or judicial review, and claims susceptible to review as a consequence of the modification procedure established by the Act. The claim in this case is none of the above.

Similarly, in analyzing whether Section 1556 violates due process requirements, the United States Court of Appeals for the Fourth Circuit, in *West Virginia CWP Fund v. Stacy,* F.3d , BLR , No. 11-1020, 2011 WL 6396510 (4th Cir. Dec. 21, 2011), recognized Congress's measured approach for application of the amendments, stating:

> Far from arbitrarily ignoring the potential financial burden that it placed on coal operators, Congress mitigated the retroactive impact of Section 1556 by limiting its application to "claims filed . . . after January 1, 2005, that are

> pending on or after" March 23, 2010 – the date the PPACA was enacted. Pub. L. No. 111-148, § 1556(c), 124 Stat. 119, 260 (2010). Consequently, operators must only pay automatic survivor's benefits for claims filed on or after 2005.

Stacy, F.3d at , BLR at , No. 11-1020, 2011 WL 6396510 at *4.

Contrary to the Fourth Circuit's analysis in *Stacy*, the majority's interpretation would remove the mitigating limitations of the plain words of the statute. Congress set into place not just one, but two requirements in Section 1556(c) of the PPACA: that the claim be filed after January 1, 2005 and that it be pending on or after March 23, 2010. The majority's interpretation renders Congress's combination of these requirements meaningless. Moreover, as employer notes, in the past, when Congress intended that amendments to the Act apply to previously denied claims, it explicitly so provided.[7] Its choice not to do so here is telling.

A review of relevant provisions of the Act, taking into account the canons of statutory construction, establishes that Section 1556 of the PPACA does not apply to previously denied survivors' claims that were finally decided and no longer subject to modification as of the date Section 1556 was enacted.

Congress established the Act to provide benefits to coal miners disabled by pneumoconiosis and to certain surviving dependents who were not covered under state health benefits. 30 U.S.C. §901(a) sets forth, in pertinent part, the general purpose of the Act:

> It is, therefore, the purpose of this subchapter to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease . . . .

30 U.S.C. §901(a).

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[7] *See e.g.* Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1635 (1981) (codified as amended at 30 U.S.C. §932(c)(2) (1983)); Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978); Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972). "Courts adopt a conservative attitude and presume that amendatory acts do not change existing law further than is declared or necessarily implied." 1A Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction § 22.30 (7th ed. 2008).

Section 932(c)[8] requires that each operator be liable for the payment of benefits "to the categories of persons entitled to benefits under 30 U.S.C. §922(a)[9] . . .," which in turn provides that "[i]n the case of death of a miner due to pneumoconiosis . . . benefits shall be paid to his widow."[10] 30 U.S.C. §§932(c), 922(a). Section 921(a) requires that the Secretary, "in accordance with the provisions of this part . . . make payments of benefits in respect of the death of any miner whose death was due to pneumoconiosis...." 30 U.S.C. §921(a). Section 932(*l*), as amended by Section 1556(b) of the PPACA, provides that eligible survivors do not have to "file a claim for benefits, or refile or

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[8] Section 932(c) provides, in pertinent part, the following:

> (c) Persons entitled to benefits
>
> Benefits shall be paid during such period by each such operator under this section to the categories of persons entitled to benefits under section 922(a) of this title in accordance with the regulations of the Secretary applicable under this section . . . .

30 U.S.C. § 932(c).

[9] Section 922(a)(2), relating to the payment of benefits to widows, provides:

> In the case of death of a miner due to pneumoconiosis or, except with respect to a claim filed under part C of this subchapter on or after the effective date of the Black Lung Benefits Amendments of 1981, of a miner receiving benefits under this part, benefits shall be paid to his widow (if any) at the rate the deceased miner would receive such benefits if he were totally disabled.

30 U.S.C. § 922(a)(2).

[10] In 1978, when Section 932(*l*) was initially enacted, Section 922(a)(2) provided that benefits were also payable to the widow of a miner based on the miner's prior receipt of benefits, and Section 921(a) similarly also provided that the Secretary shall "in accordance with the provisions of this part . . . make payments of benefits . . . in respect of the death of any miner . . . who at the time of his death was totally disabled by pneumoconiosis." The 1981 Amendments to the Act prospectively eliminated application of that coverage from Section 922(a) and the similar payment language from Section 921(a). The 1981 Amendments also removed language from Section 901 that stated that it was a purpose of the Act to provide benefits to widows under such circumstances. The PPACA did not alter the wording of Sections 901, 921(a), or 922(a), as previously revised by the 1981 Amendments.

otherwise revalidate the claim of such miner." Pub. L. No. 111-148, § 1556(c) (2010). As a consequence, eligible survivors are relieved of the obligation to prove that the miner died from pneumoconiosis. *See Stacy*, F.3d at , BLR at , 2011 WL 6396510 at *8.

One way to interpret the statute is to see the revised Section 932(*l*) as creating a new condition of entitlement. The consequence of that approach is to wholesale repeal amendments made in 1981, even though Congress did not do so. This is the path taken by the majority. Another approach is to harmonize the provisions to the greatest extent possible, by recognizing the particular role each section plays and interpreting their interaction accordingly. This is the path to take following the canons of construction. I would follow the latter approach.

Section 1556 must be considered within the framework of the Act, as amended, because Congress acts with knowledge of existing law. *Cannon v. University of Chicago*, 441 U.S. 677, 697-98 (1979). It is a general rule of construction that "a statute should be read as a whole." 1A Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction §22.34 (7th ed. 2008). Old and new provisions should be construed together. "Effect is to be given to each part, and they are interpreted so that they do not conflict." *Id.* In this framework, a surviving widow's entitlement to benefits is established by Section 922(a), as Congress expressly tells us in Section 932(c). Section 922(a)(2) provides payment only to those surviving spouses whose miners' deaths were due to pneumoconiosis.[11] However, because Section 932(*l*) says eligible survivors of a miner determined disabled due to pneumoconiosis do not have to file for benefits,[12] the amendments adopted in Section 1556 change the process for obtaining benefits, relieving eligible survivors (of miners determined eligible for benefits) of the burden of proving that the miner's death was due to pneumoconiosis, while leaving intact the substantive

[11] This statement applies with respect to claims filed on or after the effective date of the 1981 Amendments for which employers are liable for payment. Similarly, under Section 921(a), the Secretary pays benefits "in respect of the death of any miner whose death was due to pneumoconiosis." 30 U.S.C. §921(a).

[12] Filing is a procedural requirement, rather than a substantive requirement.

underlying bases for entitlement.[13] To the extent that Sections 901, 921(a), and 922(a)(2) procedurally require the survivor to prove that the miner died of pneumoconiosis in order to receive benefits, they are repealed by implication. *See Stacy*, F.3d at , BLR at , 2011 WL 6396510 at *9-10. As a result, the substantive bases for entitlement to survivors' benefits are unchanged by Section 1556, although the applicable procedures are markedly liberalized.

This analysis is consistent with the holding of the court in *Stacy* that Section 1556(c) mandates the application of amended Section 932(*l*) to survivors' claims, as well as miners' claims, filed after January 1, 2005 that are pending on or after March 23, 2010. *See Stacy*, F.3d at , BLR at , 2011 WL 6396510 at *8. In addition, it builds on the *Stacy* Court's determination that Sections 901, 921(a), and 922(a)(2) are overridden by Section 932(*l*) to the extent that they require a survivor to prove that pneumoconiosis caused the miner's death, while being mindful of its admonition that "repeals by implication are not favored." *Stacy*, F.3d at , BLR at , 2011 WL 6396510 at *10, *citing Posada v. Nat'l City Bank*, 296 U.S. 497, 503 (1936). Further, it is consistent with the intent of Congress.

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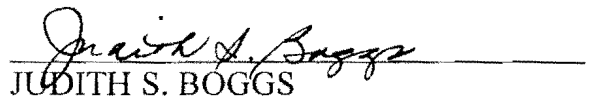
[13] The language currently in Section 932(*l*) is unchanged from its original enactment as part of the 1978 Amendments to the Act. What has changed is the universe of claims to which it applies. Interpretation of Section 932(*l*) as a procedural, rather than substantive, provision is supported by the fact that in 1978, when the Congress enacted Section 932(*l*), Section 922(a) provided entitlement to the widow of a miner who was receiving benefits, as well as entitlement for other surviving dependents of miners who were receiving benefits under the Act or were totally disabled by pneumoconiosis at the time of death. Section 921(a) was similar. Thus, at the time, Section 932(*l*) was not needed to create conditions of entitlement to benefits for the survivors it described. To read it in that manner makes it duplicative of Sections 922(a) and 921(a). However, a very useful purpose was, and is, served by relieving surviving dependents of the burden of successfully negotiating their way through a process that significantly delays receipt of benefits on which they depend. At the time that the 1978 legislation was being considered, Senator Hatch stated, with respect to claims filed under the Act, that:

> Out of approximately 109,000 claims filed, 4,100 have been approved and 56,000 have been denied. The remaining 49,000 undecided claims form the backlog resulting in large part from an average claim processing time of 630 days. Of the claims approved, coal operators are paying only 200; the industry is controverting 97 percent of the claims for which a responsible operator [has] been identified by the Secretary of Labor.

123 Cong. Rec. S24265-66 (daily ed. July 21, 1977) (statements of Sen. Orrin Hatch).

When the claim in this case is considered accordingly, it rests on the same bases of entitlement as the widow's earlier claim, and is the same claim she made earlier, reiterated.[14] It is not a claim made after January 1, 2005 and pending on or after the date of enactment of the PPACA. Claim preclusion is not affected by shifts or changes in the burden of persuasion so long as successive proceedings involve the same claim. 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4422 (2nd ed. 2002); *see Routen v. West*, 142 F.3d 1434, 1442 (Fed. Cir. 1998)("Changing the . . . evidentiary standard . . . does not effect a substantive change in the law; that is, it does not create a new cause of action, since no new basis of entitlement is created."). Because the entitlement issue was finally decided against claimant, her claim is no longer subject to modification, and it does not qualify for application of Section 932(*l*), the administrative law judge's award of benefits was clearly erroneous.

In conclusion, therefore, I would reverse the administrative law judge's award of benefits.



JUDITH S. BOGGS
Administrative Appeals Judge

[14] Claimant contends that her claim was not fairly decided. She has not claimed a substantive change in a relevant condition of entitlement that would render this claim subject to consideration under the rules respecting consideration of subsequent claims. Consequently, this claim is substantively identical to the claim she filed, which was filed prior to January 1, 2005 and not pending on or after the date the PPACA was enacted; it is the same claim.