

U.S. Department of Labor

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



BRB No. 16-0570 BLA

CARRIE KATHLEEN FERGUSON)
(Widow of LEE FERGUSON))

Claimant-Respondent)

v.)

OAK GROVE RESOURCES, LLC)

and)

DATE ISSUED: 08/07/2017

NATIONAL UNION FIRE)
INSURANCE/AIG)

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 Granting Claimant's Motion for Summary Decision of Adele H. Odegard, Administrative Law Judge, United States Department of Labor.

John R. Jacobs, J. Thomas Walker and Cecilia B. Freeman (Maples, Tucker & Jacobs, LLC), Birmingham, Alabama, for claimant.

Kary B. Wolfe (Jones Walker LLP), Birmingham, Alabama, for employer/carrier.

Emily Goldberg-Kraft (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, 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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting Claimant's Motion for Summary Decision (2016-BLA-05474) of Administrative Law Judge Adele H. Odegard, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on March 27, 2015.¹

On February 4, 2016, the district director issued a Proposed Decision and Order awarding survivor's benefits pursuant to the automatic entitlement provision of Section 422(*l*) of the Act, 30 U.S.C. §932(*l*).² Director's Exhibit 21. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 26.

On April 28, 2016, 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 Section 932(*l*). Employer opposed claimant's motion, arguing that claimant is not automatically entitled to benefits because, at the time of the miner's death, there had been no determination that the miner was eligible for benefits.

In a Decision and Order dated June 28, 2016, the administrative law judge granted claimant's motion for summary decision, finding that claimant satisfied the eligibility

¹ Claimant is the widow of the miner, who died on November 19, 2014. Director's Exhibit 3. During his lifetime, the miner filed a claim for benefits on July 23, 2012. Director's Exhibit 1. In a Decision and Order dated November 24, 2015, Administrative Law Judge Lystra Harris awarded benefits in the miner's claim. *Id.*

² As part of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148, Congress enacted amendments to the Black Lung Benefits Act (the Act), which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725 (2015).

criteria for automatic entitlement to benefits pursuant to Section 932(l). Accordingly, the administrative law judge awarded survivor's benefits, to commence as of November 2014, the month in which the miner died.

On appeal, employer challenges the administrative law judge's application of Section 932(l) to this claim. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), also responds, urging the Board to affirm the administrative law judge's award of benefits. In a reply brief, employer reiterates, and expands upon, its previous contentions.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

As part of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, §1556(b), 124 Stat. 119, 260 (2010), which is codified at 30 U.S.C. §932(l), Congress amended Section 932(l) of the Act to reinstate the right of certain survivors to receive automatic survivor's benefits without having to prove that the miner's death was due to pneumoconiosis. *See Vision Processing, LLC v. Groves*, 705 F.3d 551, 554-55, 25 BLR 2-231, 2-238-39 (6th Cir. 2013); *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 381-82, 25 BLR 2-65, 2-71-72 (4th Cir. 2011); *B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 253, 25 BLR 2-13, 2-44 (3d Cir. 2011). Specifically, the right applies to an eligible survivor of "a miner who was determined to be eligible to receive benefits under [the Act] at the time of his or her death . . ." 30 U.S.C. §932(l). Section 932(l) provides automatic benefits to survivors of miners who were determined to be eligible for benefits, including miners whose determinations of eligibility are not yet final, and are subject to potential appeal and reversal. *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141, 145-47 (2014).

The administrative law judge determined that the plain language of Section 932(l) provides that a miner's claim must be in award status in order for a survivor to be eligible to receive benefits under the automatic entitlement provision. Decision and Order at 3. The administrative law judge also noted, however, that the meaning of the phrase "at the

³ This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, as the miner's coal mine employment was in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1.

time of his death” is less clear. *Id.* Employer contended that the phrase “at the time of his death” signifies the date by which the miner must have been awarded benefits. The administrative law judge rejected employer’s contention, noting that the preceding phrase “determined to be eligible” would be rendered superfluous by employer’s construction of the statute. Decision and Order at 3. Specifically, the administrative law judge noted that under employer’s interpretation, the statute would provide benefits to the survivors of those miners who were receiving benefits at the time of their deaths and not to the survivors of miners who were eligible to receive benefits at the time of their deaths. *Id.* Thus, the administrative law judge concluded that “[t]he phrase ‘determined to be eligible’ changes the meaning of ‘at the time of his or her death.’”⁴ *Id.* Consequently, the administrative law judge interpreted the language of Section 932(l) to mean that “the statute provides benefits to survivors whose miners should have been receiving benefits at the time of their deaths (i.e., were eligible) and not only to survivors whose miners . . . were receiving benefits at the time of their deaths.” *Id.*

Employer asserts that, contrary to the administrative law judge’s interpretation, Section 932(l) requires a miner to have been receiving benefits at the time of his death for a survivor to be awarded automatic benefits. Employer notes that the title of Section 1556(b) of the PPACA includes the heading “continuation of benefits.” Employer’s Brief (unpaginated) at [8]. Employer maintains that the section’s title supports the conclusion that “the intent of [Section] 932(l) is to automatically award benefits to survivors when their spouse[s] had been receiving benefits before [their] death[s]” *Id.* Employer further asserts that the Board’s decision in *Rothwell* is inapplicable to this case, because here, unlike the situation in *Rothwell*, there was no award of benefits to the miner prior to his death. *Id.* at 1-2. We reject employer’s arguments.

In interpreting Section 932(l), we must give the words in the statute their ordinary and plain meaning. *See Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894, 900 (7th Cir. 2003). As the Director points out, the plain language of the Act provides “no basis to distinguish between miners’ claims which were awarded . . . prior to the miner’s death and those which were awarded thereafter.” Director’s Brief at 2. Rather, “[t]he Act requires only that the miner ‘was determined to be eligible to receive benefits . . . at the time of his or her death’” *Rothwell*, 25 BLR at 1-145, *quoting* 30 U.S.C. §932(l); *see* Decision and Order at 3.

⁴ The administrative law judge further noted that under employer’s interpretation, “survivors would be at the mercy” of delays in the adjudicatory process, as a case involving “a miner [who] dies one day before a decision awarding benefits is issued would be treated differently from a case in which the miner dies one day after a benefits award.” Decision and Order at 3.

Further, contrary to employer's contention, the Board's decision in *Rothwell* made clear that, for purposes of determining eligibility for derivative benefits under Section 932(l), there is no requirement that the miner have been awarded benefits prior to his death. Rather, a survivor of a miner is entitled to automatic benefits if "at any stage of a black lung proceeding" the miner is determined to be "legally entitled to receive benefits from either the responsible operator or the [Black Lung Disability] Trust Fund" *Rothwell*, 25 BLR at 1-146. Thus, miners who are entitled to receive benefits under the regulations, regardless of whether the award was issued before or after death, are necessarily "determined to be eligible to receive benefits." *Rothwell*, 25 BLR at 1-146; *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-125 (2013) (holding there is no requirement that the miner was actually receiving benefits prior to death). As long as the miner is ultimately determined to be eligible to receive benefits, a survivor is entitled to the payment of benefits. 30 U.S.C. §§901(a), 932(l); *see* 20 C.F.R. §725.212(a)(3)(ii) (2015); *Rothwell*, 25 BLR at 1-146; *Thorne*, 25 BLR at 1-125; *see also Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 1328, 12 BLR 2-60, 2-70 (3d Cir. 1988); *Smith v. Camco Mining Inc.*, 13 BLR 1-17, 1-21 (1989). Here, the administrative law judge properly found that the November 24, 2015 award of benefits by Administrative Law Judge Lystra Harris fulfills that requirement. *See Thorne*, 25 BLR at 1-125; Decision and Order at 4.

We also reject employer's argument that the revised regulation at 20 C.F.R. §725.212(a)(3) (2015) is contrary to the Act because it is inconsistent with prior regulations implementing the original version of Section 932(l). Employer's Brief at [6-9]; Employer's Reply Brief (unpaginated) at [2]. Under revised 20 C.F.R. §725.212(a)(3)(ii) (2015), a surviving spouse of a miner is entitled to benefits if the miner filed a claim "on or after January 1, 1982, which results or resulted in a final award of benefits, and [the survivor] filed a claim for benefits after January 1, 2005 which was pending on or after March 23, 2010." Employer argues that, in contrast, the 1980 regulation implementing Section 932(l) provided that a surviving spouse is automatically eligible to receive benefits only if that spouse: "(1) Is not married; (2) Was dependent on the miner at the pertinent time; and (3) The deceased miner either: (i) Was receiving benefits under section 415 or Part C of title IV of the Act at the time of death" Employer's Brief at [2-3]; Employer's Reply Brief at [7] (citing 20 C.F.R. §725.212(a)(1)-(a)(3)(i) (1980)). Employer further argues that "nothing in the text of the relevant statutory provision has changed to justify" eliminating the "critical requirement" that the miner "had been receiving benefits" from the current regulation. Employer's Reply Brief at [3]. Employer therefore contends that the revised regulation is contrary to the Act, to the extent that it can be interpreted as authorizing an automatic award of survivor's benefits when the miner was not awarded benefits until after his death. Employer's Reply Brief at [7]. We disagree.

As claimant points out, in asserting that the prior version of the regulation at 20 C.F.R. §725.212(a) (1980) required that a miner “[w]as receiving benefits” at the time of his death in order for automatic entitlement under Section 932(l) to apply, employer has selectively quoted the regulation. Employer’s Reply Brief at [2-3]; *see* Claimant’s Brief at 4. Contrary to employer’s characterization, every prior version of the regulation implementing Section 932(l) provided that a surviving spouse who met the other eligibility requirements was automatically entitled to receive benefits if the miner “was receiving benefits” at the time of death “*or (ii) Is determined to have been totally disabled due to pneumoconiosis at the time of death or to have died due to pneumoconiosis.*”⁵ 20 C.F.R. §725.212(a)(3)(i), (ii) (1979); 20 C.F.R. §725.212(a)(3)(i), (ii) (1980) (emphasis added); *see* 20 C.F.R. §725.212(a)(3)(i), (ii) (1984). Thus, in addition to providing automatic benefits to the survivor of a miner who was awarded benefits prior to death, the plain language of the prior regulations unquestionably covered the survivor of a miner who was awarded benefits after death. (i.e., a miner who *is determined to have been* entitled to benefits).

The current regulation is also consistent with a reading of the statute, which does not require that the miner was receiving benefits at the time of his death. In accord with

⁵ Congress originally added Section 422(l), codified at 30 U.S.C. §932(l), to the Act as part of the Black Lung Benefits Reform Act of 1977. Pub. L. No. 95-239, §7(h), 92 Stat. 95, 100 (1978). Under Section 932(l), an eligible survivor of a miner who was awarded benefits on a claim filed during his or her lifetime was automatically entitled to receive survivor’s benefits. *Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 1328, 12 BLR 2-60, 2-70 (3d Cir. 1988); *Smith v. Camco Mining Inc.*, 13 BLR 1-17, 1-21 (1989). The first regulation to implement Section 932(l) provided that an eligible surviving spouse of a miner is entitled to benefits if the deceased miner either “(i) Was receiving benefits under section 415 or part C of title IV of the Act at the time of death; or (ii) Is determined to have been totally disabled due to pneumoconiosis at the time of death or to have died due to pneumoconiosis.” 20 C.F.R. §725.212(a)(3)(i), (ii) (1979). Congress added language to Section 932(l) as part of the Black Lung Benefits Amendments of 1981 that eliminated automatic survivor’s benefits for claims filed on or after January 1, 1982. Pub. L. No. 97-119, §203(a)(6), 95 Stat. 1644 (1981). The 1981 statutory changes to Section 932(l) were implemented by a regulatory revision which provided that an eligible surviving spouse of a miner is entitled to benefits if the deceased miner either “(i) Was receiving benefits under section 415 or part C of title IV of the Act at the time of death as a result of a claim filed prior to January 1, 1982; or (ii) Is determined as a result of a claim filed prior to January 1, 1982, to have been totally disabled due to pneumoconiosis at the time of death or to have died due to pneumoconiosis.” 20 C.F.R. §725.212(a)(3)(i), (ii) (1984).

the prior versions of the regulation, the plain language of the current regulation covers awards that occur before a miner's death (i.e., a miner's claim which "resulted" in an award), as well as awards that occur after a miner's death (i.e., a miner's claim which "results" in an award). 20 C.F.R. §725.212(a)(3)(ii) (2015); *see also Rothwell*, 25 BLR at 1-146. Thus, we agree with the Director that like the prior regulations, the current regulation provides no basis for distinguishing between survivors of miners who were awarded benefits prior to their deaths and survivors of miners who were awarded benefits posthumously. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844-45 (1984); Director's Brief at 2. We, therefore, reject employer's argument that the current version of the regulation at 20 C.F.R. §725.212(a)(3)(i), (ii) (2015) conflicts with either the prior regulations implementing the original version of Section 932(l) or with the amended Act.

Finally, we address employer's contention that the administrative law judge's application of Section 932(l) to this case is contrary to the binding precedent of the United States Court of Appeals for the Eleventh Circuit in *U.S. Steel Mining Co., LLC v. Director, OWCP [Starks]*, 719 F.3d 1275, 25 BLR 2-297 (11th Cir. 2013). Relying on *Starks*, employer contends that entitlement to an automatic award of survivor's benefits pursuant to Section 932(l) requires that the miner was receiving benefits at the time of his death. Employer's Brief at [8], *citing Starks*, 719 F.3d at 1283, 25 BLR at 2-308.

Employer's reliance on *Starks* is misplaced. In *Starks*, the employer challenged the automatic award of survivor's benefits under Section 932(l) to the widow of a miner who filed a claim and was awarded benefits before he died. The court noted that the issue before it was whether survivors who meet the eligibility requirements of Section 932(l), as amended in 2010, are still required to prove that the miner's death was due to pneumoconiosis.⁶ *Starks*, 719 F.3d at 1279. As the Director points out, the court in

⁶ The Eleventh Circuit court held that the widow was an eligible survivor of the miner, and thus was not required to establish that the miner's death was due to pneumoconiosis to receive benefits under Section 932(l). The court concluded that "[i]f a survivor can meet the requirements of [Section] 932(l), she is entitled to benefits, and the language in the unamended statutes [Sections 901, 921(a), and 922(a)(2)] does not apply to her." *U.S. Steel Mining Co., LLC v. Director, OWCP [Starks]*, 719 F.3d 1275, 1284, 25 BLR 2-297, 2-310 (11th Cir. 2013). The court also addressed, and rejected, employer's arguments that the retroactive date for filing claims under the PPACA referred to miners' claims, and not survivors' claims; and that the retroactive application of the PPACA amendment to the Act violated the Due Process Clause of the Fifth Amendment to the United States Constitution. *Starks*, 719 F.3d at 1284-87, 25 BLR at 2-310-17.

Starks did not address “[t]he issue of whether the timing of a miner’s award is significant.” Director’s Brief at 2. Thus, we reject employer’s assertion that the administrative law judge’s application of Section 932(*l*) to this claim contradicted the binding precedent of the Eleventh Circuit in *Starks*.⁷

As employer raises no additional assignments of error, we affirm the administrative law judge’s determination that because the miner in this case was “determined to be eligible to receive benefits,” claimant is derivatively entitled to survivor’s benefits pursuant to Section 932(*l*). 30 U.S.C. §932(*l*); Decision and Order at 4.

⁷ Moreover, as the administrative law judge correctly noted, after the issuance of *Starks*, the Eleventh Circuit, in an unpublished decision, affirmed an award of survivor’s benefits under the automatic entitlement provision of Section 932(*l*) in a case where the miner was awarded benefits posthumously. *See Drummond Co. v. Director, OWCP [Allred]*, 650 F. App’x 690 (11th Cir. 2016). As in *Starks*, however, the court did not address the significance, if any, of the timing of the miner’s award.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge