

U.S. Department of Labor

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



BRB No. 15-0392 BLA

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| OMA G. KENNEDY |) | |
| (Widow of CHARLIE KENNEDY) |) | |
| |) | |
| Claimant-Respondent |) | |
| |) | |
| v. |) | |
| |) | |
| WEST COAL CORPORATION |) | DATE ISSUED: 06/28/2016 |
| |) | |
| and |) | |
| |) | |
| CONNECTICUT INDEMNITY COMPANY |) | |
| |) | |
| 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 - Denial of Request for Modification of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

John C. Morton and Austin P. Vowels (Morton Law LLC), Henderson, Kentucky, for employer/carrier.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Acting 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, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order - Denial of Request for Modification (2012-BLA-6229) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) rendered on a subsequent survivor's claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

Claimant filed her subsequent claim for survivor's benefits on January 7, 2011. Director's Exhibit 3. On February 25, 2011, the district director issued a Proposed Decision and Order, wherein he found that claimant was derivatively entitled to survivor's benefits pursuant to Section 422(l) of the Act, 30 U.S.C. §932(l).² Director's Exhibit 13. Employer requested modification of the award of benefits, asserting that the district director's failure to send formal notification of the claim deprived it of due process; that the miner's death was not due to pneumoconiosis; and that claimant's subsequent claim is barred pursuant to 20 C.F.R. §725.309. Director's Exhibits 21, 22. On July 20, 2012, the district director found no mistake in a determination of fact and denied employer's request for modification. Director's Exhibit 25. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 26. The parties subsequently waived the right to a hearing and requested a decision on the record. Decision and Order at 2.

¹ Claimant is the widow of the miner, who filed his lifetime claim for benefits on March 21, 1988. On March 8, 1991, District Chief Administrative Law Judge E. Earl Thomas awarded benefits in the miner's claim. Director's Exhibit 1. The Board affirmed the award of benefits, *Kennedy v. West Coal Corp.*, BRB No. 91-1139 BLA (Aug. 25, 1992)(unpub.), and subsequently denied employer's motion for reconsideration, *Kennedy v. West Coal Corp.*, BRB No. 91-1139 BLA (Sept. 11, 1995)(Order)(unpub.). Director's Exhibit 1. The miner died on May 15, 1996. Director's Exhibit 6. Claimant filed her initial claim for survivor's benefits on January 9, 2004, which was finally denied on November 24, 2004 by the district director. Director's Exhibit 2.

² Section 422(l) of the Act, 30 U.S.C. §932(l), 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).

The administrative law judge issued his Decision and Order on June 2, 2015, finding that claimant is automatically entitled to survivor's benefits pursuant to Section 932(l), based on the miner's lifetime award. Consequently, the administrative law judge awarded benefits.

On appeal, employer challenges its designation as the responsible operator and the administrative law judge's application of Section 932(l) to this claim.³ The Director, Office of Workers' Compensation Programs (the Director), responds in support of the award of benefits.⁴

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.⁵ 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).

Employer asserts that it should be dismissed as the responsible operator because it did not receive proper notice and service of this subsequent claim. Employer argues that the district director's failure to notify employer of the claim prior to the issuance of the Proposed Decision and Order was in violation of the regulatory requirements at 20 C.F.R. §§725.407,⁶ 725.410⁷ and 725.418(d).⁸ Employer's Brief at 5-11. Employer's arguments lack merit.

³ By Order dated February 10, 2016, the Board denied employer's request to stay the proceedings pending the outcome of *Peabody Coal Co. v. Director, OWCP*, 577 F. Appx. 496 (6th Cir. 2014), because the United States Supreme Court denied certiorari in that case. *Kennedy v. West Coal Corp.*, BRB No. 15-0392 BLA (Feb. 10, 2016) (Order)(unpub.).

⁴ We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant filed her subsequent survivor's claim after January 1, 2005, her claim was pending after March 23, 2010, and that the miner was receiving benefits under a final award at the time of his death. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁵ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mining industry in Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 2.

⁶ The regulation at 20 C.F.R. §725.407 provides, in pertinent part, that upon receipt of the miner's employment history, and the identification of the potentially liable

The version of the regulation at 20 C.F.R. §725.418 in effect when the district director issued his Proposed Decision and Order contains an exception that specifically allowed the district director to bypass the normal adjudication process and issue a proposed decision and order “at any time during the adjudication” if the district director determined that its issuance would “expedite the adjudication of the claim.” 20 C.F.R. §725.418(a)(2) (2011); *see Sextet Mining Corp. v. Whitfield*, 604 Fed. Appx. 442 (6th Cir. 2015). Moreover, the regulations implementing Section 932(l) make clear that a district director who determines that the claimant is a survivor entitled to benefits under Section 932(l) may issue a proposed decision and order at any time during adjudication of the claim, and may designate the responsible operator in the proposed decision and order, without first notifying the responsible operator of its potential liability.⁹ 20 C.F.R.

responsible operators, the district director “shall notify each such operator of the existence of the claim.” 20 C.F.R. §725.407(a), (b). The regulation states further that “[t]he district director may not notify . . . operators of their potential liability after a case has been referred to the Office of Administrative Law Judges.” 20 C.F.R. §725.407(d).

⁷ The regulation at 20 C.F.R. §725.410 provides, in pertinent part, that after the district director completes the development of medical evidence, “he shall issue a schedule for the submission of additional evidence.” 20 C.F.R. §725.410(a).

⁸ The regulation at 20 C.F.R. §725.418(d) in effect when the district director issued his Proposed Decision and Order provides, in pertinent part, that “[n]o operator may be finally designated as the responsible operator unless it has received notification of its potential liability pursuant to [20 C.F.R.] §725.407” 20 C.F.R. §725.418(d).

⁹ The Notice of Proposed Rulemaking issued in March 2012 explained that, in light of the regulatory provision at 20 C.F.R. §725.418(a)(2) (2011), after the reinstatement of the automatic entitlement provisions of Section 932(l), the Department of Labor (DOL) sought to minimize the delay in payments to eligible survivors through the implementation of an expedited procedure. Under this expedited procedure, the district director began issuing proposed decisions and orders, without first issuing a Notice of Claim. By specifically incorporating procedures through which an operator can challenge its liability, the revised regulation sought to balance the goal of prompt payment of automatic survivors’ benefits with the need to protect coal mine operators’ due process rights. *See* 77 Fed. Reg. 19,456, 19,469 (Mar. 30, 2012). These procedures are now codified at 20 C.F.R. §725.418(a)(3), and apply to claims filed after its effective date, October 25, 2013. Employer correctly notes that the procedures at 20 C.F.R.

§725.418(a)(3). Thus, contrary to employer's contention, the district director's issuance of the Proposed Decision and Order, without first having issued a formal Notice of Claim or Schedule for the Submission of Additional Evidence, was appropriate under the former regulations and is consistent with the current regulations.

Moreover, as the Director asserts, employer was not deprived of due process and suffered no prejudice by receiving its first notice of the claim as part of the district director's February 25, 2011 Proposed Decision and Order, as the Order clearly explained that claimant had filed a subsequent claim for survivor's benefits, that she had been found derivatively entitled to benefits pursuant to Section 932(l) of the Act, and that employer had been found to be liable for the payment of those benefits. Director's Exhibit 13; Director's Brief at 5. In addition, the Proposed Decision and Order afforded employer the opportunity to controvert the claim, and to request a hearing.¹⁰ Further, the district director granted employer additional time to submit evidence in support of its modification request, and employer chose to forego a hearing before the administrative law judge. Director's Exhibit 23; Decision and Order at 2. Thus, as the Proposed Decision and Order constituted actual notice of the claim, and employer was afforded a fair opportunity to defend against it, we agree with the Director's position and hold that there was no due process violation. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84, 22 BLR 2-25, 2-44-45 (6th Cir. 2000), *citing Consolidation Coal Co. v. Borda*, 171 F.3d 175, 184, 21 BLR 2-545, 2-560-61 (4th Cir. 1999) (delay in notifying an employer of its potential liability violates due process only if the employer is deprived of a fair opportunity to mount a meaningful defense against the claim).

Employer next contends that claimant is not eligible for derivative survivor's benefits under Section 932(l) because her prior claim was filed and finally denied prior to 2005. Employer argues that allowing automatic entitlement to benefits in a subsequent survivor's claim under Section 932(l) renders meaningless the time limitations set by Congress in Section 1556 of the Patient Protection and Affordable Care Act (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 20 C.F.R. §725.309. Employer's Brief at 11-13. We disagree.

§725.418(a)(3) are not applicable to this claim, as it was filed prior to October 25, 2013. Employer's Brief at 8-9.

¹⁰ The Proposed Decision and Order notified all parties that within thirty days after its issuance, "any party may file a written request for a formal hearing before the Office of Administrative Law Judges." Director's Exhibit 13 at 3.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, affirmed the award of automatic derivative survivor's benefits under Section 932(l) in a subsequent survivor's claim that complied with the time limitations set forth in Section 1556 of the PPACA. *Consolidation Coal Co. v. Maynes*, 739 F.3d 323, 25 BLR 2-509 (6th Cir. 2014); see *Union Carbide Corp. v. Richards*, 721 F.3d 307, 25 BLR 2-321 (4th Cir. 2013). The court explained that the widow could establish entitlement in her original claim only by proving that the miner's death was due to pneumoconiosis, whereas entitlement in her subsequent claim hinged upon the administrative fact of whether the miner had received benefits during his lifetime. Because the widow's subsequent claim had a different statutory basis for eligibility than her prior claim, and because her subsequent claim did not undermine either the factual or legal conclusions resulting in the denial of her earlier claim, the court held that "the doctrine of res judicata is not implicated." *Maynes*, 739 F.3d at 327, 25 BLR at 2-518. Consequently, in the present case, we reject employer's arguments to the contrary.

Lastly, we address employer's contention that application of Section 932(l) is unconstitutional, as a violation of employer's due process rights and as an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. Employer challenges the automatic entitlement provision applicable to a surviving spouse under Section 932(l), arguing that "the Act does not grant benefits to widows of miners whose deaths were not caused or hastened by pneumoconiosis, 30 U.S.C. §901(a)," and that "30 U.S.C. §932(l) merely relieves eligible survivors from being required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner." Employer's Brief at 13-14. Employer relies on arguments that have been rejected by the United States Court of Appeals for the Sixth Circuit in *Vision Processing, LLC v. Groves*, 705 F.3d 551, 25 BLR 2-231 (6th Cir. 2013). See also *McCoy Elkhorn Coal Corp. v. Dotson*, 714 F.3d 945, 945-46, 25 BLR 2-249, 2-253 (6th Cir. 2013). For the reasons set forth in *Groves* and *Dotson*, we reject employer's arguments in this case.

Because claimant filed her subsequent claim after January 1, 2005, her claim was pending after March 23, 2010, and the miner was receiving benefits under a final award at the time of his death, we affirm the administrative law judge's finding that claimant is derivatively entitled to survivor's benefits pursuant to Section 932(l).

Accordingly, the administrative law judge's Decision and Order - Denial of Request for Modification is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge