

BRB No. 10-0559 BLA

CATHERINE HENSON)
(Widow of ROBERT HENSON))
)
Claimant-Respondent)
)
v.)
)
LEECO, INCORPORATED)
) DATE ISSUED: 05/31/2011
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 Awarding Benefits of Alice M. Craft,
Administrative Law Judge, United States Department of Labor.

John L. Grigsby (Appalachian Research and Defense Fund of Kentucky,
Inc.), Barbourville, Kentucky, for claimant.

Denise M. Davidson (Davidson & Associates), Hazard, Kentucky, for
employer.

Emily Goldberg-Kraft (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 Awarding Benefits (2009-BLA-5502) of Administrative Law Judge Alice M. Craft (the administrative law judge), rendered on a survivor's claim filed on June 25, 2008, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).¹ On March 23, 2010, amendments to the Act, pertaining to claims filed after January 1, 2005, became effective. The amendments, in pertinent part, revive Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that a survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*). The administrative law judge found that Administrative Law Judge Alfred Lindeman awarded benefits in the miner's claim, in a Decision and Order issued on June 25, 1992, and that the miner received benefits until his death on May 16, 2008. Decision and Order at 2-3; Director's Exhibit 11; Living Miner's Claim 2 at 2, 103.

On May 3, 2010, the administrative law judge issued a notice requesting that the parties submit position statements as to why benefits should not be awarded in the survivor's claim pursuant to amended Section 932(*l*). In response, claimant asserted that amended Section 932(*l*) applied and that she was automatically entitled to benefits, based on the award of benefits in the miner's claim. Employer also responded and contended that claimant is not automatically entitled to survivor's benefits because the miner's claim was filed on November 24, 1987, after the effective date of the 1981 Amendments and before January 1, 2005. Employer further argued that retroactive application of Section 1556 of Public Law No. 111-148 is unconstitutional, in that it violates employer's due process rights, and that Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), requires fifteen years of qualifying coal mine employment for the invocation of the rebuttable presumption of death due to pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), did not respond.

The administrative law judge issued a Decision and Order Awarding Benefits in which she found that the miner was receiving benefits at the time of his death, that claimant is an eligible survivor of the miner, that she filed her survivor's claim after January 1, 2005, and her claim was pending as of March 23, 2010. The administrative law judge determined, therefore, that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(*l*). Accordingly, the administrative law judge awarded benefits.

¹ Claimant is the widow of the miner. Director's Exhibits 2, 10-12.

On appeal, employer challenges the administrative law judge's application of amended Section 932(l) in this case. Both claimant and the Director respond and urge the Board to affirm the award of benefits.²

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.³ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On appeal, employer alleges that claimant is not automatically entitled to survivor's benefits based on the recent amendment to Section 932(l) and maintains that because a survivor's automatic entitlement to benefits is derivative of the miner's claim and is not a new and/or separate claim, the operative date for determining eligibility for survivor's benefits is the date on which the miner's claim was filed, not the date of filing of the survivor's claim. Employer contends that, because the miner filed his claim after the effective date of the 1981 Amendments, but before the effective date of the 2010 amendments, the amended Section 932(l) does not apply to the survivor's claim. Employer further contends that the retroactive application of the automatic entitlement provisions of amended Section 932(l) constitutes a violation of its due process rights under *Eastern Enterprises v. Apfel*, 424 U.S. 498 (1988), that amended Section 411(c)(4) of the Act requires at least fifteen years of underground coal mine employment and that claimant only established that the miner worked for eleven years in the coal mines.

After consideration of the arguments on appeal and the administrative law judge's decision, we hold that the allegations of error raised by employer regarding the applicability of amended Section 932(l) are without merit. Employer's contention, that the retroactive application of amended Section 932(l) represents an unconstitutional taking, is identical to the argument that the Board rejected in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-198-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (unpub. Order). We, therefore, reject the argument here for

² We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant filed her survivor's claim after January 1, 2005, that her claim was pending on March 23, 2010, and that the miner was receiving benefits, based on the granting of his claim, at the time of his death. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Director's Exhibits 2, 10-12; Living Miner's Claim 2 at 2, 103.

³ This case arises within the jurisdiction of the of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3; Living Miner's Claim 2 at 403.

the reason set forth in that case. *Mathews*, 24 BLR at 1-198-200; *see also Stacy v. Olga Coal Co.*, 24 BLR 1- , BRB No. 10-0113 BLA, slip op. at 8 (Dec. 22, 2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011). In addition, we reject employer's arguments regarding the operative filing date for determining eligibility pursuant to amended Section 932(l). The Board has held that the operative date for determining eligibility for survivors' 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*, slip op. at 7. The Board specifically held that, under amended Section 932(l), an eligible survivor who files a claim after January 1, 2005, that is pending on or after the March 23, 2010 effective date of the Section 1556 amendments, is entitled to benefits, based solely on the miner's lifetime award, without having to prove that the miner died due to pneumoconiosis. *Id.*; *see* 30 U.S.C. §932(l). In the present case, therefore, the administrative law judge's finding that claimant is derivatively entitled to survivor's benefits pursuant to amended Section 932(l) of the Act, as she filed her survivor's claim after January 1, 2005, the claim was pending on March 23, 2010 and the miner was receiving benefits under a final award at the time of his death, is affirmed.⁴ *Mathews*, 24 BLR at 1-201; *Stacy*, slip op. at 7.

⁴ Because the administrative law judge correctly awarded benefits under amended Section 932(l), and employer does not have the opportunity to further defend the claim once derivative entitlement has been established, we need not address employer's argument with respect to amended Section 411(c)(4). *See Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge