

BRB No. 12-0160 BLA

VIOLA DESALVO)
(Widow of ANTHONY DESALVO))
)
Claimant-Respondent)
)
v.)
)
BARNES & TUCKER COMPANY)
) DATE ISSUED: 05/10/2012
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 Director's Motion For Summary Decision And Awarding Survivor's Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose, LLC), Johnstown, Pennsylvania, 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision And Order Granting Director's Motion For Summary Decision And Awarding Survivor's Benefits (2012-BLA-5073) of

Administrative Law Judge Thomas M. Burke, rendered on a claim 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)). This case involves a survivor's claim filed on August 9, 2010.¹ Director's Exhibit 6.

Congress amended the Act in 2010, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. The amendments, in pertinent part, revive Section 932(l) of the Act, 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. Pub. L. No. 111-148, §1556(b), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §932(l)). The district director awarded benefits to claimant pursuant to amended Section 932(l), and employer requested a hearing. Director's Exhibits 12, 17, 19.

While the case was pending before the Office of Administrative Law Judges, the Director, Office of Workers' Compensation Programs (the Director), moved for a summary decision, asserting that there was no genuine issue of material fact regarding claimant's entitlement to benefits under Section 932(l). Employer responded, arguing that it was premature to apply the amendments to the Act before the legal challenges to other provisions of Public Law No. 111-148 were resolved.

In his Decision and Order dated December 7, 2011, the administrative law judge found that the miner was receiving benefits at the time of his death, that claimant filed her survivor's claim after January 1, 2005, and that claimant is an eligible survivor of the miner. The administrative law judge therefore determined that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l). Accordingly, the administrative law judge awarded benefits.

On appeal, employer reiterates its contention that the application of amended Section 932(l) is premature in light of the legal challenges to Public Law No. 111-148, and requests that the case be held in abeyance pending the resolution of those challenges. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director has filed a Motion for Summary Affirmance, requesting that the Board deny employer's request and affirm the award of benefits.

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,

¹ Claimant is the widow of the miner, who died on July 22, 2000. Director's Exhibits 6, 10, 11. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim. Director's Exhibit 3.

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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The administrative law judge found that claimant met her burden to establish each fact necessary to demonstrate her entitlement under amended Section 932(l): That she filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending on or after March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death. Decision and Order at 1-2. As the Director notes, employer has not challenged any of these findings; in fact, employer concedes that claimant has established all of the elements of entitlement under amended Section 932(l). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Employer’s Brief at 6. We therefore grant the Director’s motion, and affirm the administrative law judge’s determination that claimant is derivatively entitled to benefits pursuant to amended Section 932(l) of the Act. 30 U.S.C. §932(l). Employer’s request that the case be held in abeyance is denied. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383 n.2 (4th Cir. 2011), *aff’g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order) (unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011); Employer’s Brief at 8.

² The miner’s coal mine employment was in Pennsylvania. Director’s Exhibit 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

Accordingly, the Director's Motion for Summary Affirmance is granted, and the administrative law judge's Decision And Order Granting Director's Motion For Summary Decision And Awarding Survivor's Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge