

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 19-0519 BLA

SADIE MARIE JUDE)
(Widow of CLISTON JUDE))

Claimant-Respondent)

v.)

SHELL COAL & TERMINAL COMPANY)
d/b/a WOLFE CREEK COLLIERIES,)
INCORPORATED)

and)

SAINT PAUL FIRE & MARINE)
INSURANCE COMPANY)

Employer/Carrier-)
Petitioners)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 08/27/2020

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Lauren C. Boucher,
Administrative Law Judge, United States Department of Labor.

John Earl Hunt, Allen, Kentucky, for Claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for
Employer/Carrier.

Cynthia Liao (Kate S. O’Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Lauren C. Boucher’s Decision and Order Awarding Benefits (2019-BLA-05311) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a survivor’s claim filed on October 2, 2018.¹

The administrative law judge found Claimant established entitlement under Section 422(*l*) of the Act:² she is an eligible survivor of the Miner; she filed her claim after January 1, 2005; her claim was pending on or after March 23, 2010; and the Miner was determined to be eligible to receive benefits at the time of his death.³ 30 U.S.C. §932(*l*). Accordingly, the administrative law judge awarded benefits.

On appeal, Employer challenges the constitutionality of Section 422(*l*) of the Act, 30 U.S.C. §932(*l*). Employer also asserts the award of survivor’s benefits must be vacated as premature. Claimant responds in support of the award of benefits. The Director, Office of Workers’ Compensation Programs (the Director) filed a limited response urging the

¹ Claimant is the surviving spouse of the Miner, who died on August 10, 2018. Director’s Exhibit 4.

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*).

³ The Miner filed seven claims during his lifetime. When he died, his most recent claim filed on February 13, 2012, was pending before Administrative Law Judge Larry A. Temin. Director’s Exhibits 1, 8. Claimant continued to pursue the Miner’s claim on his behalf. Judge Temin awarded benefits in the Miner’s claim on February 2, 2019. Director’s Exhibit 60. Employer appealed the award of miner’s benefits to the Board and separately appealed Administrative Law Judge Boucher’s award of survivor’s benefits.

Benefits Review Board to decline to entertain Employer’s constitutional objections and to reject its argument that the award of survivor’s benefits is premature.

The Board’s scope of review is defined by statute. We must affirm the administrative law judge’s Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.⁴ 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, 362 (1965).

Constitutionality of the Section 422(l) Automatic Entitlement Provision

Citing *Texas v. United States*, 340 F.Supp.3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer summarily “objects to the application of 30 U.S.C. §921(c)(4) and 30 U.S.C. §932(l) because section 1556 of the Affordable Care Act, Pub. Law 111-148, reviving these provisions, violates Article II of the United States Constitution.” Employer’s Brief at 2. We agree with the Director that Employer has failed to adequately brief this issue. *See* 20 C.F.R. §802.211(b); *Barnes v. Director, OWCP*, 18 BLR 1-55, 1-57 (1994).

The Board’s procedural rules impose threshold requirements for alleging specific error before it will consider the merits of an issue. In relevant part, a petition for review “shall be accompanied by a supporting brief, memorandum of law or other statement which . . . [s]pecifically states the issues to be considered by the Board.” 20 C.F.R. §802.211(b). While Employer states the application of Section 422(l) violates Article II of the Constitution, it has not cited any authority for its argument, identified the provision of Article II on which it relies, or otherwise explained how Section 422(l) violates Article II.⁵ Employer’s Brief at 2. We decline to address the issue because Employer has not complied with the regulation requiring it to provide argument and authority concerning each issue raised. *See* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the Miner’s coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

⁵ Moreover, Employer’s reference to Article II of the Constitution appears misplaced. As the Director asserts, *Texas v. United States*, 340 F. Supp. 3d 579, *decision stayed pending appeal*, 352 F. Supp. 3d 665, 690 (N.D. Tex. 2018), Employer cites, addresses the constitutionality of the Affordable Care Act under Congress’s tax and Commerce Clause powers, both of which are found in Article I. Director’s Brief at 1-2.

(6th Cir. 1986); *Barnes*, 18 BLR at 1-57 (Board will decline to address issues that are not raised with specificity).

The Survivor's Claim

Employer contends the administrative law judge's application of Section 422(l) was erroneous because the award of benefits in the Miner's claim was not yet final when Judge Boucher awarded benefits in the survivor's claim. Employer's Brief at 2-3. An award of benefits in a miner's claim need not be final for a claimant to receive survivor's benefits under Section 422(l). *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141, 1-145-46 (2014). Moreover, subsequent to the filing of briefs in this appeal, the Board affirmed Judge Temin's decision awarding benefits in the Miner's claim. *Jude v. Shell Coal & Terminal Coal Co.*, BRB No. 19-0230 BLA (Apr. 30, 2020) (unpub). Because the Board has affirmed the award of benefits in the Miner's claim, Claimant is derivatively entitled to survivor's benefits pursuant to Section 422(l). 30 U.S.C. §932(l); see *Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013). Employer's arguments to the contrary are therefore moot.⁶

⁶ The Board's affirmance of the award of benefits in the Miner's claim also renders moot the Director's suggestion to consolidate it with the survivor's claim. Director's Brief at 2.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge