

U.S. Department of Labor

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



BRB No. 21-0451 BLA

ALICE F. GAYLOR)	
(Widow of BILLY G. GAYLOR))	
)	
Claimant-Respondent)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	
)	DATE ISSUED: 8/15/2022
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 Paul C. Johnson, Jr., District Chief Administrative Law Judge, United States Department of Labor.

Catherine A. Karczmarczyk (Penn, Stuart & Eskridge), Bristol, Virginia, for Employer.

Sarah M. Hurley (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), 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 appeals District Chief Administrative Law Judge (ALJ) Paul C. Johnson, Jr.'s Decision and Order Awarding Benefits (2021-BLA-05568) 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 claim¹ filed on August 23, 2017.

The ALJ determined that because the Miner was found eligible to receive benefits at the time of his death, Claimant is automatically entitled to survivor's benefits under Section 422(l) of the Act, 30 U.S.C. §932(l) (2018).² He also rejected Employer's argument that because the Miner's award is still pending and not final, Claimant is not yet entitled to receive automatic survivor's benefits. Thus, the ALJ declined to hold the survivor's claim in abeyance and awarded Claimant benefits.

On appeal, Employer argues the ALJ erred in awarding Claimant survivor's benefits under Section 422(l) because the Miner's award is still pending and not final. Alternatively, Employer requests the Benefits Review Board reconsider its order denying its motion to hold the survivor's claim in abeyance pending a final decision in the Miner's claim.³ Claimant did not file a response brief. The Director, Office of Workers'

¹ Claimant is the widow of the Miner, who filed a subsequent miner's claim on August 6, 2015 and died on July 27, 2017 while his claim was pending. Director's Exhibits 1, 3.

² Under Section 422(l) of the Act, a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l) (2018).

³ On September 8, 2021, Employer filed a motion requesting that the Board vacate the automatic award of benefits to Claimant and remand her survivor's claim for consolidation with the miner's claim. In the alternative, it requested the Board hold the survivor's claim in abeyance pending the final outcome in the miner's claim. On September 14, 2021, the Director responded, objecting to Employer's motion. The Board denied Employer's motion on November 22, 2021, based on its holding in *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141, 1-146 (2014) that a final award in a miner's claim is not necessary for a survivor's award pursuant to Section 422(l). *Gaylor v. Consol. Coal Co.*, BRB No. 21-0451 BLA, slip op. at 1 (Nov. 22, 2021) (Order) (unpub.).

Compensation Programs (the Director) responds, urging the Board to reject Employer's arguments.

The Board's scope of review is defined by statute. We must affirm the ALJ'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'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Employer argues Claimant is not entitled to an award of benefits under Section 422(l) because the Miner's award is not yet final. Employer's Brief at 6-7. The ALJ awarded benefits in a separate decision in the Miner's claim, and Employer timely filed a motion for reconsideration, which the ALJ denied as untimely. Upon review of Employer's appeal, the Board vacated the ALJ's denial of Employer's motion for reconsideration and remanded the case to the ALJ for further consideration on the basis that Employer's motion for reconsideration was timely filed. *Gaylor v. Consolidated Coal Co.*, 20-0425 BLA, slip op. at 4 (July 19, 2021) (unpub.); Decision and Order at 1. The ALJ has not yet issued a decision on remand with respect to Employer's motion for reconsideration in the Miner's claim.

The Director responds, asserting the Board should reject Employer's argument for the reasons set forth in *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141, 1-145-47 (2014). Director's Brief at 2-3. We agree with the Director.

For a claimant to automatically receive survivor benefits, Section 422(l) requires only that the miner be "determined to be eligible to receive benefits . . . at the time of his . . . death." 30 U.S.C. §932(l). In *Rothwell*, the Board held that an award of benefits in a miner's claim need not be final or effective for a claimant to receive benefits under Section 422(l). *Rothwell*, 25 BLR at 1-145-47; see Director's Brief at 2. *Rothwell* states in relevant part:

[U]pon an award of benefits at any stage of a black lung proceeding, a miner is legally entitled to receive benefits from either the responsible operator or [the Black Lung Disability Trust Fund], regardless of an appeal, or a request for modification, of the award. Therefore, we agree with the Director that miners who are entitled to receive benefits payments under

⁴ We will apply the law of the United States Court of Appeals for the Sixth Circuit because the Miner performed his last coal mine employment in Tennessee or Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); *Gaylor v. Consolidated Coal Co.*, 20-0425 BLA, slip op. at 2 n.3 (July 19, 2021) (unpub.).

the regulations, even before their awards are final, are necessarily “determined to be eligible to receive benefits” 30 U.S.C. §932(l).

Rothwell, 25 BLR at 1-146. Therefore, eligible survivors are entitled to receive benefits under Section 422(l) “notwithstanding the pendency of a motion for reconsideration before an administrative law judge or an appeal to the Board or court” 20 C.F.R. §725.502(a)(1) (emphasis added); *Rothwell*, 25 BLR at 1-146; Director’s Brief at 3. The implementing regulation similarly conditions automatic survivor’s entitlement on a miner’s claim that “results or resulted in a final award of benefits,” which the Board interpreted as encompassing awards that are final (a claim which “resulted” in a final award) and those that are not yet final (a claim which “results” in a final award). 20 C.F.R. §725.212(a)(3)(ii); *Rothwell*, 25 BLR at 1-146; Director’s Brief at 3.

We also find unpersuasive Employer’s contention that in the event the Miner’s claim is ultimately denied, considerable time and resources will have been unnecessarily spent on the survivor’s award, resulting in prejudice to Employer. Employer’s Brief at 7-8. In *Rothwell*, the Board held that “forcing an eligible survivor to wait years for a final determination in a miner’s claim before being awarded survivor’s benefits would be contrary to the purpose of Section [422](l).” *Rothwell*, 25 BLR at 1-147; see Director’s Brief at 3. We therefore reject Employer’s contention that it is prejudicial to pay survivor’s benefits when it has no “present” obligation to pay benefits on the Miner’s claim.⁵ Employer’s Brief at 8.

⁵ Following the district director’s Proposed Decision and Order awarding benefits in the Miner’s claim, he became entitled to benefits. Employer does not allege it is currently paying benefits, and therefore fails to show how it is harmed when the Black Lung Disability Trust Fund is paying benefits on the Miner’s claim. 20 C.F.R. §§725.420(a), 725.522.

Accordingly, the ALJ'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