

U.S. Department of Labor

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



BRB No. 21-0509 BLA

JUDY ROSE)	
(Widow of DANA E. ROSE))	
)	
Claimant-Respondent)	
)	
v.)	
)	
ENTERPRISE MINING COMPANY, LLC)	
)	
and)	DATE ISSUED: 02/24/2023
)	
BRICKSTREET MUTUAL INSURANCE)	
)	
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 Awarding Benefits of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

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

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) John P. Sellers, III's Decision and Order Awarding Benefits (2018-BLA-05137) rendered on a survivor's claim¹ pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

On May 26, 2015, the Miner filed a claim for federal black lung benefits, which the district director awarded in a proposed decision and order dated May 24, 2016.² Director's Exhibits 1, 3. On February 16, 2016, the Miner reached a settlement with Enterprise Mining Company, LLC, Brickstreet Mutual Insurance, and the Kentucky Coal Workers' Pneumoconiosis Fund that resolved his separate claim for state workers' compensation benefits. Director's Exhibit 10. The parties agreed to a total settlement amount of \$100,000, which included a \$50,000 lump-sum payment by Employer, and \$675.66 to be paid bi-weekly for one hundred forty-eight weeks by the Kentucky Coal Workers' Pneumoconiosis Fund. *Id.*

On May 15, 2017, after the Miner's death, Claimant filed a claim for survivor's federal black lung benefits, which the district director awarded in a proposed decision and order dated May 24, 2017. Director's Exhibits 5, 14. The district director also sent a letter to Claimant on May 24, 2017, stating the Miner was receiving state benefits before his death, notifying her she must file for a continuation of state benefits if she wished to continue receiving them, and informing her state benefits reduce federal benefits dollar for dollar. Director's Exhibit 8.

Claimant elected to receive the full amount of her federal benefits and agreed to refund any overpayment of federal benefits that may result from a continuation of state benefits. Director's Exhibit 9. Employer submitted a letter on June 8, 2017, alleging Claimant was receiving state workers' compensation benefits under the Kentucky Workers' Compensation Act that "totally offset federal black lung benefits due," and asking the district director to issue a revised proposed decision and order including an

¹ Claimant is the widow of the Miner, who died on March 22, 2017. Director's Exhibit 7.

² After appealing the proposed decision and order to the Office of Administrative Law Judges, Employer withdrew its controversion of benefits and, on March 2, 2017, Administrative Law Judge Patrick M. Rosenow remanded the case to the district director for payment of benefits to the Miner. Decision and Order at 2.

offset for her state award. Director's Exhibit 10. The district director replied on June 22, 2017, indicating "[state benefits] are not automatically awarded [to Claimant]," and noting the Kentucky State Workers' Compensation Office stated "continuation of benefits have not been started [by Claimant]." Director's Exhibit 11. On July 1, 2017, Employer again requested the district director revisit her determination regarding offset of benefits. Director's Exhibit 12. The district director responded on August 8, 2017, stating the Kentucky Department of Labor confirmed Claimant "has not filed for a continuation of benefits under [the Miner's] [s]tate claim." Director's Exhibit 13. Further, Claimant notified the district director she "does not intend to file for continuation of benefits in the [s]tate claim," and asserted no offset should be charged. *Id.*

At Employer's request, the case was transferred to the Office of Administrative Law Judges for further review. Director's Exhibit 21. The ALJ found the record did not support a conclusion that Claimant either filed for state workers' compensation benefits or received them. Therefore, he found Claimant's federal black lung benefits were not subject to offset by the Miner's state settlement agreement. He also determined there were no factual issues for hearing, as stipulated by the parties. Because Employer did not contest that Claimant is the eligible survivor of the Miner, and the Miner was entitled to benefits at the time of his death, the ALJ found Claimant is automatically entitled to survivor's benefits under Section 422(l) of the Act, 30 U.S.C. §932(l) (2018).³

On appeal, Employer argues the ALJ erred in finding Claimant's federal black lung benefits are not subject to offset based on state benefits awarded to the Miner during his lifetime and payable after his death, and state survivor's benefits for which Claimant is eligible but which she has not received.⁴ Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the award of benefits, urging affirmance of the ALJ's determination that offset is precluded.

The Benefits Review 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

³ Section 422(l) of the Act provides that the survivor of a miner who was 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).

⁴ We affirm, as unchallenged on appeal, the ALJ's finding that Claimant is entitled to benefits under Section 422(l) of the Act. 30 U.S.C. §932(l) (2018); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3-4.

accordance with applicable law.⁵ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

The Act requires that a claimant’s federal black lung benefits be reduced (but not below zero) by the amount of state workers’ compensation benefit payments he or she “receives” for total or partial disability or death due to pneumoconiosis, during periods in which the claimant is also awarded federal benefits. 30 U.S.C. §932(g), as implemented by 20 C.F.R. §§725.533(a)(1), 725.535(b); *see Harman Mining Co. v. Director, OWCP [Stewart]*, 826 F.2d 1388, 1389-90 (4th Cir. 1987). The district director determines any offset upon proof that the state compensation payments were for disability due to pneumoconiosis and for periods concurrent with federal benefit payments. *See* 20 C.F.R. §§725.533(a)(1), 725.535(b); *Stewart*, 826 F.2d at 1390.

Employer does not challenge the ALJ’s finding that Claimant has not received any state workers’ compensation benefits; thus we affirm it. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3. Instead, Employer contends Claimant’s award is subject to an offset of benefits because some benefits awarded to the Miner during his lifetime are payable to his estate after his death and, therefore, “state benefits payable to the Miner after the date of his death should offset benefits in the Survivor’s claim.” Employer’s Brief at 3. We disagree.

As the Director argues, an offset of federal benefits is appropriate only when the claimant “receives” other federal or state workers’ compensation benefits, “not when a Claimant is merely entitled to such benefits.” Director’s Response Brief at 2 (unpaginated); *see* 30 U.S.C. §932(g); 20 C.F.R. §725.535(b). The district director stated on two separate occasions that Claimant has neither filed for a continuation of state benefits nor received them. Director’s Exhibits 11, 13. Claimant also informed the district director she does not intend to file for continuation of state benefits. Director’s Exhibit 13. Further, as the ALJ correctly stated, the Director summarized his evidence showing “it has no record of [Claimant] receiving state benefits.” ALJ’s Exhibit 1; *see* Decision and Order at 3. Additionally, the parties agreed there is no evidence Claimant filed for, or received, any state benefits. Decision and Order at 3. Employer does not challenge this on appeal; thus we affirm it. *Skrack*, 6 BLR at 1-711. Accordingly, the ALJ permissibly found an offset of federal benefits has not been triggered merely by her eligibility for a continuation of benefits payable to the Miner’s estate because “the Claimant has not received any state

⁵ The Board 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 Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Miner’s Claim (MC) Director’s Exhibit 3.

benefits to which she may be entitled.” Director’s Response Brief at 1 (unpaginated), quoting Decision and Order at 3.

Employer also argues an offset should be applied to Claimant’s benefits because, under Kentucky Revenue Statute, KRS §342.730(3),⁶ she “would be entitled to an award of benefits in her own right for the remainder of the period of benefits to be paid to the Miner.” Employer’s Brief at 3. But, as explained above, even if eligible for these benefits in her own right, Claimant has not received them and has stated she does not intend to apply for them. Thus, as Claimant has not received these benefits, an offset of her federal benefits has not been triggered.⁷

⁶ The statute provides:

[W]hen an employee, who has sustained disability compensable under this chapter, and who has filed, or could have timely filed, a valid claim in his or her lifetime, *dies from causes other than the injury* before the expiration of the compensable period specified, portions of the income benefits specified and unpaid at the individual’s death, whether or not accrued or due at his or her death, shall be paid, under an award made before or after the death, for the period specified in this section

KRS §342.730(3) (emphasis added).

⁷ Moreover, in one sentence Employer merely alleges Claimant is entitled to state benefits under KRS §342.730(3) because the Miner died during the “compensable period.” Employer’s Brief at 3. Thus, in addition to Claimant having not received state benefits under this provision, Employer has not set forth sufficient argument or analysis that would enable us to even conclude Claimant is eligible for them. *See* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986). The law states it applies when the employee’s death is “from causes *other than the injury* before the expiration of the compensable period specified” KRS §342.730(3) (emphasis added). But in this federal claim, the cause of the Miner’s death was not at issue. The Miner was awarded federal benefits based on a finding that he was *totally disabled* due to pneumoconiosis, and Claimant was found automatically entitled to survivor’s benefits under Section 422(l) of the Act, which Employer does not dispute. 30 U.S.C. §932(l) (2018); Decision and Order at 3-4; Employer’s Brief at 2. Because the cause of the Miner’s death has not been litigated in this federal claim, and Employer does not attempt to explain whether he died due to causes “other than the injury” as contemplated by the state statute, Employer has not adequately explained how KRS §342.730(3) is applicable. *See Shinseki v. Sanders*, 556

Substantial evidence supports the ALJ's determination that the record fails to show Claimant was receiving benefits from the Miner's state workers' compensation settlement agreement for any month concurrent with her federal award of survivor's benefits. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the ALJ's determination that Employer is not entitled to an offset of Claimant's federal benefits. Decision and Order at 3.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference").