

BRB No. 13-0136 BLA

EVELYN THORNE)	
(Widow of CALVIN THORNE))	
)	
Claimant-Respondent)	
)	
v.)	
)	
EASTOVER MINING COMPANY)	DATE ISSUED: 09/27/2013
)	
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 – Award of Survivor’s Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

John Crockett Carter, Harlan, Kentucky, for claimant.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer.

Jeffrey S. Goldberg (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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Survivor’s Benefits (2011-BLA-05614) of Administrative Law Judge Adele Higgins Odegard rendered on a survivor’s claim filed on March 19, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).¹ The district director issued a Proposed Decision and Order awarding benefits on January 25, 2011, under amended 30 U.S.C. §932(l).² Director’s Exhibit 27. At employer’s request, the case was forwarded to the Office of Administrative Law Judges for a hearing. On February 8, 2012, the administrative law judge issued an Order to Show Cause why claimant should not be found entitled to benefits under amended Section 932(l). Employer responded, asserting that the operative date for determining eligibility under amended Section 932(l) is the filing date of the miner’s claim and that claimant is not automatically eligible for survivor’s benefits, as the miner was not receiving federal black lung benefits at the time of his death, due to the offset of his federal benefits by a state award of benefits.

The administrative law judge held a hearing on June 28, 2012, and issued a decision on November 20, 2012, in which she found that employer is the responsible operator, rejected its arguments regarding the applicability of amended Section 932(l), and determined that claimant satisfied the criteria for automatic entitlement to survivor’s benefits. Specifically, the administrative law judge found that claimant is the survivor of the miner; that the miner had been determined to be eligible for federal black lung benefits at the time of his death;³ that the survivor’s claim was filed after January 1, 2005; and that it was pending after March 23, 2010. Additionally, the administrative law judge rejected employer’s contention that claimant is not eligible for automatic

¹ Claimant is the widow of the miner, Calvin Thorne, who died on February 18, 2010. Director’s Exhibit 14.

² Congress enacted amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, amended Section 932(l) provides that a survivor of a miner who was determined to be 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), *amended by* Pub. L. No. 111-148, §1556(b), 124 Stat. 119, 260 (2010).

³ The miner filed a claim for benefits on August 10, 1983. Director’s Exhibit 1. In a Decision and Order issued on October 31, 1986, Administrative Law Judge Richard E. Huddleston awarded benefits. Director’s Exhibits 1, 4.

entitlement because the miner's award of federal black lung benefits was offset by a state award and that the operative date for determining eligibility is the filing date of the miner's claim. Accordingly, the administrative law judge awarded survivor's benefits, commencing February 2010, the month in which the miner died.

On appeal, employer challenges the administrative law judge's application of amended Section 932(l) to this case. Claimant and the Director, Office of Workers' Compensation Programs, respond, urging the Board to affirm the administrative law judge's 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, 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 Associates, Inc.*, 380 U.S. 359 (1965).

Employer initially contends that, pursuant to Section 932(l), the miner had to be receiving federal black lung benefits from employer at the time of his death in order for claimant to be automatically entitled to survivor's benefits. In support of this argument, employer notes that the title to Section 1556(b) of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §1556(b), 124 Stat. 119, 260 (2010), which is codified at 30 U.S.C. §932(l), includes the phrase "continuation of benefits." Employer's Brief in Support of Petition for Review at 5. Employer maintains that "there was no such 'continuation' possible in this case," as the miner's federal black lung benefits were offset by the state award at the time of his death. *Id.* We reject employer's argument.

Amended Section 932(l), provides that "[i]n no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits at the time of his or her death, be required to file a new claim for benefits, or refile or otherwise revalidate the claim." 30 U.S.C. §932(l). The administrative law judge properly concluded that, "[b]ased on the fact that the miner was awarded benefits before his death, it necessarily follows that the miner was 'determined to be eligible' for such benefits under [the Act]." Decision and Order at 4, quoting 30 U.S.C. §932(l). In addition, the administrative law judge's finding, that the offset of the miner's federal black lung benefits by the state award did not affect the miner's eligibility for benefits under the Act, is consistent with the applicable regulations. Rather than a termination of benefits, an offset is defined under 20 C.F.R. §725.533(a)(1) as "a *reduction* of the amount of benefits payable on

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 was in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 7.

account of . . . [a]ny compensation or benefits received” under a state workers’ compensation award. 20 C.F.R. §725.533(a)(1) (emphasis added). Furthermore, the terms of 20 C.F.R. §725.532(a) provide that no “termination in the payment of benefits is permitted unless authorized by the district director, administrative law judge, Board, or court.” 20 C.F.R. §725.532(a). None of the entities referenced in 20 C.F.R. §725.532(a) terminated the payment of benefits on the miner’s claim in this case. We affirm, therefore, the administrative law judge’s finding that the miner was determined to be eligible to receive benefits at the time of his death, as required by amended Section 932(l).

Employer also contends that claimant cannot be found automatically entitled to survivor’s benefits pursuant to amended Section 932(l), as the operative date for determining eligibility under amended Section 932(l) is the date that the miner’s claim was filed. This argument is virtually identical to the one that the United States Court of Appeals for the Sixth Circuit rejected in *Vision Processing, LLC v. Groves*, 705 F.3d 551, BLR (6th Cir. 2013); *see also W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *aff’g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *cert. denied*, 133 S. Ct. 127 (2012); *B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011). For the reasons set forth in *Groves*, we reject employer’s argument.

Because claimant filed her survivor’s claim after January 1, 2005, her claim was pending on March 23, 2010, and the miner was determined to be eligible to receive benefits under a final award at the time of his death, we affirm the administrative law judge’s finding that claimant is entitled to receive survivor’s benefits pursuant to amended Section 932(l). 30 U.S.C. §932(l).

Accordingly, the administrative law judge's Decision and Order - Award of Survivor's Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge