

BRB No. 10-0513 BLA

ALICIA KAY McDONALD)
(Widow of HARLEY E. McDONALD))
)
Claimant-Respondent)
)
v.)
)
SOUTHERN OHIO COAL COMPANY)
) DATE ISSUED: 04/29/2011
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 Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams, Rutherford & Reynolds), Norton, Virginia, for claimant.

William P. Margelis (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Michelle S. Gerdano (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, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (08-BLA-5822) of Administrative Law Judge Donald W. Mosser rendered on a survivor's claim¹ 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)) (the Act). Claimant filed her claim for benefits on November 19, 2007. Director's Exhibit 2. The district director issued a proposed decision and order awarding survivor's benefits on March 19, 2008, and employer timely requested a hearing. Director's Exhibits 12, 16. Subsequently, the case was referred to the Office of Administrative Law Judges and a hearing was scheduled before Administrative Law Judge Joseph E. Kane, on March 25, 2009. Director's Exhibit 33.

On March 11, 2009, employer notified Judge Kane that the Department of Labor (DOL) Form CM-1025, listing the issues contested by the parties, contained errors. *See* Director's Exhibit 16. Employer explained to Judge Kane that, in addition to the issues marked as contested, employer "continue[d] to contest," *inter alia*, "Issue No. 10 labeled 'Dependency,' and Issue No. 11 labeled 'Survivor.'" Before the hearing, however, claimant requested a continuance, and the case was reassigned to Judge Mosser (the administrative law judge), who rescheduled the hearing for October 14, 2009.

Before the rescheduled hearing, in an order dated August 10, 2009, the administrative law judge noted that a review of Form CM-1025 revealed that the only contested issues were medical ones, and that, therefore, the parties should advise him whether the case was suitable for a decision on the record in lieu of a formal hearing. On August 31, 2009, employer again asserted that the list of contested issues on Form CM-1025 was incomplete, and that the issues of dependency and survivorship were still contested. Employer explained that the main reason a hearing was required was to elicit claimant's testimony regarding these contested issues. Employer requested that the hearing be held, as scheduled, unless those issues could be resolved prior to the hearing.

By order dated September 9, 2009, the administrative law judge acknowledged employer's assertions that, *inter alia*, the issues of dependency and survivorship were still contested, and that claimant's testimony was needed on these issues unless they could be resolved prior to the hearing. The administrative law judge concluded that, since no party had waived its right to a hearing, the hearing would proceed as scheduled, unless a stipulation could be reached as to the contested factual issues. At claimant's request, however, the hearing was again continued, and it was rescheduled for May 5, 2010.

¹ Claimant is the widow of the miner, who died on October 18, 2007. Director's Exhibit 4. At the time of his death, the miner was receiving benefits pursuant to the September 13, 1999 award of benefits of Administrative Law Judge Donald W. Mosser (the administrative law judge). Living Miner's Exhibit 1.

Subsequently, by order dated April 12, 2010, the administrative law judge noted that Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims filed after January 1, 2005, was applicable to this claim. The administrative law judge correctly noted that the amendments, in pertinent part, revived Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that an eligible survivor of a miner who was receiving 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*). Finding that this case met the preliminary requirements of amended Section 932(*l*), the administrative law judge canceled the hearing, and allowed the parties thirty days to address why an order awarding benefits should not be entered in this case. The administrative law judge noted that any challenges to the constitutionality of Section 1556 of Public Law No. 111-148 would not be adjudicated, but would be preserved for appeal. Claimant and employer responded.

Claimant asserted that she meets the eligibility requirements for the application of amended Section 932(*l*), that there remains no genuine issue as to any material fact, and that, therefore, she is entitled to benefits as a matter of law. Employer agreed that because the miner was receiving black lung benefits at the time of his death, and because claimant filed her claim after January 1, 2005, and her claim was pending on March 23, 2010, amended Section 932(*l*) may affect this claim. Employer contended, however, that the application of Public Law No. 111-148, without a definitive statement from DOL as to how the amendments will be implemented, would violate employer's due process right to proper notice of the standard under which the claim would be adjudicated. Employer further asserted that it was entitled to a full and fair hearing under the Administrative Procedure Act (APA), 5 U.S.C. §§554, 556, 557, as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Employer also argued that if amended Section 932(*l*) was to be retroactively applied, a hearing was necessary to allow employer to elicit testimony from claimant as to whether she was remarried and whether she was dependent on the miner at the pertinent time.²

² Further, employer asserted that this case should be held in abeyance until sixty days after the Department of Labor issues guidelines or promulgates regulations implementing 30 U.S.C. §932(*l*), as amended, and made applicable by Section 1556 of Public Law No. 111-148. Employer's Brief at 22. Employer also argued that, because the constitutionality of Public Law No. 111-148 was challenged in a lawsuit filed in the United States District Court for the Northern District of Florida, this case should be held in abeyance. Employer concluded that if the claim was not held in abeyance, it should proceed to a hearing to allow employer the opportunity to determine if claimant meets the statutory requirements for application of amended Section 932(*l*). Employer preserved

In a decision dated May 19, 2010, the administrative law judge initially noted that the miner was receiving benefits at the time of his death pursuant to a September 13, 1999 award,³ that claimant filed her survivor's claim on November 19, 2007, and that it was pending on March 23, 2010, the date of the enactment of the amendments. Decision and Order at 2. After considering the parties' arguments regarding the applicability of amended Section 932(l), the administrative law judge found that claimant met the eligibility criteria for automatic entitlement to benefits. Further, the administrative law judge denied employer's request to proceed to a hearing so that it could determine whether claimant is a survivor and a dependent of the miner, because "as of April 12, 2010, the date of my order cancelling the hearing and less than one month prior to the scheduled hearing, employer had not raised the issues of survivorship or dependency." Decision and Order at 3. Accordingly, the administrative law judge declined to hold this survivor's claim in abeyance, and awarded benefits. Decision and Order at 2-3.

On appeal, employer challenges the administrative law judge's denial of its request for a hearing. Employer further challenges the administrative law judge's application of amended Section 932(l) to this case. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, responds, agreeing with employer that the administrative law judge erred in denying employer's request for a hearing, but disagreeing with employer's arguments regarding the applicability of amended Section 932(l) to this case.

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. 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 Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

The Act and regulations mandate that an administrative law judge hold a hearing on any claim whenever a party requests such a hearing, *see* 20 C.F.R. §§725.421(a), 725.450, 725.451, unless one of the following exceptions is applicable: (1) the right to a hearing is waived, in writing, by the parties, *see* 20 C.F.R. §725.461(a); (2) a party

for appeal its assertion that retroactive application of Public Law No. 111-148 is unconstitutional.

³ The administrative law judge further noted that the award of benefits in the miner's claim was not appealed, that claimant married the miner on July 9, 2002, and that the miner's benefits were augmented to include claimant and her daughter. Decision and Order at 2.

requests summary judgment and the administrative law judge determines that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law, *see* 20 C.F.R. §725.452(c); or (3) the administrative law judge notifies the parties by written order of his or her belief that a hearing is not necessary, allowing at least thirty days for the parties to respond, and no party requests that a hearing be held. *See* 20 C.F.R. §725.452(d). The record reflects that neither of the first two exceptions was applicable, since employer did not file a written waiver of its right to the requested hearing and no party moved for summary judgment.⁴ *See Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425, 429, 21 BLR 2-495, 2-504 (6th Cir. 1998); *Cunningham v. Island Creek Coal Co.*, 144 F.3d 388, 390, 21 BLR 2-384, 2-388-89 (6th Cir. 1998); *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69, 1-72 (2000).

With respect to the third exception to the administrative law judge's duty to hold the requested hearing, Section 725.452(d) specifically provides:

If the administrative law judge believes that an oral hearing is not necessary (for any reason other than on motion for summary judgment), the judge shall notify the parties by written order and allow at least 30 days for the parties to respond. The administrative law judge shall hold the oral hearing if any party makes a timely request in response to the order.

20 C.F.R. §725.452(d). By order dated April 12, 2010, the administrative law judge canceled the hearing, and directed the parties to show cause, within thirty days, why a decision on the record should not be issued. Despite employer's timely response to the order, and its request for a hearing, the administrative law judge proceeded with a decision on the record. Thus, the administrative law judge did not comply with Section 725.452(d). Because the Act and regulations mandate that a hearing be held if one is requested, unless one of the exceptions applies, and the administrative law judge did not comply with the applicable exception pursuant to Section 725.452(d), we must vacate the administrative law judge's decision. *See* 33 U.S.C. §921(b)(3); *see Robbins*, 146 F.3d at 429, 21 BLR at 2-504.

Contrary to claimant's argument, her belief that there is "no issue that she is the surviving spouse of [the miner] and is eligible for benefits," and her agreement to notify DOL if she remarries, do not obviate the need for a hearing, as efficiency is not a justification for failure to apply the statute and regulations. *See Robbins*, 146 F.3d at 429, 21 BLR at 2-505; Claimant's Brief, unnumbered page. In addition, as employer asserts,

⁴ There is no regulatory provision that would permit an administrative law judge to initiate summary judgment proceedings *sue sponte*. *See Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425, 429, 21 BLR 2-495, 2-504 (6th Cir. 1998).

the record reveals that as early as March 11, 2009, approximately fourteen months prior to the scheduled hearing, employer notified the Office of Administrative Law Judges that the list of contested issues on Form CM-1025 contained errors, and that the issues of dependency and survivorship were still contested. Moreover, employer reiterated its intention to challenge these issues on August 31, 2009, and, as claimant concedes, its challenge was specifically acknowledged by the administrative law judge on September 9, 2009. Thus, the record does not support the administrative law judge's conclusion that employer first contested the issues of survivorship and dependency on May 12, 2010, less than one month prior to the scheduled hearing. Decision and Order at 3. For the foregoing reasons, we remand this case for the administrative law judge to conduct the hearing that employer requested, unless one of the exceptions is found to be applicable on remand.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is vacated, and this case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge