

BRB No. 10-0585 BLA

MAXINE COPLEY )  
(Widow of RALPH C. COPLEY) )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 W-P COAL COMPANY, OMAR DIVISION )  
 )  
 and )  
 )  
 WEST VIRGINIA COAL WORKERS' ) DATE ISSUED: 04/15/2011  
 PNEUMOCONIOSIS FUND )  
 )  
 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 Daniel L. Leland,  
Administrative Law Judge, United States Department of Labor.

Donald C. Wandling (Avis, Witten & Wandling, L.C.), Logan, West  
Virginia, for claimant.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West  
Virginia, for employer.

Helen H. Cox (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 (09-BLA-5818) of Administrative Law Judge Daniel L. Leland rendered on a survivor's claim<sup>1</sup> 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).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, revive Section 422(l) of the Act, 30 U.S.C. §932(l), which 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). Accordingly, on April 13, 2010, the administrative law judge set a hearing date of August 17, 2010, and referenced the applicability to this claim of the amendments to the Act, based on the fact that the miner was receiving benefits at the time of his death. Specifically, the administrative law judge required the parties to file position statements addressing why an award should not be entered in the survivor's claim. In response, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision on May 14, 2010, asserting that no material issue of fact is contested in this claim,<sup>2</sup> and that under amended Section 422(l), and given the filing date of her claim, claimant is entitled to benefits based on the award to her deceased husband. Claimant joined in the Director's motion. Employer also responded, conceding that claimant "ostensibly" meets all of the requirements for derivative entitlement. Employer's Position Statement at 2. However, employer reserved the right to challenge the constitutionality of the relevant provision,

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<sup>1</sup> Claimant is the widow of the miner, who died on October 9, 2008. Director's Exhibit 8. Claimant filed her claim for survivor's benefits on November 17, 2008. *Id.* at 2. The miner's initial claim for benefits, filed on March 12, 1973, was denied on March 11, 1981. Decision and Order at 1-2. The miner filed a second claim on August 4, 1986, and benefits were awarded on August 27, 1993. By Order dated November 10, 1993, the Board dismissed employer's appeal as untimely filed. Therefore, at the time of his death, the miner was receiving federal black lung benefits pursuant to a final award. Decision and Order at 2; Director's Exhibit 1.

<sup>2</sup> The Director, Office of Workers' Compensation Programs (the Director), states that there is no dispute regarding the issue of claimant's relationship to, and/or dependency on, the miner, or the liability of employer as responsible operator, and that the award of benefits in the miner's claim became final on December 10, 1993. Director's Motion for Summary Decision at 3-4.

and its retroactive application. Finally, employer requested that the claim be held in abeyance until the enactment of implementing regulations.

The administrative law judge noted employer's concession that "claimant meets the three requirements of §1556 of the PPACA." See Section 1556 of Pub. L. No. 111-148; Decision and Order at 2. He observed that employer failed to provide any rationale for his position that the new law is not applicable until implementing regulations are enacted, and rejected employer's arguments, allowing the constitutionality challenge to be preserved for purposes of appeal. Accordingly, the administrative law judge found that claimant meets the eligibility criteria for automatic entitlement, and awarded benefits.

Employer appeals, challenging the constitutionality of Section 1556, and asserting a denial of due process. The Director and claimant 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. 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).

On appeal, employer argues that the retroactive application of amended Section 932(l) to claims filed after January 1, 2005, is unconstitutional in that it violates employer's due process rights. The Director submits that employer's objections to the validity and application of the provisions to the Act contained in Pub. L. No. 111-148 are without merit, and that claimant is automatically entitled to survivor's benefits under amended Section 932(l), as she is the eligible survivor of the miner, who was receiving benefits at the time of his death, and as her survivor's claim was filed after January 1, 2005, and was still pending on March 23, 2010. We agree.

Contrary to employer's contention, the retroactive application of amended Section 932(l) to claims filed after January 1, 2005 does not violate the Fifth Amendment Due Process Clause, and employer's reliance on *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-20, 3 BLR 2-36, 2-43-47 (1975) to the contrary is misplaced. See *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-198-200 (2010) (pending on recon.); *Stacy v. Olga Coal Co.*, 24 BLR 1- , BRB No. 10-0113 BLA (Dec. 22, 2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011). While employer asserts that the application of retroactive measures is disfavored and that "settled expectations should not be lightly disrupted," Employer's Brief at 3, the Court in *Usery* upheld the retroactive application of the Black Lung Benefits Act (BLBA) of 1972, stressing that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Usery*, 428 U.S. at 16, 3 BLR at 2-44 (citations omitted); *accord*,

*Mathews*, 24 BLR at 1-197, 1-199. We therefore agree with the Director’s position that employer is “simply incorrect” in asserting that the *Usery* Court suggested that retroactive imposition of unrelated death benefits for the survivor of a miner who himself received benefits is constitutionally impermissible.<sup>3</sup> Director’s Response at 2 n.1.

We conclude that employer has not met its burden to establish that retroactive application of amended Section 932(l) is a violation of due process in this case.<sup>4</sup> Consequently, we affirm the administrative law judge’s award of benefits.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge

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<sup>3</sup> Additionally, in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193 (2010)(pending on recon.), the Board agreed with the Director that an examination of the legislative history discloses that the sponsor of the amendments, Senator Robert C. Byrd, explained that amended Section 932(l) would apply not only to all future miners’ and survivors’ claims, but that it would “also benefit all of the claimants who have recently filed a claim, and are awaiting or appealing a decision or order, or who are in the midst of trying to determine whether to seek a modification of a recent order.” *Mathews*, 24 BLR at 197, *citing* 156 Cong. Rec. S2083-84 (daily ed. Mar. 25, 2010) (statement of Sen. Byrd).

<sup>4</sup> We also reject employer’s request that this case be held in abeyance pending the resolution of challenges to the constitutionality of Pub. L. 111-148. *See Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010)(pending on recon.).