

BRB No. 10-0661 BLA

GENEVA SIMPSON)
(Widow of FLOYD SIMPSON))
)
Claimant-Respondent)
)
v.)
)
GABRIEL MINING COMPANY) DATE ISSUED: 08/17/2011
)
and)
)
KENTUCKY COAL PRODUCERS')
SELF-INSURANCE 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 John P. Sellers, III,
Administrative Law Judge, United States Department of Labor.

Ronald E. Gilberston (K & L Gates LLP), Washington, D.C., for employer.

Sarah M. Hurley (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
HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2009-BLA-5498) of Administrative Law Judge John P. Sellers, III, 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). This claim was filed July 18, 2008, and a hearing was scheduled for August 5, 2010. Director's Exhibit 16.

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, were enacted. The amendments, in pertinent part, revive Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that a 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).

On April 29, 2010, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision, arguing that there was no genuine issue as to any material fact regarding claimant's eligibility for survivor's benefits, as the miner was receiving benefits at the time of his death, and claimant, therefore, was automatically entitled to benefits pursuant to amended Section 932(l). Employer responded in opposition to the motion.

In his Decision and Order issued on July 26, 2010, the administrative law judge determined that the miner was receiving benefits at the time of his death, pursuant to an award of benefits issued by Administrative Law Judge Pamela Lakes Wood on March 18, 2008, which was affirmed by the Board. *See F.S. [Simpson] v. Gabriel Mining Co.*, BRB No. 08-0528 BLA (Apr. 28, 2009) (unpub.), *aff'd on recon.*, BRB No. 08-0528 BLA (Oct. 29, 2009) (unpub. Order); Decision and Order at 4. The administrative law judge also found that there is no dispute that claimant is an eligible survivor of the miner, that she filed her survivor's claim on July 18, 2008, that the claim was, therefore, filed on or after January 1, 2005, and was pending as of March 23, 2010, the date of enactment of Section 1556 of Public Law No. 111-148. Decision and Order at 4-5. Thus, the administrative law judge determined that claimant satisfied the eligibility criteria for automatic entitlement pursuant to amended Section 932(l) and he awarded benefits. *Id.* at 5.

On appeal, employer argues that the operative date for determining eligibility for survivor's benefits pursuant to amended Section 932(l) is the date on which the miner's claim was filed, not the date of filing of the survivor's claim. Additionally, employer

¹ Claimant is the widow of the miner, Floyd D. Simpson, who died on January 7, 2008. Director's Exhibit 20.

argues that, because its right to due process under the Fifth Amendment is violated by the retroactive imposition of benefits under amended Section 932(l), liability for benefits must transfer to the Black Lung Disability Trust Fund. The Director responds, urging affirmance of the award of benefits. Employer has also filed a reply brief, reiterating its arguments.

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.² 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).

After consideration of the arguments on appeal and the administrative law judge's decision, we hold that the allegations of error raised by employer regarding the applicability of amended Section 932(l) are without merit. First, employer's argument, that retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005, constitutes "a due process violation," is identical to the argument that the Board rejected in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-198-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (unpub. Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). Employer's Brief in Support of Petition for Review at 12. We, therefore, reject the argument here for the reason set forth in that case.³ *Mathews*, 24 BLR at 1-198-200; *see also Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011).

In addition, the Board recently rejected contentions identical to those raised by employer regarding the relevant filing date under amended Section 932(l). *See Stacy*, 24 BLR at 1-211-13. The Board held that the operative date for determining eligibility for survivors' benefits under amended Section 932(l) is the date that the survivor's claim was filed, not the date that the miner's claim was filed. *Id.* The Board specifically held that, under amended Section 932(l), an eligible survivor who files a claim after January 1, 2005, that is pending on or after the March 23, 2010 effective date of amended Section 932(l), is entitled to benefits based solely on the miner's lifetime award, without having

² 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 (1989) (*en banc*); Director's Exhibits 1, 2, 9.

³ Since we reject employer's argument that its due process rights are violated, we reject its argument that liability for benefits must transfer to the Black Lung Disability Trust Fund.

to prove that the miner died due to pneumoconiosis. *Id.*; *see* 30 U.S.C. §932(l). We, therefore, affirm the administrative law judge's finding that claimant is derivatively entitled to benefits pursuant to amended Section 422(l) of the Act, 30 U.S.C. §932(l).⁴ Because amended Section 932(l) does not afford employer the opportunity to defend the claim, once derivative entitlement has been established, employer's request that the case be remanded for hearing and a decision on the merits of whether the miner's death was due to pneumoconiosis is denied.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁴ We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant filed her survivor's claim after January 1, 2005, that it was pending on March 23, 2010, and that the miner was receiving benefits at the time of his death, based on his lifetime claim. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).