

BRB No. 11-0161 BLA

EMMA PENSULE )  
(Widow of FRANK PENSULE) )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 KEYSTONE SERVICE INDUSTRIES ) DATE ISSUED: 08/25/2011  
 )  
 and )  
 )  
 WEST VIRGINIA COAL WORKERS' )  
 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 Granting Summary Decision Motion and Awarding Benefits and Order Denying Reconsideration of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman, Wendy G. Adkins and Amy Jo Holley (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Summary Decision Motion and Awarding Benefits and Order Denying Reconsideration (2009-BLA-05243) of Administrative Law Judge Pamela Lakes Wood rendered on a survivor's claim 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). The survivor's claim was filed on December 21, 2007.<sup>1</sup>

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, and pending on March 23, 2010, were enacted. Those amendments, in pertinent part, revived 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).

By Order dated March 30, 2010, the administrative law judge canceled the scheduled hearing and ordered the parties to provide a position statement on whether this claim should be granted in light of the recent legislative changes.<sup>2</sup> Employer responded, arguing that because it did not have notice that derivative entitlement would be applicable, due process requires that it be given notice as to how the Department of Labor plans to implement amended Section 422(l). In the alternative, employer contends that the claim should proceed to a hearing in order to determine whether claimant meets the requirements of an eligible survivor. Claimant responded, arguing that the instant claim is governed by amended Section 422(l) and, therefore, she is entitled to benefits.

Subsequently, on May 18, 2010, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision, asserting that the

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<sup>1</sup> Claimant is the widow of the miner, who died on December 5, 2007. Director's Exhibit 9. At the time of his death, the miner was receiving federal black lung benefits pursuant to a final award on his lifetime claim. Decision and Order Granting Summary Decision Motion and Awarding Benefits at 2; *see also Pensule v. Keystone Service Industries, Inc.*, BRB No. 92-1779 BLA (Sept. 28, 1994)(unpub.).

<sup>2</sup> In addition, the administrative law judge denied employer's Motion to Compel Production of Witness, holding that the Director, Office of Workers' Compensation Programs (the Director), was under no obligation to locate or produce Dr. Cardona for employer's deposition as the physician was not under the control of the Director. However, the administrative law judge noted that since the hearing was being canceled, the parties would have additional time to attempt to locate Dr. Cardona.

threshold requirements of the amended Section 422(l) were met, as the miner was receiving benefits at the time of his death pursuant to a final award, claimant filed her claim after January 1, 2005, it was still pending on March 23, 2010 and claimant meets the relationship and dependency requirements of an eligible survivor. The Director, therefore, states that because there is no genuine issue of material fact on claimant's entitlement to benefits, the Motion for Summary Decision should be granted, awarding benefits. Neither claimant nor employer responded to the Director's Motion for Summary Decision.

In a Decision and Order Granting Summary Decision Motion and Awarding Benefits, dated September 9, 2010, the administrative law judge determined that the provisions of amended Section 422(l) were applicable, and that there were no issues of material fact in contention. Specifically, the administrative law judge noted that the miner was receiving benefits at the time of his death pursuant to an award of benefits, issued by Administrative Law Judge Robert S. Amery and affirmed by the Board in a Decision and Order issued on September 28, 1994. Decision and Order Granting Summary Decision Motion and Awarding Benefits (Decision and Order) at 2, 5; *see Pensule v. Keystone Service Industries, Inc.*, BRB No. 92-1779 BLA (Sept. 28, 1994) (unpub.). The administrative law judge also noted that claimant filed her survivor's claim after January 1, 2005, Director's Exhibit 2, and that the claim was pending on March 23, 2010. Decision and Order at 2, 5. The administrative law judge therefore found that claimant met the eligibility criteria for automatic entitlement to benefits under amended Section 422(l). Additionally, the administrative law judge denied employer's request to hold the case in abeyance until implementing regulations are issued, and rejected employer's request for a hearing on claimant's eligibility as a qualified survivor, finding that employer failed to establish that there was a material basis for disputing claimant's eligibility. Accordingly, the administrative law judge found that claimant meets the eligibility criteria for automatic entitlement, and awarded benefits. By Order dated October 15, 2010, the administrative law judge denied employer's Motion for Reconsideration, rejecting employer's argument that the filing date of the miner's claim is the controlling date for purposes of amended Section 422(l).

On appeal, employer challenges the administrative law judge's application of amended Section 422(l) to this case. The Director responds, urging affirmance of the administrative law judge's award of benefits. Claimant did not file a response to employer's appeal. In a reply brief, employer argues that this case should be held in abeyance until there is a resolution of the constitutional challenges pending in federal court.

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.<sup>3</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer challenges the constitutionality of the retroactive application of the new amendments to this claim, arguing that retroactive application of amended Section 422(l) is unconstitutional, as it violates employer’s due process rights and constitutes an unlawful taking of employer’s property, in violation of the Fifth Amendment to the United States Constitution. Employer’s Brief at 6-12. Employer further contends that the operative date for determining eligibility pursuant to amended Section 422(l) is the date that the miner’s claim was filed, not the date that the survivor’s claim was filed. *Id.* at 12-21. The Director urges affirmance of the administrative law judge’s award of benefits, as the arguments raised by employer are the same as those arguments raised 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)(Order)(unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011) and *Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011), and rejected by the Board. In a reply brief, employer argues that this case should be held in abeyance until there is a resolution of the constitutional challenges pending in federal court. In the alternative, employer further contends that the case be held in abeyance until the United States Court of Appeals for the Fourth Circuit issues a decision in *Stacy*.

We reject employer’s arguments regarding the constitutionality of the amendments, as applied to this case. We agree with the Director that the arguments employer makes are essentially the ones that the Board rejected in *Mathews*, 24 BLR at 1-198-200. We, therefore, reject them here for the reasons set forth in *Mathews*. *Id.* at 1-198-200; *see also Keene v. Consolidation Coal Co.*, 645 F.3d 844, BLR (7th Cir. 2011); *Stacy*, 24 BLR at 1-214.

We also reject employer’s contention that the operative filing date under amended Section 422(l), is the date that the miner’s claim was filed and not the date of the survivor’s claim. In *Stacy*, the Board held that the operative date for determining eligibility for survivors’ benefits under amended Section 422(l) is the date that the survivor’s claim was filed, not the date that the miner’s claim was filed. *Stacy*, 24 BLR at 1-213. Specifically, the Board held that, under amended Section 422(l), an eligible survivor who files a claim after January 1, 2005, that is pending on or after the March 23,

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<sup>3</sup> The record indicates that the miner’s last coal mine employment was in West Virginia. Director’s Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe Director, OWCP*, 12 BLR 1-200, 1-202 (1989).

2010 effective date of the amendments, is entitled to benefits, based solely on the miner's lifetime award, without having to prove that the miner died due to pneumoconiosis. *Stacy*, 24 BLR at 1-213; *see* 30 U.S.C. §932(l). Because claimant filed her survivor's claim after January 1, 2005, her claim was pending on March 23, 2010, and the miner was awarded benefits on his claim, we reject employer's contention and hold that the administrative law judge properly found that amended Section 422(l) applies to this case. *Stacy*, 24 BLR at 1-213; Decision and Order at 2, 5.

Further, we deny employer's request, that this case be held in abeyance pending resolution of the legal challenge to Public Law No. 111-148. *See Stacy*, 24 BLR at 1-214-15; *Mathews*, 24 BLR at 1-201; *Fairman v. Helen Mining Co.*, BLR , BRB No. 10-0494 BLA (Apr. 29, 2011), *appeal docketed*, No. 11-2445 (3d Cir. May 31, 2011). Employer's request, that this case be held in abeyance pending a decision by the Fourth Circuit in *Stacy*, is also denied.

Because claimant filed her survivor's claim after January 1, 2005, her claim was pending on March 23, 2010, and the miner was receiving benefits under a final award at the time of his death, we affirm the administrative law judge's finding that claimant is derivatively entitled to survivor's benefits pursuant to amended Section 422(l) of the Act, 30 U.S.C. §932(l).

Accordingly, the administrative law judge's Decision and Order Granting Summary Decision Motion and Awarding Benefits and Order Denying Reconsideration are 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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BETTY JEAN HALL  
Administrative Appeals Judge