

BRB No. 13-0067 BLA

MARY S. GRAY)
(Widow of EARL D. GRAY))
)
Claimant-Respondent)
)
v.)
)
MOUNTAINEER MINING)
MANAGEMENT, INCORPORATED)
)
and)
)
WEST VIRGINIA COAL WORKERS') DATE ISSUED: 08/29/2013
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 Director's Motion for Summary Decision of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Francesca Tan (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Barry H. Joyner (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 Director's Motion for Summary Decision (2012-BLA-5983) of Administrative Law Judge Theresa C. Timlin (the administrative law judge), rendered on a subsequent survivor's claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(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. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148 (2010). 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).

On October 1, 2012, the administrative law judge issued an Order to Show Cause why claimant should not be awarded benefits pursuant to amended Section 932(l) in this claim. In response, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision, arguing that, under amended Section 932(l), and given the filing date of her claim, claimant was entitled to benefits based on the prior award to her deceased husband.² Employer filed its Response to Order to Show Cause and Director's Motion for Summary Decision, acknowledging that the case of *Richards v. Union Carbide Corp.*, 25 BLR 1-31 (2012) (en banc) (McGranery, J.,

¹ Claimant, Mary S. Gray, is the widow of the miner, Earl D. Gray, who died on July 3, 2008. Director's Exhibit 7. Claimant filed her first claim for survivor's benefits on July 17, 2008. Director's Exhibit 2. On January 26, 2009, the district director denied benefits because claimant failed to establish that the miner's death was due to pneumoconiosis. Director's Exhibit 2. The record does not demonstrate that claimant further pursued this claim. On March 28, 2012, claimant filed a subsequent claim for benefits, which is pending herein on appeal. Director's Exhibit 4.

² At the time of his death, the miner was receiving federal black lung benefits pursuant to a Decision and Order issued by Administrative Law Judge Samuel J. Smith on September 9, 1996. On appeal, and again on reconsideration, the Board affirmed the award of benefits. *Gray v. Mountaineer Mining Mgmt.*, BRB No. 96-1739 BLA (Jun. 25, 1997) (unpub.), *aff'd on recon.* (Nov. 21, 1997) (unpub. Order); Director's Exhibit 1.

concurring and dissenting) (Boggs, J., dissenting), was relevant and potentially dispositive to the outcome of this case, and was pending on appeal to the United States Court of Appeals of the Fourth Circuit. Employer, therefore, requested that the present case be held in abeyance in order to conserve judicial resources.

The administrative law judge found that, pursuant to amended Section 932(l), derivative benefits are available to an eligible survivor of a miner who was eligible to receive lifetime benefits at the time of his death, if the claim was filed after January 1, 2005 and was pending on or after March 23, 2010. Finding that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l), the administrative law judge granted the Director's Motion for Summary Decision, denied employer's motion to hold the case in abeyance, and awarded survivor's benefits, commencing as of July 2008.

On appeal, employer contends that the doctrine of res judicata bars an award of benefits under the automatic entitlement provisions of amended Section 932(l) in this subsequent survivor's claim, where claimant's previously filed claim was denied. Claimant and the Director 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.³ 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).

Subsequent to the filing of employer's brief on appeal, the United States Court of Appeals for the Fourth Circuit affirmed the award of automatic derivative survivor's benefits in *Richards*, holding that amended Section 932(l) applies to all claims that comply with the time limitations set forth in Section 1556 of the PPACA, including subsequent survivor's claims. The court explained that the doctrine of res judicata does not bar a subsequent survivor's claim, since Section 1556 created a new cause of action not available to a survivor at the time of filing of the initial claim, and entitlement under amended Section 932(l) does not require relitigation of a prior finding that the miner's death was not due to pneumoconiosis. *Union Carbide Corp. v. Richards*, 721 F.3d 307, BLR (4th Cir. 2013); see *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th

³ As the miner's last coal mine employment occurred in West Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1.

Cir. 2011), *cert. denied*, 133 S.Ct. 127 (2012). Consequently, we reject employer's arguments to the contrary.

Because claimant filed her subsequent survivor's claim after January 1, 2005, her claim was pending after 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 entitled to receive survivor's benefits pursuant to amended Section 422(l) of the Act, 30 U.S.C. §932(l).

Accordingly, the Decision and Order Granting Director's Motion for Summary Decision of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge