



BRB No. 16-0656 BLA

MARGARET ANNE CLAY)	
(Widow of WAYNE A. CLAY))	
)	
Claimant-Respondent)	
)	
v.)	
)	
ARMCO INCORPORATED/AK STEEL)	DATE ISSUED: 08/30/2017
CORPORATION)	
)	
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 Survivor's Benefits of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Kathleen H. Kim (Nicholas C. Geale, Acting Solicitor of Labor; Maia Fisher, 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: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Survivor's Benefits (2015-BLA-05572) of Administrative Law Judge Lystra A. Harris, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim¹ filed on January 6, 2015.

On February 4, 2015, the district director issued a Proposed Decision and Order, finding that claimant was derivatively entitled to benefits pursuant to Section 422(l) of the Act,² 30 U.S.C. §932(l) (2012). Director's Exhibit 3. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 5. By Order to Show Cause dated July 12, 2016, the administrative law judge directed the parties to show "why benefits under the automatic entitlement provision [at Section 932(l)] should not be awarded to [c]laimant." Order to Show Cause at 2. Claimant responded, agreeing that an award of benefits under Section 932(l) was appropriate. Neither employer, nor the Director, Office of Workers' Compensation Programs (the Director), responded to the Order to Show Cause.

In her Decision and Order, the administrative law judge determined that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under Section 932(l): that she filed her claim after January 1, 2005; that her claim was pending on or after March 23, 2010; that she is an eligible survivor of the miner; and that the miner was determined to be eligible to receive benefits at the time of his death. Accordingly, the administrative law judge awarded survivor's benefits.

On appeal, employer contends that the administrative law judge erred in determining that claimant is derivatively entitled to survivor's benefits pursuant to Section 932(l) because the miner's award of benefits is not final and effective. Employer disagrees with the Board's decision in *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141

¹ Claimant is the widow of the miner, who died on October 1, 2014. Director's Exhibit 2. The miner filed five claims for benefits. The first four claims were denied by the district director. The fifth claim was filed on December 21, 2011. In a Proposed Decision and Order dated July 13, 2012, the district director awarded benefits. At employer's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. On April 25, 2016, Administrative Law Judge Theresa C. Timlin issued a Decision and Order awarding benefits.

² Section 422(l) of the Act provides that a survivor of a miner who was determined to be 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) (2012).

(2014), and requests the Board to reconsider its decision therein. Claimant responds in support of the award of benefits. The Director asserts that the Board decided *Rothwell* correctly. The Director also acknowledges that the miner's claim and the survivor's claim were appealed to the Board separately, and that the outcome of the miner's claim will affect the outcome of the survivor's claim.³

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.⁴ 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).

Employer asserts that its right to due process has been violated because the provision at Section 932(l) "[a]llow[s] an award to become final under automatic entitlement in a survivor's claim before the award of benefits in the miner's claim from which it derives becomes final." Employer's Brief at 9. We perceive no due process violation in this case because employer is not prevented from pursuing litigation of the underlying miner's claim, and it did not assert before the administrative law judge that there are any issues in controversy.⁵ See *Vision Processing, LLC v. Groves*, 705 F.3d 551, 25 BLR 2-231 (6th Cir. 2013); see also *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998) (due process requires that an employer be afforded notice of the claim and the opportunity to mount a meaningful defense). Thus, we reject employer's assertion that its right to due process has been violated.

³ We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant is an eligible survivor of the miner. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁴ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner's last coal mine employment was in West Virginia. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); *Clay v. Armco, Inc./AK Steel Corp.*, BRB No. 16-0490 BLA, slip op. at 3 n.6 (June 21, 2017)(unpub.).

⁵ While employer noted in its request for a hearing that it wished to contest its liability, Director's Exhibit 5, the administrative law judge correctly noted that claimant was the only party to respond to her Order to Show Cause dated July 12, 2016. Decision and Order at 2. By letter dated July 15, 2016, employer merely advised the administrative law judge that it had complied with the mandatory disclosure requirements set forth at 20 C.F.R. §725.413.

Employer also argues that claimant did not satisfy the eligibility criteria for automatic entitlement at Section 932(l) because the miner's award of benefits is not yet final and effective. Employer's Brief at 4-8. Contrary to employer's argument, Section 932(l) requires only that a miner be "determined to be eligible to receive benefits . . . at the time of his . . . death." 30 U.S.C. §932(l). As the Director asserts, and as employer recognizes, the Board has rejected that argument, and held that an award of benefits in a miner's claim need not be final or effective for a claimant to receive benefits under Section 932(l). *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141, 1-145-47 (2014). The Board's decision in *Rothwell* made it clear that, for the purposes of determining eligibility for derivative benefits under Section 932(l), the award in the miner's claim need not be final or effective:

In short, upon an award of benefits at any stage of a black lung proceeding, a miner is legally entitled to receive benefits from either the responsible operator or [the Black Lung Disability Trust Fund], regardless of an appeal, or a request for modification, of the award. Therefore, we agree with the Director that miners who are entitled to receive benefits payments under the regulations, even before their awards are final, are necessarily "determined to be eligible to receive benefits" 30 U.S.C. §932(l).

Rothwell, 25 BLR at 1-146. In *Rothwell*, the Board recognized that even where a responsible operator timely requests a hearing following a district director's proposed order awarding benefits in a miner's claim, the miner is still entitled to receive benefits paid by the employer or, in the event of the employer's default, by the Black Lung Disability Trust Fund. *Rothwell*, 25 BLR at 1-146 n.6, citing 20 C.F.R. §§725.420(a), 725.522(a).

In this case, the administrative law judge found that "[the miner] was determined to be eligible for benefits on a claim filed during his lifetime." Decision and Order at 3. As discussed, *supra*, the district director awarded benefits in the miner's claim on July 13, 2012, and Administrative Law Judge Theresa C. Timlin awarded benefits on April 25, 2016. The administrative law judge found that Judge Timlin's award of benefits was "final and effective." *Id.* at 2-3.

Judge Timlin's award of benefits was still pending on appeal before the Board when the administrative law judge issued her Decision and Order in the survivor's claim. Nevertheless, Section 932(l) provides automatic benefits to eligible survivors of miners whose determinations of eligibility for benefits are not yet final, and are subject to potential appeal and reversal. See *Rothwell*, 25 BLR at 1-146-47. Consequently, the administrative law judge's error in finding that Judge Timlin's award of benefits was "final and effective" is harmless. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Because employer raises no other meritorious contentions of error, we decline employer's request to reconsider the Board's holding in *Rothwell*,⁶ and therefore reject employer's argument that the administrative law judge erred in determining that claimant was entitled to automatic survivor's benefits pursuant to Section 932(l) at the time she issued her Decision and Order.

The Board recently vacated Judge Timlin's award of benefits in the miner's claim, and remanded that case for further consideration. *Clay v. Armco, Inc./AK Steel Corp.*, 16-0490 BLA (June 21, 2017) (unpub.). The Director maintains that if the award of benefits in the miner's claim is vacated, the Board should vacate the award of benefits in the survivor's claim and remand the case for further proceedings. We agree with the Director. In light of the Board's decision to vacate and remand Judge Timlin's award of benefits in the miner's claim, we vacate the administrative law judge's award of derivative benefits in the survivor's claim and remand the case for further consideration.⁷ If, on remand, benefits are awarded in the miner's claim, the award of survivor's benefits must be reinstated. See *Rothwell*, 25 BLR at 1-145-47. Conversely, if benefits are denied in the miner's claim, the administrative law judge must determine whether

⁶ Employer contends that the Director, Office of Workers' Compensation Programs (the Director), should not be entitled to deference with regard to whether an operator is required to pay benefits because the Director has offered conflicting positions in *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141 (2014), and *Nowlin v. Eastern Assoc. Coal Corp.*, 331 F. Supp. 2d 465 (N.D.W.VA. 2004)(No.CIV.A.1:02-CV-51). Employer's Brief at 6 n.1. Specifically, employer asserts that the Director has previously acknowledged that "once an operator timely contests the District Director's award, it is not effective, and the operator is not obligated to pay benefits." *Id.* at 6. The Director argues that the *Nowlin* case is not relevant to this case because it "involves additional compensation issues when an employer defaults on benefit payments and not a survivor's award under revived Section 932(l)." Director's Response Letter at 3 n.3. The Director further asserts that even if the *Nowlin* case is relevant, "an agency is not obligated to maintain its statutory interpretations in any event." *Id.* Having declined employer's request to reconsider the Board's decision in *Rothwell*, we need not further address employer's assertion that the Director was not entitled to deference in determining the liability for the payment of survivor's benefits by operators pursuant to Section 932(l).

⁷ We note that an administrative law judge is given broad discretion in resolving procedural matters. See *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc). Consequently, the administrative law judge's consideration of the survivor's claim on remand is not limited. The administrative law judge, for example, may consolidate the miner's and survivor's claims, or hold the survivor's claim in abeyance until the miner's claim is adjudicated.

claimant has established entitlement to survivor's benefits by establishing that the miner had pneumoconiosis arising out of coal mine employment, and that his death was due to pneumoconiosis. 20 C.F.R. §§718.202, 718.203, 718.205.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur.

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I concur in the majority's decision to affirm the administrative law judge's uncontested finding that claimant is an eligible survivor of the miner. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). In addition, because the Board's decision in *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141 (2014), constitutes binding precedent, I concur in the majority's decision to reject employer's argument that the administrative law judge erred in determining that claimant was entitled to automatic survivor's benefits pursuant to Section 932(l) at the time she issued her Decision and Order. Further, in light of the Board's prior decision to vacate and remand the award of benefits in the miner's claim, *Clay v. Armco, Inc./AK Steel Corp.*, 16-0490 BLA (June 21, 2017) (unpub.), I concur in vacating the administrative law judge's award of derivative benefits in the survivor's claim and remanding this case for further consideration.

JUDITH S. BOGGS
Administrative Appeals Judge