

BRB No. 12-0166 BLA

MARY ANN KORDELLA )  
(Widow of FRANK KORDELLA) )  
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 Claimant-Respondent )  
 )  
 v. )  
 )  
 UNITED STATES STEEL CORPORATION ) DATE ISSUED: 12/21/2012  
 )  
 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 Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick Long), Ebensburg, Pennsylvania, for claimant.

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, for employer.

Richard A. Seid (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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-5025) of Administrative Law Judge Michael P. Lesniak, rendered on a survivor's claim filed on June 30, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30

U.S.C. §§901-944 (Supp. 2011).<sup>1</sup> 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 November 4, 2011, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision, arguing that there was no genuine issue of a material fact as to whether claimant is entitled to benefits under amended Section 932(*l*). Employer responded to the motion on November 18, 2011. In his Decision and Order Awarding Benefits, issued on December 14, 2011, the administrative law judge granted the Director's motion, finding that claimant satisfied the criteria for derivative entitlement pursuant to amended Section 932(*l*). Accordingly, the administrative law judge awarded benefits, commencing on June 1, 2011, the first day of the month in which the miner died.

On appeal, employer challenges the constitutionality of amended Section 932(*l*) and its application to this survivor's claim. Employer also contends that the administrative law judge erred in granting summary judgment and requests that the case be remanded for an evidentiary hearing to determine whether claimant is an eligible survivor of the miner. Claimant and the Director respond, urging the Board to reject employer's arguments and affirm the award of survivor's 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.<sup>2</sup> 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).

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<sup>1</sup> Claimant is the widow of the miner, who died on June 19, 2011. Director's Exhibits 2, 4. The miner filed his lifetime claim for black lung benefits on May 20, 1985. Director's Exhibit 1. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim. *Id.*

<sup>2</sup> The record indicates that the miner was employed in the coal mining industry in Pennsylvania. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

As an initial matter, we reject employer’s contention 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 and an unlawful taking of private property under the Fifth Amendment to the United States Constitution. *See B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, BLR (3d Cir. 2011); *Stacy v. Olga Coal Corp.*, 24 BLR 1-207 (2010), *aff’d sub nom. W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-69 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010). We also reject employer’s assertion that the operative date for determining eligibility under amended Section 932(l) is the date the miner’s claim was filed, not the date that the survivor’s claim was filed. *See Stacy*, 24 BLR at 1-211. Furthermore, there is no merit to employer’s contention that Section 1556 of the PPACA violates the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). *Fairman v. Helen Mining Co.* 24 BLR 1-225, 1-229-30 (2011). Finally, we deny employer’s request to hold this case in abeyance until final regulations are implemented addressing amended Section 932(l).<sup>3</sup> *See Mathews*, 24 BLR at 1-201; *Fairman*, 24 BLR at 1-229.

Employer argues that the administrative law judge erred in finding that there was no dispute that claimant is an eligible survivor of the miner. Employer contends that, insofar as it timely controverted whether claimant was an eligible survivor, the administrative law judge was required to conduct a hearing. Employer states that while the record shows that claimant was a dependent of the miner when he was awarded benefits, “nothing in Director’s Exhibit 1 (the exhibit cited by the administrative law judge to support his ruling) established that she was an eligible survivor of the miner at the time of his death.” Employer’s Brief in Support of Petition for Review (unpaginated) at [2].

In response, the Director asserts that the “mere controversion of the survivor issue is not enough to defeat a summary decision motion,” in the absence of a specific showing that a genuine issue of fact exists that requires a hearing. Director’s Brief at 3, *citing* 29 C.F.R. §18.40(c). The Director contends that the record supports a conclusion that there is no genuine issue of a material fact as to whether claimant is an eligible survivor of the miner:

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<sup>3</sup> We reject employer’s argument that further proceedings or actions related to this claim should be held in abeyance pending resolution of the constitutional challenges to the Patient Protection and Affordable Care Act, Public Law No. 111-148. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012).

[A copy of] the marriage certificate is contained in [Director's Exhibit] 1 and Administrative Law Judge Michael Lesniak determined that [claimant] was the miner's dependent spouse when he adjudicated the miner's claim. On her survivor's claim form, [claimant] avers that she is [the miner's] surviving spouse ([Director's Exhibit] 2). By signing the form, she confirmed the accuracy of the information, including her relationship to the miner, and acknowledged she could be subject to penalties for providing false information. Finally, the miner's death certificate indicates that he was married at the time of death ([Director's Exhibit] 4). Thus, [claimant] meets the relationship and dependency requirements set forth in 20 C.F.R. §§725.214 and 725.215(g).

*Id.* Thus, the Director urges the Board to reject employer's request to remand the case for a hearing. *Id.*

Under 20 C.F.R. §725.452(c), “[a] full evidentiary hearing need not be conducted if a party moves for summary judgment and the administrative law judge determines that there is no genuine issue as to any material fact and that the moving party is entitled to the relief requested as a matter of law.” 20 C.F.R. §725.452(c); *see also* 29 C.F.R. §18.40(a); *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69, 1-72 (2000). In reviewing an administrative law judge's order granting summary judgment, the Board views the record in the light most favorable to the non-moving party. *See Dunn v. Lockheed Martin Corp.*, 33 BRBS 204, 207 (1999).

In his motion for summary judgment, the Director asserted, *inter alia*, that claimant was entitled to benefits under amended Section 932(l), because she filed her claim after March 23, 2010, the miner was receiving benefits at the time of his death and claimant satisfied the “relationship and dependency requirements,” under the regulations and “thus is an eligible survivor.” Director's Motion for Summary Judgment at 3. Although employer responded in opposition to the summary judgment motion, employer did not argue that there was a genuine issue of material fact with regard to claimant's status as a survivor.<sup>4</sup> *See* Responsible Operator Response to Director's Motion for Partial Summary Decision and Proposed Order at 1-2.

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<sup>4</sup> Employer asserted five specific arguments in opposition to the motion for summary judgment. Employer argued that: 1) the filing date of the miner's claim, not the survivor's claim, determined the applicability of amended Section 932(l); 2) the amendments were unconstitutional; 3) the amendments were contrary to the Administrative Procedure Act; 3) the claim should be held in abeyance pending resolution of legal challenges to the Patient Protection and Affordable Care Act; and 4) the claim should be held in abeyance until the Director, Office of Workers'

We reject employer's assertion that by simply controverting the survivor issue, it was entitled to a hearing. The regulation at 20 C.F.R. §18.40 states, in relevant part, that a party opposing a motion for summary decision may not rest upon the mere allegations or denials of a pleading. The response must set forth specific facts showing that there is a genuine issue of fact for the hearing. *See* 29 C.F.R. §18.40. Because employer did not present any specific facts to the administrative law judge to show that there was a genuine issue of material fact for hearing on the survivor issue, we see no error in the administrative law judge's summary judgment finding, based on the current record, that claimant is an eligible survivor of the miner. *Id.*; Director's Exhibits 1, 2, 4; *see Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986). Thus, we deny employer's request to remand this case for a hearing as to whether claimant is an eligible survivor of the miner.

Because the administrative law judge found that claimant is an eligible survivor of the miner, she filed her survivor's claim after January 1, 2005, which 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 determination that claimant is entitled to receive survivor's benefits pursuant to amended Section 932(l).

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Compensation Programs, implemented regulations. *See* Responsible Operator Response to Director's Motion for Partial Summary Decision and Proposed Order at 1-2.

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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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge