

BRB No. 10-0351 BLA

FLORA VERNA ROBINSON)
(Widow of DONALD EUGENE)
ROBINSON))
)
Claimant-Petitioner)
)
v.)
)
ROBERT COAL COMPANY) DATE ISSUED: 02/18/2011
)
and)
)
OLD REPUBLIC INSURANCE COMPANY)
)
Employer/Carrier-)
Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Remand of Janice K. Bullard,
Administrative Law Judge, United States Department of Labor.

Roger D. Foreman (The Law Office of Roger D. Foreman, L.C.),
Charleston, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for
employer/carrier.

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:

Claimant¹ appeals the Decision and Order on Remand (2007-BLA-5447) of Administrative Law Judge Janice K. Bullard denying benefits 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).² This case is before the Board for the second time. In the original Decision and Order, the administrative law judge credited the miner with 35 years of qualifying coal mine employment, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b). The administrative law judge also found that the evidence established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

In response to employer's appeal, the Board affirmed the administrative law judge's length of coal mine employment finding and her findings that the evidence

¹ Claimant is the widow of the miner. The miner filed claims on June 23, 1973 and March 31, 1983. On September 27, 1988, Administrative Law Judge Victor J. Chao issued a Decision and Order denying benefits because the miner failed to establish total disability due to pneumoconiosis. The Board affirmed Judge Chao's denial of benefits. *Robinson v. Pickland and Mather*, BRB No. 88-3422 BLA (Dec. 29, 1989)(unpub.). The United States Court of Appeals for the Fourth Circuit, however, reversed the Board's decision and remanded the miner's claim to Judge Chao to consider the evidence regarding disability causation under the legal standards articulated in its decision. *Robinson v. Picklands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). On January 16, 1991, Judge Chao issued a Decision and Order on Remand denying benefits because the miner failed to establish total disability due to pneumoconiosis. The Board affirmed Judge Chao's denial of benefits. *Robinson v. Pickland and Mather*, BRB No. 91-0990 BLA (Aug. 25, 1992)(unpub.). The Fourth Circuit court, however, reversed the Board's decision and remanded the case with directions to award benefits to the miner. *Robinson v. Pickland and Mather*, No. 92-2106 (4th Cir. June 21, 1993). The miner died on January 20, 2006. Director's Exhibit 6. He was in payment status pursuant to a final award of benefits at the time of his death. Claimant filed her survivor's claim on April 24, 2006. Director's Exhibit 2.

² This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the miner's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 3, 7, 8.

established the existence of clinical pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4) and 718.203(b). *F.R. [Robinson] v. Robert Coal Co.*, BRB No. 08-0580 BLA, slip op. at 3 n.3 (May 27, 2009)(unpub.). However, the Board vacated the administrative law judge's finding that the evidence established that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), and remanded the case for reconsideration of all the evidence in accordance with the Administrative Procedure Act (APA). *Id.* at 11. The Board instructed the administrative law judge, on remand, to determine whether the evidence established the existence of legal pneumoconiosis. *Id.* The Board also instructed the administrative law judge to determine whether the miner's death was due to clinical pneumoconiosis, legal pneumoconiosis, or both. *Id.*

On remand, the administrative law judge found that the medical opinion evidence did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge also found that the evidence did not establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Accordingly, the administrative law judge denied benefits.

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

On April 8, 2010, claimant filed a motion to remand the case for an award of benefits pursuant to the amendments to the Act found at Section 1556 of the recently enacted Patient Protection and Affordable Care Act (PPACA).³ On April 23, 2010, employer filed a motion to remand the case to the district director for consideration under the PPACA, so that the parties can raise any defenses available to them and the district

³ By Order, the Board directed claimant to submit a Petition for Review and brief in support of the appeal. *Robinson v. Robert Coal Co.*, BRB No. 10-0351 BLA (Oct. 20, 2010)(unpub. Order). The Board advised claimant that it would construe his motion to remand as his pleading in support of the appeal, if he did not submit the pleading. *Id.* In a letter dated November 9, 2010, claimant informs the Board that, in compliance with its Order, he stands upon his motion to remand as his brief in support of the appeal. Claimant also informs the Board that he joins in the argument of the Director, Office of Workers' Compensation Programs (the Director), that the case should be remanded for an award of benefits pursuant to amended Section 932(*l*).

director can issue whatever order is necessary.⁴ By letter dated June 14, 2010, the Director, Office of Workers' Compensation Programs (the Director), filed a respond brief to the motions to remand by claimant and employer, arguing that the Board should vacate the administrative law judge's denial of benefits and enter an order awarding benefits based on amended Section 422(l).⁵ 30 U.S.C. §932(l). The Director asserts that remanding the case to the district director for further consideration of any defenses raised by the parties is not necessary, as any legal arguments can be raised before the Board and all the factual prerequisites to liability appear to be settled.

In its Reply to Director's Response to Order dated July 7, 2010, employer argues that liability should rest with the Black Lung Disability Trust Fund (Trust Fund) because its right to due process under the Fifth Amendment is violated by the retroactive imposition of benefits under amended Section 932(l). Specifically, employer asserts that retroactive imposition of benefits under amended Section 932(l) unreasonably upsets settled investment-backed expectations of it and its carrier, given that the consequences of its prior acceptance of liability in the miner's claim could not have been known or anticipated at that time. Employer also argues that amended Section 932(l) does not apply to this case because the miner's claim was filed before January 1, 2005.

By letter dated November 1, 2010, the Director responded to employer's July 10, 2010 reply brief, arguing that the Board should reject employer's due process assertion, based on its holding in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193 (2010)(motion for recon. pending). The Director also argues that the Board should reject employer's assertion that amended Section 932(l) is not applicable to this case because the miner's claim was filed before January 1, 2005, as employer provides no support for its position, and as the plain language of Section 1556 of the PPACA, as well as the structure of the Act, clearly indicate that the effective date of amended Section 932(l) may be based on the filing date of a survivor's claim.

In its Reply to Director, dated November 23, 2010, employer argues that the Director's reliance on *Mathews* is misplaced because it did not have notice at the time that it accepted liability in the miner's claim that such acceptance included liability for survivor's benefits. Employer therefore asserts that liability should rest with the Trust

⁴ Employer notes that amended Section 932(l) may affect this case because the miner was receiving benefits at the time of his death.

⁵ The Director notes that the new amendments are applicable in this survivor's claim, as there is no dispute regarding employer's identification as the responsible operator liable for any benefits awarded to claimant, the survivor's relationship and dependency to the miner, and the miner's eligibility for benefits at the time of his death.

Fund, if claimant is entitled to benefits under amended Section 932(l).

By letter dated December 10, 2010, the Director responded to employer's November 23, 2010 reply brief, asserting that employer's argument is simply a variation of the argument that application of amended Section 932(l) violates due process because it interferes with an employer's investment-backed expectations by imposing a new and unforeseen liability. The Director maintains that the Board rejected the same argument in *Mathews*. The Director therefore urges the Board to award benefits to claimant under amended Section 932(l) that are payable by employer.

We reject employer's arguments regarding the constitutionality of the amendments, as applied to this case. The arguments made by employer are identical to the ones that the Board rejected in *Mathews*. We, therefore, reject them here for the reasons set forth in that case. *See Mathews*, 24 BLR at 1-198-200; *see also Stacy v. Olga Coal Co.*, BLR , BRB No. 10-0113 BLA, slip op. at 8 (Dec. 22, 2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011).

Furthermore, we reject employer's argument that the date of the filing of the miner's claim is the operative date for determining whether Section 1556 of the PPACA applies to the survivor's claim. In *Stacy*, the Board held that the operative date for determining eligibility for survivor's 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. 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 the amendments to the Act by Section 1556 of the PPACA is entitled to benefits, based solely on the miner's lifetime award, without having to prove that the miner died due to pneumoconiosis. *Stacy*, BLR , BRB No. 10-0113 BLA, slip op. at 7; *see* 30 U.S.C. §932(l). Thus, 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 hold that Section 932(l) applies to this case. *Mathews*, 24 BLR at 1-200; *Stacy*, BLR , BRB No. 10-0113 BLA, slip op. at 7. Consequently, claimant is derivatively entitled to benefits pursuant to amended Section 932(l) of the Act. 30 U.S.C. §932(l).

Accordingly, because claimant is derivatively entitled to benefits in this case, we remand it to the district director for the entry of an award of benefits.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge