

BRB No. 11-0399 BLA

DELLA F. STINNETT )  
(Widow of CARL STINNETT) )  
 )  
Claimant-Respondent )  
 )  
v. )  
 )  
LEIVASY MINING CORPORATION )  
 ) DATE ISSUED: 02/17/2012  
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 of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Tiffany B. Davis (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Ann Marie Scarpino (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (09-BLA-5919) of Administrative Law Judge Alan L. Bergstrom awarding benefits on a 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). This case involves a survivor's claim filed on May 9, 2008.<sup>1</sup>

On March 23, 2010, prior to a hearing on the claim, amendments to the Act, affecting claims filed after January 1, 2005, were enacted. The amendments, in pertinent part, revive Section 932(l) of the Act, 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).

On April 8, 2010, Administrative Law Judge William S. Colwell ordered the parties to show cause, in light of amended Section 932(l), why an order awarding survivor's benefits should not be entered. Employer responded by filing a Motion to Hold Claim in Abeyance or Proceed with a Hearing, in which employer requested that the case be held in abeyance pending the issuance of regulations implementing the regulations and pending the resolution of legal challenges to Public Law No. 111-148. Employer also objected to the retroactive application of the amendments and contended that further factual development was required, including on the issue of whether claimant had remarried. *See* 20 C.F.R. §725.212(a)(1). The Director, Office of Workers' Compensation Programs (the Director), responded, arguing that the survivor's claim satisfied the requirements for automatic entitlement. In an Order dated May 6, 2010, Judge Colwell ruled that a hearing should be held, since employer maintained that factual issues were in dispute. *See* 20 C.F.R. §725.452(d).

On June 15, 2010, the Director filed a Motion for Summary Decision, arguing that there was no genuine issue of material fact concerning whether claimant was automatically entitled to benefits pursuant to amended Section 932(l). By Order dated June 18, 2010, Judge Colwell denied the Director's motion "at this time," and ordered that a hearing be held, albeit one limited to the issue of claimant's eligibility as a surviving spouse.<sup>2</sup> Accordingly, a hearing was scheduled for March 7, 2011.

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<sup>1</sup> Claimant is the widow of the miner, who died on April 17, 2008. Director's Exhibit 8. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim. *See* Unmarked Exhibit.

<sup>2</sup> Review of Administrative Law Judge William S. Colwell's June 18, 2010 Order does not disclose a specific finding by him as to whether there was a genuine issue of material fact regarding claimant's status as an eligible survivor.

In a Decision and Order dated February 9, 2011, Administrative Law Judge Alan L. Bergstrom (the administrative law judge) found that the miner was receiving benefits at the time of his death, that claimant filed her survivor's claim on May 9, 2008, that her claim was pending on March 23, 2010, and that claimant is an eligible survivor of the miner. The administrative law judge, therefore, found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l). Accordingly, the administrative law judge granted the Director's Motion for Summary Decision, canceled the scheduled hearing, and awarded benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 932(l) to this case. Employer also argues that the administrative law judge erred in granting the Director's Motion for a Summary Decision, asserting that there is a genuine issue of material fact that required the holding of a hearing. Claimant has not filed a response brief. The Director responds in support of the administrative law judge's award of benefits.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (*en banc*).

Employer argues that this case should be held in abeyance pending the resolution of legal challenges to Public Law No. 111-148, and pending a decision from the United States Court of Appeals for the Fourth Circuit on the issue of whether the date that the miner's claim was filed, or the date that the survivor's claim was filed, is the operative date for determining eligibility under amended Section 932(l). Finally, employer contends that the administrative law judge erred in not holding a hearing to determine claimant's eligibility as a surviving spouse.

Because the Fourth Circuit recently held that the operative date for determining a surviving spouse's eligibility under amended Section 932(l) is the date that the survivor's claim was filed, we deny as moot employer's request to hold this case in abeyance pending the court's decision. *W. Va. CWP Fund v. Stacy*, No. 11-1020, 2011 WL 6396510, at \*8-9 (4th Cir. Dec. 21, 2011). Additionally, we reject employer's request that this case be held in abeyance pending resolution of the legal challenges to Public Law No. 111-148. See *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (unpub. Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011).

Employer next argues that the administrative law judge erred in failing to hold a hearing to determine claimant's eligibility as a surviving spouse. Specifically, employer contends that the administrative law judge failed to consider whether a hearing was needed to determine if claimant has remarried since she filed her claim for benefits on May 9, 2008. Employer's Brief at 12-15. We disagree.

The Act and its accompanying regulations require an administrative law judge to hold a hearing on a claim when a party requests such a hearing, unless the hearing is waived by the parties or a party requests summary judgment and the administrative law judge determines that there is no genuine issue of material fact pursuant to 20 C.F.R. §725.452. *Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-230 (2011); *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69, 1-72 (2000). In this case, the Director filed a Motion for Summary Decision, asserting that there was no genuine issue of material fact concerning claimant's entitlement to benefits under amended Section 932(l). In support of his motion, the Director attached a June 3, 2010 written Declaration from claimant, stating "under penalty of perjury," that she has not remarried since the miner's death. *See* 28 U.S.C. §1746.

The administrative law judge accurately found that the evidence of record shows that claimant was married to the miner and resided with him at the time of his death. Decision and Order at 6; Director's Exhibit 8. The administrative law judge also found that the evidence indicates that claimant has not been married to anyone other than the miner. Director's Exhibit 2. Further, the administrative law judge accurately noted that employer submitted no evidence showing that there was a genuine issue of material fact as to whether claimant had remarried.<sup>3</sup> 20 C.F.R. §725.452(c); Decision and Order at 6-7. Because the administrative law judge rationally concluded that there was no genuine issue of material fact regarding claimant's entitlement to benefits under amended Section

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<sup>3</sup> As the Director, Office of Workers' Compensation Programs, notes, under the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges:

When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.

29 C.F.R. §18.40(c); *see Buck v. Gen. Dynamics Corp.*, 37 BRBS 53 (2003). Here, employer submitted no specific facts suggesting that claimant had remarried, nor did it ask the administrative law judge for additional time to seek discovery of any such information.

932(l), the administrative law judge did not abuse his discretion in determining that no hearing was required. *See Fairman*, 24 BLR at 1-230; *Pukas*, 22 BLR at 1-72; *Clark*, 12 BLR at 1-153.

In this case, claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under amended Section 932(l): That she filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending on March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death. Therefore, we affirm the administrative law judge's determination that claimant is derivatively entitled to benefits pursuant to amended Section 932(l) of the Act.

Accordingly, the administrative law judge's Decision and Order granting benefits is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge