

BRB No. 11-0321 BLA

ANNA VICTORIA RATLIFF)
(Widow of KENNARD O. RATLIFF))
)
 Claimant-Respondent)
)
 v.)
)
 DIGUM COAL COMPANY) DATE ISSUED: 01/30/2012
)
 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 Order Denying Employer's Motion to Dismiss Responsible Operator and Granting Director's Motion for Summary Decision Awarding Benefits of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

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

Helen H. Cox (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Order Denying Employer's Motion to Dismiss Responsible Operator and Granting Director's Motion for Summary Decision Awarding Benefits (2009-BLA-05409) of Administrative Law Judge Robert B. Rae (the administrative law judge), rendered on a survivor's claim filed on May 30, 2008, 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).¹ On March 23, 2010, amendments to the Act affecting claims filed after January 1, 2005, were enacted. The amendments to the Act changed the entitlement criteria for certain claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this survivor's claim, amended Section 422(l) of the Act, 30 U.S.C. §932(l), 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.²

¹ Claimant is the surviving spouse of the miner, Kennard O. Ratliff, who died on May 6, 2008. Director's Exhibit 10. At the time of his death, the miner was receiving federal black lung benefits pursuant to a Decision and Order-Award of Benefits issued by Administrative Law Judge Richard T. Stansell-Gamm, on August 24, 1998. Director's Exhibit 27. The Board dismissed employer's appeal of that award as abandoned. *Ratliff v. Digum Coal Co.*, BRB No. 97-1628 BLA (Mar. 24, 1999)(unpub. Order); Director's Exhibit 28.

² As it existed prior to March 23, 2010, Section 422(l) provided that:

In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner, except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981, [*sic*].

30 U.S.C. §932(l). On March 23, 2010, Public Law Number 111-148 amended Section 422(l) as follows: "(b) Continuation of Benefits – Section 422(l) of the Black Lung Benefits Act (30 U.S.C. §932(l)) is amended by striking 'except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981'." Pub. L. No. 111-148, §1556(b), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §932(l)). Section 1556 of Public Law No. 111-148 provides further that "[t]he amendments made by this section shall apply with respect to claims filed

Subsequent to the enactment of the amendments, Associate Chief Administrative Law Judge William S. Colwell issued an Order dated April 8, 2010, in which he instructed the parties to file position statements addressing why an award of benefits should not be issued with respect to the survivor's claim. Claimant responded and asserted that the amendments were applicable to her claim, thereby automatically entitling her to benefits. Employer responded, raising constitutional arguments and requesting that this case be held in abeyance until the Department of Labor (DOL) promulgates regulations implementing the amendments and the constitutional challenges to Public Law Number 111-148 are finally resolved. Employer further argued that it should be dismissed as the responsible operator because it did not employ the miner for a cumulative period of one year pursuant to 20 C.F.R. §§725.101(a)(32), 725.494(c).

On April 26, 2010, Judge Colwell issued an Order preserving the constitutional issues raised by employer for appeal and a formal hearing was scheduled. Employer subsequently filed a Motion to Dismiss Named Responsible Operator, reiterating that the record did not establish that the miner worked for employer for a cumulative period of one year. The Director, Office of Workers' Compensation Programs (the Director), filed a response to employer's motion to dismiss and a Motion for Summary Decision, asserting that employer is the correctly designated responsible operator and that claimant is automatically entitled to benefits pursuant to amended Section 932(l). In response, employer objected to Director's Motion for Summary Decision and reiterated its arguments. On September 21, 2010, the administrative law judge held a formal hearing.

In the administrative law judge's subsequent Order Denying Employer's Motion to Dismiss Responsible Operator and Granting Director's Motion for Summary Decision Awarding Benefits, he found that the operative date for determining eligibility for survivors' benefits pursuant to amended Section 932(l) is claimant's filing date, that claimant was the dependent of the miner at the time of his death, that employer is the responsible operator, and that claimant satisfied the eligibility criteria for automatic entitlement to benefits, pursuant to amended Section 932(l). Order Denying Employer's Motion to Dismiss Responsible Operator and Granting Director's Motion for Summary Decision Awarding Benefits at 6, 10. Accordingly, the administrative law judge awarded benefits, commencing May 6, 2008, the date of the miner's death. *Id.* at 11.

On appeal, employer asserts that it should be dismissed as the responsible operator because the miner did not work for a cumulative period of one year for employer. Employer contends that retroactive application of the amendments is unconstitutional and

under part B or part C of the Black Lung Benefits Act (30 U.S.C. 921 et seq., 931 et seq.) after January 1, 2005, that are pending on or after the date of enactment of this Act." Pub. L. No. 111-148, §1556(c).

that amended Section 932(l) is not applicable to this case, based on the filing date of the miner's claim. Claimant did not file a response brief. The Director responds, urging the Board to reject employer's arguments and affirm the award of benefits.

The Board's scope of review is defined by statute. The administrative law judge's 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'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Responsible Operator

Employer challenges its designation as the responsible operator, arguing that it did not employ the miner for a cumulative period of one year pursuant to 20 C.F.R. §725.101(a)(32). In resolving this issue, the administrative law judge considered several forms of evidence from the miner's earlier claim including: An employment history form (CM-911a) prepared by the miner in 1996; the United Mine Workers' (UMW) Health and Retirement Funds Hours of Verification for Pension Eligibility; a DOL, Office of Workers' Compensation Programs questionnaire, completed by the miner in 1996; payroll and West Virginia Workers' Compensation records; and the Social Security Administration Table of Earnings for claimant. Order Denying Employer's Motion to Dismiss Responsible Operator and Granting Director's Motion for Summary Decision Awarding Benefits at 4-5. The administrative law judge found the totality of the evidence supported a finding that the miner worked for employer from July 1985 through August 1986. *Id.* at 6.

Employer argues that, of the eight exhibits the administrative law judge reviewed, only the UMW records and the miner's answers to the DOL questionnaire suggested that the miner worked for employer from July 1985 through August 1986.⁴ Employer asserts that the administrative law judge failed to explain why these two exhibits are more reliable than the other employment records, specifically the earning statements or pay stubs that reported earnings from employer in 1986 only. Employer argues that, because there is inconsistent evidence from the miner that he worked for employer from July 1985

³ The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 27. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

⁴ Employer concedes that, while the 125-working day requirement is met, the 365-day requirement is not met pursuant to 20 C.F.R. §725.101(a)(32). Employer further argues that in 1986, the miner also worked for McBank Coal Company for 31.51 days, making it unlikely that he worked for employer for a year in 1986.

through August 1986, his statements should not be credited. The Director disagrees, arguing that the administrative law judge properly determined that the DOL questionnaire and UMW records is sufficient to prove one year of employment.

Employer's arguments have merit. The Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law.⁵ See *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10, 21 BLR 2-587, 2-603 n.10 (4th Cir. 1999); *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 803, 21 BLR 2-302, 2-311 (4th Cir. 1998); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, in finding that employer was properly designated as the responsible operator, the administrative law judge specifically stated:

Upon thorough review of all the evidence of record concerning the length of time [the] miner "worked" for Digum Coal Company, I find that the totality of the evidence supports a finding that the miner worked for Digum Coal Company from at least July 1985 through August 1986. The documents considered were all "regular on their face" and the preponderance of the evidence shows that the criteria for imposing liability on this particular responsible operator are satisfied.

Order Denying Employer's Motion to Dismiss Responsible Operator and Granting Director's Motion for Summary Decision Awarding Benefits at 6. Accordingly, the administrative law judge found that the Director sustained his burden of establishing that employer was a potentially liable operator in accordance with 20 C.F.R. §725.495(b). The administrative law judge did not, however, explain how he weighed the conflicting evidence, and did not explain how the evidence supported his finding that the miner worked for employer for a full calendar year pursuant 20 C.F.R. §§725.494(c), 725.101(a)(32). Consequently, we hold that the administrative law judge's findings do not comport with the requirements of the APA. *Wojtowicz*, 12 BLR at 1-165. We, therefore, vacate the administrative law judge's determination that employer is the properly designated responsible operator and remand the case for further consideration of the conflicting evidence. On remand, the administrative law judge must address

⁵ The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

employer's specific arguments and must set forth the rationale underlying his findings, as required by the APA. *Wojtowicz*, 12 BLR at 1-165.

II. Amended 30 U.S.C. §932(l)

Employer asserts that retroactive application of amended Section 932(l) is unconstitutional because it denies employer due process and constitutes an unlawful taking of private property. Employer also contends that the operative date for determining eligibility pursuant to amended Section 932(l) is the date that the miner's claim was filed, not the date that the survivor's claim was filed. Employer further argues that this case should be held in abeyance pending the resolution of legal challenges to Public Law Number 111-148.

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 a taking of private property, for the same reasons the Board rejected substantially similar arguments in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (unpub. Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). *See also B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, BLR (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Further, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has affirmed the Board's holding 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. *Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *aff'd sub. nom. W. Va. CWP Fund v. Stacy*, F. 3d , BLR , No. 11-1020, 2011 WL 6396510 (4th Cir. Dec. 21, 2011), *pet. for reh'g filed* Jan. 20, 2012. For the reasons set forth in our decision in *Stacy*, we reject employer's arguments to the contrary and, consistent with our reasoning in *Mathews*, we also reject employer's request to hold this case in abeyance pending resolution of the legal challenges to Public Law Number 111-148.

We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant filed her survivor's claim after January 1, 2005, that her claim was pending on March 23, 2010, and that, at the time of his death, the miner was receiving benefits, based on an award issued on August 24, 1998. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Order Denying Employer's Motion to Dismiss Responsible Operator and Granting Director's Motion for Summary Decision Awarding Benefits at 2. Because employer does not otherwise challenge the administrative law judge's determination that claimant is entitled to receive benefits pursuant to amended Section 932(l), we affirm the administrative law judge's finding that claimant has met the prerequisites for the application of automatic entitlement.

Accordingly, the administrative law judge's Order Denying Employer's Motion to Dismiss Responsible Operator and Granting Director's Motion for Summary Decision Awarding Benefits is affirmed in part, vacated in part and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge