

BRB No. 11-0381 BLA

VIRGINIA A. SMITH )  
(Widow of WALKER C. SMITH) )  
 )  
 Claimant-Respondent )  
 )  
 v. ) DATE ISSUED: 01/26/2012  
 )  
 UNITED POCAHONTAS COAL )  
 COMPANY/AMERICAN MINING )  
 CLAIMS SERVICE )  
 )  
 and )  
 )  
 WEST VIRGINIA CWP 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.

Jeffrey S. Goldberg (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 (10-BLA-5072) of Administrative Law Judge Alan L. Bergstrom (the administrative law judge) 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 February 13, 2009.<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 422(l) of the Act, 30 U.S.C. §932(l), 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 why, in light of amended Section 932(l), an order awarding benefits should not be entered in the survivor's claim. The Director, Office of Workers' Compensation Programs (the Director), asserted that, pursuant to amended Section 932(l), claimant was automatically entitled to benefits. 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 amendments 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). 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). Accordingly, a hearing was scheduled for March 23, 2011.

On January 24, 2011, 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). Employer did not file a response.

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<sup>1</sup> Claimant is the widow of the miner, who died on January 28, 2009. Director's Exhibit 6. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim. Decision and Order at 9; Director's Exhibit 14.

In his Decision and Order dated February 9, 2011, 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 February 13, 2009, that her claim was pending on March 23, 2010, and that claimant is an eligible surviving spouse 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 hearing that was scheduled for March 23, 2011, and awarded benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 932(l) to this case. Employer argues further that the administrative law judge erred in granting the Director's Motion for Summary Decision, asserting that there is a genuine issue of material fact that required the holding of a hearing. The Director responds, urging the Board to affirm the administrative law judge's award of 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'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. *See 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.

As the United States Court of Appeals for 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, employer's request to hold this case in abeyance pending the court's decision is denied as moot. *W. Va. CWP Fund v. Stacy*, No. 11-1020, 2011 WL 6396510, at \*8-9 (4th Cir. Dec. 21, 2011), *petition for reh'g filed* Jan. 20, 2012. Additionally, employer asks that this case be held in abeyance pending the

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<sup>2</sup> The record reflects that the miner's last coal mine employment was in West Virginia. Unmarked Exhibit (Miner's Claim). Therefore, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

United States Supreme Court's resolution of the legal challenges to Public Law No. 111-148. Employer's Brief at 11. Employer's request is denied. *See Stacy*, No. 11-1020, 2011 WL 6396510 at \*3 n.2; *see also Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-215 (2010); *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 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 answers to employer's interrogatories in October 2009. Employer's Brief at 13-15. 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(I). In his motion, the Director cited, *inter alia*, claimant's answers to employer's interrogatories, indicating that she had not remarried since her husband's death.<sup>3</sup> Director's Exhibit 20. Although the administrative law judge provided employer with the opportunity to respond to the Motion for Summary Decision, employer filed no response. *See* 20 C.F.R. §725.452(c).

The administrative law judge accurately found that the evidence of record showed that claimant was married to the miner and resided with him at the time of his death. Decision and Order at 8; Director's Exhibit 6. The administrative law judge also found that the evidence indicated that claimant has not been married to anyone other than the miner. Director's Exhibit 3. Further, the administrative law judge accurately noted that employer submitted no evidence showing that there was a genuine issue of material fact

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<sup>3</sup> On appeal, employer concedes that claimant's responses to interrogatories verify that she had not remarried as of approximately October 15, 2009, the date those responses were received by the Department of Labor. Employer's Brief at 15. Employer argues that a hearing was required to determine whether claimant remarried between the time she completed those responses and February 9, 2011, the date of the administrative law judge's Decision and Order.

as to whether claimant had remarried.<sup>4</sup> 20 C.F.R. §725.452(c); Decision and Order at 9. The administrative law judge rationally concluded that there was no genuine issue of material fact regarding claimant's entitlement to benefits under amended Section 932(l); therefore, 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 sum, claimant established each fact necessary to demonstrate her entitlement to benefits under amended Section 932(l): That she filed her claim after January 1, 2005; that her claim was pending on March 23, 2010; that she is an eligible surviving spouse; and that the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim at the time of his death. Therefore, we affirm the administrative law judge's determination that claimant is automatically entitled to survivor's benefits pursuant to amended Section 932(l) of the Act.

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<sup>4</sup> As the Director 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, as employer chose not to respond to the Director's motion, it submitted no specific facts suggesting that claimant had remarried since October of 2009, nor did it ask the administrative law judge for additional time to seek discovery of any such information.

Accordingly, the administrative law judge's Decision and Order awarding 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