

BRB No. 10-0548 BLA

IRENE A. O'BROCHTA)	
(Widow of JOSEPH W. O'BROCHTA, SR.))	
)	
Claimant-Respondent)	
)	
v.)	
)	
U.S. STEEL CORPORATION)	DATE ISSUED: 06/28/2011
)	
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

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

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

Emily Goldberg-Kraft (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2010-BLA-5168) of Administrative Law Judge Thomas M. Burke (the administrative law judge) rendered on a survivor's claim filed on March 27, 2009, 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 October 8, 2009, the district director issued a proposed decision and order denying benefits. By letter dated October 9, 2009, claimant rejected the district director's determination and requested a hearing before the Office of Administrative Law Judges (OALJ). The claim was referred to the OALJ on December 8, 2009, and a hearing was scheduled to take place on September 14, 2010.

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, became effective. 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 May 14, 2010, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision asserting that, pursuant to amended Section 932(l), claimant was automatically entitled to benefits as a matter of law, and that there was no genuine issue as to any material fact concerning her entitlement. On May 20, 2010, the administrative law judge advised the parties of the Director's request, and issued a notice directing the parties to file responses. Employer objected and requested that the case be held in abeyance, pending resolution of legal challenges to Public Law No. 111-148 or until the Department of Labor (DOL) promulgates implementing regulations. Employer further argued that, because the miner's lifetime award of benefits is not contained within the Director's Exhibits in the survivor's claim, it cannot be considered in the survivor's claim. Employer also maintained that the retroactive application of Section 1556 of Public Law No. 111-148 is unconstitutional and conflicts with other provisions of the Act. Claimant did not file a response.

The administrative law judge found that "a review of the record from the miner's lifetime claim readily establishes that an award of benefits was issued on July 28, 1987" and, therefore, took judicial notice of the July 28, 1987 Decision and Order –Award of Benefits issued by Administrative Law Judge Michael H. Schoenfeld. Decision and Order Awarding Benefits at 2 n.1. The administrative law judge also determined that

¹ Claimant is the widow of the miner, Joseph W. O'Brochta, Sr., who died on March 10, 2009. Director's Exhibits 2, 7-8, 18.

Judge Schoenfeld's decision awarding benefits to the miner became final, as it was not appealed, and that claimant filed her survivor's claim on March 27, 2009. The administrative law judge found that claimant is eligible to receive survivor's benefits pursuant to amended Section 932(l) and rejected employer's request to hold this case in abeyance. Accordingly, the administrative law judge awarded survivor's benefits commencing on March 1, 2009.

On appeal, employer challenges the administrative law judge's application of amended Section 932(l) to this case. Both the Director and claimant respond, urging affirmance of the administrative law judge's award of benefits.²

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.³ 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).

We reject employer's arguments regarding the constitutionality of the amendments, as applied to this case. The allegations employer makes regarding the violation of its right to due process and the unlawful taking of its property are identical to the ones that the Board rejected in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-198-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (unpub. Order). We, therefore, reject them here for the reasons set forth in that case. *Mathews*, 24 BLR at 1-198-200; *see also Stacy v. Olga Coal Co.*, 24 BLR 1- , BRB No. 10-0113 BLA, slip op. at 8 (Dec. 22, 2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011).

We also reject employer's assertion that amended Section 932(l) is rendered unenforceable by language in Sections 411(a) and 412(a)(2) of the Act, 30 U.S.C. §§921(a), 922(a)(2). Those two sections provide, in relevant part, that benefits are to be paid at the applicable rate to a survivor when a miner was totally disabled due to pneumoconiosis at the time of his death, "except with respect to a claim filed under part C of this subchapter on or after the effective date of the Black Lung Benefits Amendments of 1981. . . ." 30 U.S.C. §§921(a), 922(a)(2). As the Board recently held in *Fairman v. Helen Mining Co.*, 24 BLR 1- , BRB No. 10-0494 BLA (Apr. 29, 2011),

² We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant filed her survivor's claim after January 1, 2005, and that her claim was pending on March 23, 2010. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order Awarding Benefits at 2.

³ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

Section 932(l), as amended, is not rendered inapplicable by the language in Sections 921(a) and 922(a)(2). In Section 1556, Congress specifically amended Section 932(l) by striking its former language stating that the provision could not apply to claims filed on or after the effective date of the Black Lung Benefits Amendments of 1981, and mandated that the amendment “*shall apply* with respect to claims,” such as this one, “filed under . . . Part C . . . after January 1, 2005, that are pending on or after the date of enactment of this Act.” Pub. L. No. 111-148, §1556(c), 124 Stat. 119 (2010)(emphasis added). Thus, such survivors’ claims filed after January 1, 2005, in which the survivor has derivative entitlement, are not subject to the language that employer highlights in 30 U.S.C. §§921(a), 922(a)(2), to the extent that it is inconsistent with Section 932(l). *Fairman*, BRB No. 10-0494 BLA, slip op. at 4.

We further reject employer’s contention that it was denied due process because the administrative law judge issued a summary decision without holding a hearing on the merits or conducting a full review of the evidence. Contrary to employer’s argument, the administrative law judge was not required to provide employer with a hearing after the amendments to the Act were enacted on March 23, 2010. The Act and regulations mandate that an administrative law judge hold a hearing on any claim whenever a party requests such a hearing, unless such hearing is waived by the parties or a party requests summary judgment pursuant to 20 C.F.R. §725.452.⁴ *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69, 1-72 (2000); *Fairman*, slip op. at 4-5. In this case, the Director moved for summary judgment, arguing that there was no genuine issue of material fact concerning claimant’s entitlement to benefits under amended Section 932(l) and the administrative law judge allowed employer to respond to the motion for summary judgment prior to decision. *See* 20 C.F.R. §725.452(c). The administrative law judge rationally determined that, in light of the applicability of amended Section 932(l), there was no genuine issue of material fact concerning claimant’s entitlement to benefits and, thus, no hearing was required. *See Pukas*, 22 BLR at 1-72; *Fairman*, slip op. at 5.

We also reject employer’s argument that, in the absence of unambiguous statutory language, the application of amended Section 932(l) to alter claimant’s burden of proof

⁴ Pursuant to 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. All parties shall be entitled to respond to the motion for summary judgment prior to decision thereon.

20 C.F.R. §725.452(c).

violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d), 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). Amended Section 932(l) did not alter a survivor's burden of proof; it altered the facts that a certain class of survivors must prove to qualify for benefits. Here, 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.

Employer also contends that the administrative law judge erred in considering Judge Schoenfeld's Decision and Order – Award of Benefits in the miner's claim, as it is “not included in the Director's Exhibits or included in the [r]ecord.” Employer's Brief at [17] (unpaginated). Employer raised this issue before the administrative law judge, who rejected employer's objection, stating “[a] review of the record from the miner's lifetime claim readily establishes that an award of benefits was issued on July 28, 1987. Judicial notice is taken of this decision.” Decision and Order at 2 n.1 (citation omitted).

Pursuant to 29 C.F.R. §18.45, an administrative law judge is granted discretion to take judicial notice “of any material fact, not appearing in evidence in the record, which is among the traditional matters of judicial notice: Provided, however, that the parties shall be given adequate notice, at the hearing or by reference in the administrative law judge's decision, of the matters so noticed, and shall be given adequate opportunity to show the contrary.” 29 C.F.R. §18.45; *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Jordan v. James G. Davis Construction Corp.*, 9 BRBS 528.9 (1978). We hold that, under the circumstances of the present case, the administrative law judge's decision to take judicial notice of the award of benefits in the miner's claim represented a permissible exercise of his discretion.

Employer does not assert, nor is there any indication, that the award of benefits to the miner is not “among the traditional matters of judicial notice.”⁵ 29 C.F.R. §18.45. In addition, employer has not established that the administrative law judge's action deprived it of its ability to defend against the survivor's claim. Contrary to employer's assertion, the record contains some information concerning the award of benefits in the miner's claim. As employer noted in its brief on appeal, the district director referenced the award in his Proposed Decision and Order denying benefits in the survivor's claim, finding that the existence of pneumoconiosis was established, as this fact had been fully and fairly adjudicated in the award of benefits in the miner's claim. Employer's Brief at [1]

⁵ Facts traditionally subject to judicial notice include those that are generally known or are capable of determination by using sources whose accuracy cannot reasonably be questioned. *See Fed. R. Evid.* 201(b).

(unpaginated); Director’s Exhibit 21. In addition, employer does not explicitly dispute that the miner’s claim was successful, stating in its brief that “the award became final July 28, 1987” Employer’s Brief at [2] (unpaginated). Employer also does not assert that it was deprived of the opportunity to contradict the noticed fact. We affirm, therefore, the administrative law judge’s decision to take judicial notice of the award of benefits in the miner’s claim. *See Maddaleni*, 14 BLR at 1-139; *Jordan*, 9 BRBS at 530.

Finally, as we noted in *Mathews*, the mandatory language of amended Section 932(l) supports the conclusion that the provision is self-executing. Therefore, there is no need to hold this case in abeyance pending the promulgation of new regulations. *Mathews*, 24 BLR at 1-201. Employer’s request, that this case be held in abeyance pending resolution of the legal challenges to Public Law No. 111-148, is also denied. *See Mathews*, 24 BLR at 1-201. Therefore, we affirm the administrative law judge’s determination that claimant is derivatively entitled to benefits pursuant to amended Section 422(l) of the Act, 30 U.S.C. §932(l).

Accordingly, the administrative law judge’s Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge