

BRB No. 10-0549 BLA

BETTY L. ROSE)
(Widow of HARLESS S. ROSE, JR.))
)
Claimant-Respondent)
)
v.)
)
HOKIE MINING COMPANY)
)
and)
)
AMERICAN MINING INSURANCE) DATE ISSUED: 06/28/2011
COMPANY)
)
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 Granting Summary Decision and Awarding Survivor's Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

Michelle S. Gerdano (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:

Employer/carrier (employer) appeals the Decision and Order Granting Summary Decision and Awarding Survivor's Benefits (09-BLA-5109) of Administrative Law Judge Paul C. Johnson, Jr. (the administrative law judge), rendered on a survivor's claim¹ 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).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that 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 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 April 2, 2010, the administrative law judge issued an Order for Additional Briefing, requesting a position statement from each party addressing why an order awarding benefits should not be entered in this claim. In response, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision, arguing that, under amended Section 932(l), and given the filing date of her claim, claimant was entitled to benefits based on the award of benefits to her deceased husband.² Employer responded, requesting that the case be held in abeyance until various legal challenges were resolved and implementing regulations were promulgated.

The administrative law judge declined to hold the case in abeyance, and found that claimant, as an eligible survivor of the miner, met the eligibility requirements for application of amended Section 932(l). Accordingly, the administrative law judge found claimant entitled to survivor's benefits, commencing as of September 1, 2007.

On appeal, employer argues that retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005 is unconstitutional as a violation of employer's due process rights and a taking of private property. Alternatively, employer requests that further proceedings or actions related to

¹ Claimant, Betty L. Rose, is the widow of the miner, who died on September 18, 2007. Director's Exhibit 8. Claimant filed her application for survivor's benefits on January 28, 2008. Director's Exhibit 2.

² At the time of his death, the miner was receiving federal black lung benefits pursuant to an award issued by the district director on April 23, 2002.

this claim be held in abeyance, pending the promulgation of implementing regulations and resolution of the constitutional challenges to Public Law No. 111-148 in federal court. Claimant, who is without the assistance of counsel, has not filed a response brief in this appeal. 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. 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 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 identical 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) (Order) (unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011); *accord Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011); *see also Keene v. Consolidation Coal Co.*, F.3d , 2011 WL 1886106 (7th Cir. 2011). We also reject employer's request that this case be held in abeyance pending either promulgation of implementing regulations or resolution of the legal challenges to Public Law No. 111-148. *See Stacy*, 24 BLR at 1-214-215; *Mathews*, 24 BLR at 1-201; *Fairman v. Helen Mining Co.*, BLR , BRB No. 10-0494 BLA (Apr. 29, 2011).

Because claimant filed her survivor's claim after January 1, 2005, her claim was pending on March 23, 2010, and the miner was receiving benefits under a final award at the time of his death, we affirm the administrative law judge's finding that claimant is derivatively entitled to survivor's benefits pursuant to Section 422(l) of the Act, 30 U.S.C. §932(l).

Accordingly, the Decision and Order Granting Summary Decision and Awarding Survivor's Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge