

BRB No. 10-0579 BLA

GLORIA G. NORMAN)
(Widow of JOHN E. NORMAN))
)
 Claimant-Respondent)
)
 v.)
)
 PINE MOUNTAIN RESOURCES,)
 INCORPORATED)
)
 and)
)
 WEST VIRGINIA COAL WORKERS') DATE ISSUED: 06/24/2011
 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 Summary Decision - Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer/carrier.

Rita Roppolo (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 Summary Decision - Awarding Benefits (2009-BLA-5897) of Administrative Law Judge Michael P. Lesniak, rendered on a survivor's 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). The claim was filed on December 18, 2008.¹

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, were enacted. Those amendments, in pertinent part, revived 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 26, 2010, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision, arguing that there was no genuine issue as to any material fact regarding claimant's eligibility for survivor's benefits, because claimant was automatically entitled to benefits pursuant to amended Section 932(l). By Order dated May 5, 2010, the administrative law judge, *inter alia*, noted the Director's Motion for Summary Decision and provided employer and claimant the opportunity to address the Director's motion. Employer responded to the administrative law judge's May 5, 2010 Order, noting that, ostensibly, claimant is entitled to an award of benefits based on application of the three requirements set forth in Pub. L. No. 111-148, §1556. However, employer further states that, in conceding the applicability of Public Law No. 111-148, employer is "in no way conceding the constitutionality of the provisions [sic] or its retroactive application." Employer's Response to May 5, 2010 Order at 2. Employer also argues that application of Public Law No. 111-148 should be held in abeyance until new regulations implementing these changes are enacted. Claimant did not respond to the administrative law judge's May 5, 2010 Order.

In a Summary Decision – Awarding Benefits, dated June 2, 2010, the administrative law judge cancelled the formal hearing and granted the Director's Motion for Summary Decision. Initially, the administrative law judge noted that the miner was receiving benefits at the time of his death pursuant to a May 22, 1997 award of benefits,

¹ Claimant is the widow of the miner, who died on November 21, 2008. Director's Exhibit 14. At the time of his death, the miner was receiving federal black lung benefits pursuant to a final award on his lifetime claim. Summary Decision – Awarding Benefits at 2; *see also Norman v. Pine Mountain Resources, Inc.*, BRB No. 97-1334 BLA (May 20, 1998)(unpub).

issued by Administrative Law Judge Joan Huddy Rosenzweig, and affirmed by the Board, *Norman v. Pine Mountain Resources, Inc.*, BRB No. 97-1334 BLA (May 20, 1998) (unpub). Summary Decision at 2. The administrative law judge also noted that claimant filed her survivor's claim after January 1, 2005, Director's Exhibit 2, the claim was pending on March 23, 2010, and there was no dispute that claimant is an eligible survivor of the miner. Summary Decision at 2. The administrative law judge therefore found that claimant met the eligibility criteria for automatic entitlement to benefits under amended Section 932(l). Accordingly, the administrative law judge awarded survivor's benefits thereunder.

On appeal, employer challenges the constitutionality of the application of Public Law No. 111-148 to this claim, arguing that it is impermissibly retroactive and violates due process. In addition, employer requests that the case be held in abeyance until the constitutional challenges in federal court to Pub L. No. 111-148 are resolved. The Director responds, urging affirmance of the administrative law judge's award of benefits. Claimant did not file a response to employer's appeal.

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.² 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).

As the administrative law judge correctly noted, the recent amendment to the Act reviving Section 422(l), 30 U.S.C. §932(l), applies to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Pub. Law. No. 111-148, §1556(c). In a recent case, the Board held that the operative date for determining eligibility for survivors' 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), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011). Specifically, the Board held that, under amended Section 932(l), an eligible survivor who files a claim after January 1, 2005, that is pending on or after the March 23, 2010 effective date of Section 1556, is entitled to benefits, based solely on the miner's lifetime award, without having to prove that the miner died due to pneumoconiosis. *Stacy*, 24 BLR at 1-213; *see* 30 U.S.C. §932(l). Because claimant filed her survivor's claim after January 1, 2005, her claim was pending on March 23, 2010, and the miner was awarded benefits on his claim, the

² The record indicates that the miner's last coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe Director, OWCP*, 12 BLR 1-200, 1-202 (1989).

administrative law judge properly found that amended Section 932(l) applies to this case. *Stacy*, 24 BLR at 1-213; Summary Decision at 2.

We reject employer's arguments regarding the constitutionality of amended Section 932(l), as applied to this case. The arguments employer makes 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) (Order) (unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). We, therefore, reject them here for the reasons set forth in that case. *Mathews*, 24 BLR at 1-198-200; *see also Stacy*, 24 BLR at 1-214. 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).

Consequently, we affirm the administrative law judge's determination that claimant is derivatively entitled to benefits pursuant to amended Section 422(l), 30 U.S.C. §932(l), as she filed her survivor's claim after January 1, 2005, the claim was pending on March 23, 2010, and the miner was determined to be eligible to receive benefits at the time of his death.

Accordingly, the administrative law judge's Summary Decision - Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge