

BRB No. 10-0582 BLA

ADELE A. TERRY	)	
(Widow of HAROLD L. TERRY)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HOBET MINING, INCORPORATED	)	DATE ISSUED: 06/15/2011
	)	
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 Denying Employer's Motion to Hold Matter in Abeyance; Granting Claimant's Motion for Summary Decision; and Awarding Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell (Black Lung Legal Clinic, Washington and Lee University School of Law), Lexington, Virginia, for claimant.

Ashley M. Harman and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Denying Employer's Motion to Hold Matter in Abeyance; Granting Claimant's Motion for Summary Decision; and Awarding Benefits (2008-BLA-05432) of Administrative Law Judge Adele Higgins Odegard, rendered on a survivor's claim filed on May 4, 2007, 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).<sup>1</sup> The administrative law judge held a hearing in this case on December 15, 2009. On March 23, 2010, amendments to the Act, pertaining to claims filed after January 1, 2005, became effective. 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 20, 2010, claimant filed a Motion for Summary Judgment, asserting that, pursuant to amended Section 932(l), she was automatically entitled to benefits as a matter of law. The Director, Office of Workers' Compensation Programs (the Director), responded and requested that the administrative law judge grant claimant's Motion for Summary Judgment. Employer opposed claimant's motion and argued that due process requires that the Department of Labor (DOL) give it notice regarding implementation of the statutory amendments. Employer also requested that the administrative law judge hold the case in abeyance pending the outcome of litigation regarding the constitutionality of Public Law No. 111-148 or until after the DOL issues guidelines or promulgates regulations implementing the amended version of Section 932(l).

In an Order issued on April 8, 2010, the administrative law judge directed the parties to show cause why benefits should not be awarded in the survivor's claim pursuant to Section 1556 of Public Law No. 111-148, in light of the award of benefits in the miner's claim. In response, claimant requested that the administrative law judge grant her Motion for Summary Judgment and reasserted her argument that, pursuant to amended Section 932(l), she is automatically entitled to benefits as a matter of law. Employer reiterated the arguments that it made in opposition to claimant's Motion for Summary Judgment, and further argued that retroactive application of Section 1556 of Public Law No. 111-148 was unconstitutional, as it violates employer's due process rights and constitutes an unlawful taking of employer's property. The Director did not respond. The administrative law judge found that claimant satisfied the eligibility criteria

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<sup>1</sup> Claimant is the widow of the miner, who died on July 8, 2003. Director's Exhibits 2, 8.

for automatic entitlement to benefits, pursuant to amended Section 932(l). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 932(l) in this case. Claimant responds and urges the Board to affirm the award of benefits. The Director also responds and urges affirmance of the administrative law judge's award of benefits. Employer has filed a consolidated reply in response to each of the briefs filed by claimant and the Director, reiterating its arguments.<sup>2</sup>

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>3</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We reject employer's arguments regarding the constitutionality of the amendments, as applied in 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, hold that they are without merit for the reasons set forth in that case. *Mathews*, 24 BLR at 1-198-200; *see also Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011).

We also reject employer's arguments regarding the operative filing date for determining eligibility pursuant to amended Section 932(l). The Board has 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*, 24 BLA at 1-214. The Board specifically held that an eligible survivor who files a claim after January 1, 2005, that is pending on or after the March 23, 2010

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<sup>2</sup> 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, that her claim was pending on March 23, 2010, and that, at the time of the miner's death, he was receiving benefits based on the duplicate claim he filed on October 18, 1993. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order Denying Employer's Motion to Hold Matter in Abeyance; Granting Claimant's Motion for Summary Decision; and Awarding Benefits at 2.

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

effective date of the Section 1556 amendments, is entitled to benefits, based solely on the miner's lifetime award, without having to prove that the miner died due to pneumoconiosis. *Id.*; see 30 U.S.C. §932(l).

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. *Id.* 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 Denying Employer's Motion to Hold Matter in Abeyance; Granting Claimant's Motion for Summary Decision; and Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA S. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge