

BRB No. 10-0632 BLA

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| MARY ANN MUSCARA |) | |
| (Widow of DOMIE B. MUSCARA) |) | |
| |) | |
| Claimant-Respondent |) | |
| |) | |
| v. |) | |
| |) | |
| D&F COAL COMPANY |) | DATE ISSUED: 06/29/2011 |
| |) | |
| and |) | |
| |) | |
| AMERICAN MINING INSURANCE |) | |
| COMPANY |) | |
| |) | |
| Employer/Carrier-Petitioners |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Party-in-Interest |) | DECISION and ORDER |

Appeal of the Order Granting Director's Motion for Reconsideration; and Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Sean B. Epstein (Pietragallo Gordon Alfano Bosick & Raspanti, LLP), Pittsburgh, Pennsylvania, for employer/carrier.

Ann Marie Scarpino (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 Order Granting Director's Motion for Reconsideration; and Awarding Benefits (2010-BLA-5397)(Order) of Administrative Law Judge Theresa C. Timlin 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 23, 2010, claimant requested that the administrative law judge remand her case to the district director for entry of an award of survivor's benefits, based on the miner's lifetime award of benefits and the amended Section 422(l) of the Act. The Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision on May 13, 2010, asserting that there is no genuine issue of material fact in this claim, and that under amended Section 422(l), and given the filing date of her claim, claimant was entitled to benefits, based on the award to her deceased husband. By responses of June 1, 2010, and July 1, 2010, employer objected to a remand for entry of an award of survivor's benefits, and requested a formal hearing in order to develop a record for appeal. Additionally, employer challenged the constitutionality, and the Director's interpretation, of amended Section 422(l), and asserted that any award of benefits in this case would be premature because the Department of Labor (DOL) has not yet promulgated implementing regulations to the recent amendments. On June 10, 2010, the administrative law judge issued an Order denying the Director's motion for summary decision, on the basis that employer was entitled to a hearing pursuant to 20 C.F.R. §725.450, and indicated that the administrative hearing scheduled for July 13, 2010 would proceed.² Subsequently, on July 7, 2010, the administrative law judge issued an

¹ Claimant is the widow of the miner, who died on April 16, 2009. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim. *See D&F Coal Co. v. Muscara*, No. 00-2239 (3d Cir. Mar. 6, 2001)(unpub.). Claimant filed a survivor's claim on May 15, 2009. Director's Exhibit 2.

² Claimant joined in the Motion for Summary Decision, and the Motion for Reconsideration of the Denial of the Motion for Summary Decision, both filed by the

Order, granting the Director's motion for reconsideration of the June 10, 2010 Order. The administrative law judge found that there were no genuine issues of material fact in contention, and that claimant satisfied the eligibility criteria for automatic entitlement to survivor's benefits pursuant to amended Section 422(l), 30 U.S.C. §932 (l). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that amended Section 422(l) should not be interpreted as granting automatic entitlement to benefits, and that any such interpretation violates the constitutional guarantee of due process. Both claimant and the Director respond, urging affirmance of 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.³ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the language of amended Section 422(l) simply eliminates the need for eligible survivors to file a new claim for benefits, but "does not, in and of itself, create an automatic entitlement to benefits." Employer's Brief at 3. Rather, employer asserts that, until such time as implementing regulations governing Section 422(l) are enacted, any award of benefits is premature and not in accordance with applicable law. Employer therefore argues that this case should be held in abeyance until DOL promulgates regulations implementing amended Section 422(l). Additionally, employer maintains that granting automatic entitlement to benefits violates the constitutional guarantee of due process to defend the claim, as there was "no insurance coverage contemplated" for the employer in this case. Employer's Brief at 3-4. Finally, employer argues that the administrative law judge's issuance of a summary decision in this matter, without holding an administrative hearing as requested by employer, constituted a denial of due process. We disagree.

Director, Office of Workers' Compensation Programs. Claimant's Responses of May 24, 2010, and June 22, 2010.

³ The record indicates that the miner was employed in the coal mining industry in Pennsylvania. Director's Exhibit 2; Hearing Transcript at 31-33. Accordingly, the law of the United States Court of Appeals for the Third Circuit is applicable. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

The Board has specifically held that, under amended Section 422(l), 30 U.S.C. §932(l), an eligible survivor who files a claim after January 1, 2005, that is pending on or after March 23, 2010, the effective date of the amendments, is entitled to receive benefits, based solely on the miner's lifetime award, without having to prove that the miner died due to pneumoconiosis. *Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011). We reject employer's assertions, that granting automatic entitlement to benefits constitutes a due process violation and unconstitutionally imposes an adverse, unanticipated economic impact on employer, for the same reasons the Board rejected similar 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); *see also Keene v. Consolidation Coal Co.*, F.3d , 2011 WL 1886106 (7th Cir. 2011). Additionally, we reject employer's request that the case be held in abeyance pending promulgation of implementing regulations, as the mandatory language of amended Section 422(l) supports the conclusion that the provision is self-executing. *Mathews*, 24 BLR at 1-201; *Fairman v. Helen Mining Co.*, BLR , BRB No. 10-0494 BLA (Apr. 29, 2011). Finally, we 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. The Act and regulations mandate that an administrative law judge hold a hearing on any claim whenever a party requests such a hearing, *see* 20 C.F.R. §§725.421(a), 725.450, 725.451, *unless* one of the following exceptions is applicable: (1) the right to a hearing is waived, in writing, by the parties, *see* 20 C.F.R. §725.461(a); (2) a party requests summary judgment, and the administrative law judge determines that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law, *see* 20 C.F.R. §725.452(c); or (3) the administrative law judge notifies the parties by written order of his or her belief that a hearing is not necessary, allowing at least thirty days for the parties to respond, and no party requests that a hearing be held. *See* 20 C.F.R. §725.452(d). The administrative law judge properly determined that no hearing was required because the second exception applied here, as the Director moved for summary judgment, and there were no disputed facts regarding claimant's entitlement to benefits under amended Section 422(l) of the Act, 30 U.S.C. §932(l). 20 C.F.R. §725.452(c); *see Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425, 429, 21 BLR 2-495, 2-504 (6th Cir. 1998); *Cunningham v. Island Creek Coal Co.*, 144 F.3d 388, 390, 21 BLR 2-384, 2-388-89 (6th Cir. 1998); *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69, 1-72 (2000); *Fairman*, slip op. at 4-5.

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 amended Section 422(l), based solely on the miner's lifetime award. *See* 30 U.S.C. §932(l).

Accordingly, the administrative law judge's Order Granting Director's Motion for Reconsideration; and 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