

BRB No. 11-0670 BLA

GRACIE BLANKENSHIP)
(Widow of VIRGUS BLANKENSHIP))
)
Claimant-Respondent)
)
v.)
)
RED ASH SALES COMPANY)
)
and)
)
WEST VIRGINIA COAL WORKERS') DATE ISSUED: 06/07/2012
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.

Francesca Tan (Jackson Kelly, PLLC), Morgantown, West Virginia, for employer/carrier.

Barry H. Joyner (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 (2011-BLA-5362) of Administrative Law Judge Michael P. Lesniak rendered on a 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). This case involves a survivor's claim filed on August 2, 2010.¹ Director's Exhibit 3.

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, were enacted. The amendments, in pertinent part, revive Section 932(l) of the Act, 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). The district director awarded benefits to claimant pursuant to amended Section 932(l), and employer requested a hearing. Director's Exhibits 7, 8.

On February 9, 2011 the Director, Office of Workers' Compensation Programs (the Director), moved for a 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. Employer responded, arguing that amended Section 932(l) should not be applied. The Director replied, reiterating his contention that claimant is entitled to benefits.

In a Summary Decision Awarding Benefits dated June 2, 2011, the administrative law judge found that claimant satisfied the eligibility criteria 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) to this case. The Director responds, urging affirmance of the administrative law judge's award of benefits. Claimant did not file a response brief in this 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

¹ Claimant is the widow of the miner, who died on June 27, 2010. Director's Exhibit 6. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim. Director's Exhibit 1.

² The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer argues that retroactive application of amended Section 932(l) is unconstitutional, as a violation of employer’s due process rights and as an unlawful taking of employer’s property, in violation of the Fifth Amendment to the United States Constitution. Employer also contends that the operative date for determining eligibility under amended Section 932(l) is the date the miner’s claim was filed, not the date the survivor’s claim was filed. The arguments employer makes are virtually identical to the ones that the United States Court of Appeals for the Fourth Circuit recently rejected. *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383-89 (4th Cir. 2011), *aff’g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010); *see also B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 254-63 (3d Cir. 2011). For the reasons set forth in *Stacy*, we reject employer’s arguments. We further reject employer’s request that we remand this case to the administrative law judge so that it can submit evidence concerning the economic impact of the amendments.³ *See Stacy*, 671 F.3d at 387; Employer’s Brief at 14. Finally, we reject employer’s request that this case be held in abeyance pending resolution of the legal challenges to Public Law No. 111-148. *See Stacy*, 671 F.3d at 383 n.2; *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011)(unpub.).

States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

³ To the extent employer is arguing that the administrative law judge should have held a hearing to allow employer to submit additional documentary evidence concerning the economic impact of the amendments, employer’s contention lacks merit. Employer’s Brief at 14. As the Director asserts, employer did not seek to submit such evidence before the administrative law judge. Director’s Brief at 4. Moreover, under the facts of this case, the administrative law judge was not required to hold a hearing. The Act and regulations mandate that an administrative law judge hold a hearing on any claim, including a request for modification filed with the district director, 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. *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69, 1-72 (2000). Here, the Director moved for summary judgment, and the administrative law judge determined, as the Director asserted, that claimant is entitled to benefits as a matter of law. *See* 20 C.F.R. §725.452(c). Thus, the administrative law judge did not err in declining to hold a hearing. *See Pukas*, 22 BLR at 1-72.

In this case, the administrative law judge found that 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. Therefore, we affirm the administrative law judge's determination that claimant is derivatively entitled to benefits pursuant to amended Section 932(l) of the Act. 30 U.S.C. §932(l).

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