

BRB No. 11-0700 BLA

ROSE M. SWINEFORD)
(Widow of CHARLES F. SWINEFORD))
)
Claimant-Respondent)
)
v.)
)
ENERGY RESOURCES, INCORPORATED)
)
and)
)
AMERICAN MINING INSURANCE) DATE ISSUED: 06/14/2012
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 Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

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

Jeffrey S. Goldberg (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 Awarding Benefits (11-BLA-5745) of Administrative Law Judge Michael P. Lesniak (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. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010). 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).

The administrative law judge found that claimant is an eligible survivor of the miner,² and that claimant meets the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l). Accordingly, the administrative law judge awarded survivor's benefits, commencing as of August 1, 2008.

On appeal, employer argues that the retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005 constitutes a violation of its due process rights and, as such, is unconstitutional. Employer requests that further proceedings or actions related to this claim be held in abeyance, pending the resolution of the constitutional challenges to the PPACA in federal court and the promulgation of implementing regulations by the Secretary of Labor. Claimant and the Director, Office of Workers' Compensation Programs, respond, urging the Board to affirm the administrative law judge's award of benefits.

¹ Claimant, Rose M. Swineford, is the widow of the miner, who died on August 7, 2008. Director's Exhibit 8. Claimant filed her claim for survivor's benefits on July 1, 2009. Director's Exhibit 2.

² At the time of his death, Charles F. Swineford, the miner, was receiving federal black lung benefits pursuant to an award contained in a Decision and Order on Remand issued on July 16, 2008 by Administrative Law Judge Richard A. Morgan. Director's Exhibit 1.

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, for the same reasons the Board rejected substantially 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.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011); *B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011); *West Virginia CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010). Further, consistent with the Board's decision in *Mathews*, we reject employer's request to hold this case in abeyance pending promulgation of implementing regulations or resolution of the legal challenges to the PPACA. *See Mathews*, 24 BLR at 1-201; *Fairman v. Helen Mining Co.*, 24 BLR 1-225 (2011), *appeal docketed*, No. 11-2445 (3d Cir. May 31, 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 entitled to receive survivor's benefits pursuant to amended Section 422(l) of the Act, 30 U.S.C. §932(l).

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge