

BRB No. 13-0484 BLA

JOYCE FAYE FRANKLIN)
(Widow of NORMAN K. FRANKLIN))
)
Claimant-Respondent)
)
v.)
)
CHEVRON MINING, INCORPORATED) DATE ISSUED: 06/25/2014
)
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 Awarding Continuing Benefits Under the Automatic Entitlement Provision of the Black Lung Benefits Act of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

John C. Morton (Morton Law LLC), Henderson, Kentucky, for employer.

Emily Goldberg Kraft (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: HALL, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Continuing Benefits Under the Automatic Entitlement Provision of the Black Lung Benefits Act (2013-BLA-5538) of Administrative Law Judge Alice M. Craft with respect to a survivor's claim filed on December 6, 2012, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act).¹ The administrative law judge found that claimant was automatically entitled to receive benefits under amended Section 932(*l*) of the Act, 30 U.S.C. §932(*l*), and awarded benefits accordingly.²

On appeal, employer argues that it was deprived of due process because it did not receive proper notice, and service, of the claim. Employer thus maintains that it should be dismissed as the responsible operator, and that the Black Lung Disability Trust Fund (the Trust Fund) should be liable for any benefits payable to claimant. Employer also challenges the administrative law judge's application of amended Section 932(*l*). Employer contends that automatic entitlement to survivor's benefits is unconstitutional and represents an improper interpretation of the Act. Alternatively, employer requests that this case be held in abeyance pending the outcome of all challenges regarding automatic entitlement pending in the United States Court of Appeals for the Sixth Circuit. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond in support of the administrative law judge's award of benefits. Employer has filed reply briefs, reiterating its arguments on appeal.³

¹ Claimant is the widow of the miner, who died on September 5, 2012. Director's Exhibit 9. Administrative Law Judge Daniel F. Solomon awarded benefits to the miner in a Decision and Order issued on July 17, 2008. Director's Exhibit 5. Employer did not appeal that decision and, at the time of his death, the miner was receiving federal black lung benefits pursuant to the award on his lifetime claim.

² Relevant to this case, amended Section 932(*l*) provides that a survivor of a miner who was determined to be 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*), amended by Pub. L. No. 111-148, §1556(b), 124 Stat. 119, 260 (2010).

³ Employer does not challenge the administrative law judge's findings that claimant established 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 or after March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death. Employer also does not challenge the administrative law judge's finding that it meets the

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.⁴ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363 (1965).

Transfer of Liability For Benefits

Employer asserts that liability for any benefits awarded in this case must transfer to the Trust Fund because it did not receive proper notice, and service, of this claim, in violation of its right to due process under the Fifth Amendment to the United States Constitution. The miner died on September 5, 2012. Director's Exhibit 9. In a letter to the Office of Workers' Compensation Programs dated November 28, 2012, counsel for employer acknowledged that it was aware that the miner had died and that claimant requested a continuation of benefits. Director's Exhibit 10. Claimant filed an application for survivor's benefits on December 6, 2012. Director's Exhibit 7. On December 10, 2012, the district director issued a Proposed Decision and Order awarding benefits, based on amended Section 932(l). Director's Exhibit 11. Employer requested a hearing by letter dated January 8, 2013. The district director issued an agreement to pay benefits on January 10, 2013, which employer rejected on January 16, 2013. Director's Exhibits 6, 13. The case was then forwarded to the Office of Administrative Law Judges (OALJ) for a formal hearing. Director's Exhibit 16.

On May 16, 2013, claimant moved for summary decision, arguing that there was no genuine issue with respect to any material fact concerning whether she is automatically entitled to derivative benefits pursuant to amended Section 932(l). On June 12, 2013, employer filed a response in opposition to claimant's motion for a summary decision. In a Decision and Order issued on June 20, 2013, the administrative law judge noted that a hearing was unnecessary, as employer "did not raise any issue of material fact" regarding whether claimant met the criteria for the application of amended Section 932(l). Decision and Order at 2. The administrative law judge also rejected employer's assertion that the district director's failure to issue a Notice of Claim, and a Schedule for the Submission of Additional Evidence, deprived employer of its right to due process. *Id.* at 4. The administrative law judge further declined to grant employer either of the dispositions that it proposed if she did not dismiss it as the responsible operator, stating:

regulatory criteria for being named the responsible operator. Therefore, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁴ The miner's last coal mine employment was in Kentucky. Director's Exhibit 5. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

I find that remanding the claim to the [d]istrict [d]irector or holding it in abeyance would not be consistent with judicial economy under the current state of the case law upholding the [Patient Protection and Affordable Care Act] and the automatic entitlement provision. The ability of [e]mployer to appeal this Decision and Order will preserve its rights.

Id. The administrative law judge determined that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l) and, therefore, is derivatively entitled to survivor's benefits, based on the award of benefits to the miner, payable by employer. *Id.* at 5.

On appeal, employer alleges that the district director failed to comply with the requirements of procedural due process by "refusing to issue a 'Notice of Claim,' as required by 20 C.F.R. §725.407 or a 'Schedule for the Submission of Additional Evidence' as required by 20 C.F.R. §725.410[.]"⁵ Employer's Petition for Review and Brief at 3. Citing *Morton v. Ruiz*, 415 U.S. 199, 235 (1974), employer maintains that an agency must follow its own regulations and procedures, "even if doing so is more rigorous than what would otherwise be required."⁶ *Id.* The Director responds and maintains that the district director's actions were consistent with the revised regulations pertaining to the processing of claims under amended Section 932(l). Director's Letter Response Brief at 2, *citing* 78 Fed. Reg. 59,102, 59,118-19 (Sept. 25, 2013) (to be codified at 20 C.F.R. §725.418(a)(3)). The Director also contends that, under the version of 20 C.F.R. §725.418 in effect when claimant filed her survivor's claim, the district director had the authority to issue a Proposed Decision and Order at any time, if she determined that its issuance would expedite the adjudication of the claim. Director's Letter Response Brief at 4, *citing* 20 C.F.R. §725.418(a)(2). Lastly, the Director asserts

⁵ The revised regulations became effective on October 25, 2013. *See* 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). We will indicate when a regulatory citation in this decision refers to a regulation as it appears in the September 25, 2013 Federal Register. Otherwise, all regulations cited in this Decision and Order may be found in 20 C.F.R. Parts 718, 725 (2013).

⁶ In *Morton v. Ruiz*, 415 U.S. 199, 235 (1974), the United States Supreme Court held that the Bureau of Indian Affairs could not impose new requirements that reduced the number of people eligible for benefits without following the agency's own rule that eligibility requirements be published. *Ruiz*, 415 U.S. at 235-36. The Court emphasized that the agency had to comply with established procedures before making a substantive policy change. *Id.* The district director's omission of a Notice of Claim, and Schedule for Submission of Additional Evidence, did not result in changes to employer's substantive rights, and therefore does not fall within the Court's holding in *Ruiz*.

that, regardless of the procedures used by the district director, employer's right to due process was not violated.

The Due Process Clause, which applies to adjudicative administrative proceedings, requires that an employer receive notice and an opportunity to be heard before it is held liable for an award of benefits. *See Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Arch of Kentucky, Inc. v. Director, OWCP [Hatfield]*, 556 F.3d 472, 478, 24 BLR 2-135, 2-144 (6th Cir. 2009). Notice must be reasonably calculated to inform the employer of the claim for benefits. *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 1048, 14 BLR 2-1, 2-9 (6th Cir. 1990). A delay in notifying an employer of its potential liability violates due process only if the employer is deprived of a fair opportunity to mount a meaningful defense against the claim. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84, 22 BLR 2-25, 2-44-45 (6th Cir. 2000); *see also Consolidation Coal Co. v. Borda*, 171 F.3d 175, 184, 21 BLR 2-545, 2-560-61 (4th Cir. 1999); *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 807, 21 BLR 2-302, 2-320 (4th Cir. 1998).

In this case, employer's counsel was aware of claimant's intent to seek a continuation of the miner's benefits before she formally filed a claim. Director's Exhibit 10. Furthermore, once employer received the district director's Proposed Decision and Order, it challenged the award of benefits, and the district director transferred the case to the OALJ for a hearing, at employer's request. Director's Exhibits 12, 16. Employer responded to claimant's subsequent motion for summary decision, but did not allege that it did not satisfy the criteria for designation as a responsible operator, or that claimant did not satisfy the criteria for automatic entitlement to benefits under amended Section 932(l). Under these circumstances, employer has not established that the manner in which the district director processed the survivor's claim deprived it of a fair opportunity to meaningfully defend against the claim for survivor's benefits.⁷ *See Holdman*, 202 F.3d at 883-84, 22 BLR at 2-44-45; *Borda*, 171 F.3d at 184, 21 BLR at 2-560-61; *Lockhart*, 137 F.3d at 807, 21 BLR at 2-320. We affirm, therefore, the administrative law judge's finding that liability for the payment of benefits should not be transferred from employer to the Trust Fund. *See England v. Island Creek Coal Co.*, 17 BLR 1-141 (1993); *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354, 1-357 (1984).

Constitutionality and Interpretation of Section 932(l)

Employer contends that application of amended Section 932(l) is unconstitutional, as it represents a violation of employer's due process rights, and an unlawful taking of

⁷ Based on this holding, we need not determine whether the district director's actions were proper under the regulations in effect when the claim was filed, or those that became effective on October 25, 2013.

property, in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 5; Employer's Reply Brief at 2. Employer asserts that the Act should be interpreted to exclude benefits for survivors "who died for reasons unrelated" to pneumoconiosis. Employer's Brief at 6-7; Employer's Reply Brief at 7; Employer's Second Reply Brief at 7. The arguments employer makes are virtually identical to the ones that the Sixth Circuit recently rejected in *Vision Processing, LLC v. Groves*, 705 F.3d 551, 25 BLR 2-231 (6th Cir. 2013). See also *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 388, 25 BLR 2-65, 2-83 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *cert. denied*, 568 U.S. 127 (2012); *B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011). For the reasons set forth in *Groves*, we reject employer's arguments.⁸

In this case, the administrative law judge correctly 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 after March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death. Thus, we affirm the administrative law judge's determination that claimant is derivatively entitled to survivor's benefits pursuant to amended Section 932(l). 30 U.S.C. §932(l).

⁸ To the extent that employer requests that this case be held in abeyance pending the Sixth Circuit's resolution of other cases involving the validity of amended Section 932(l), its request is denied. Employer's Brief at 7-8; Employer's Reply Brief at 7-8.

Accordingly, the administrative law judge's Decision and Order Awarding Continuing Benefits Under the Automatic Entitlement Provision of the Black Lung Benefits Act is affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge