

BRB No. 10-0511 BLA

WILMA GROSE )  
(Widow of CHARLES M. GROSE) )  
 )  
Claimant-Respondent )  
 )  
v. )  
 )  
TERRY EAGLE LIMITED )  
 )  
and )  
 )  
WEST VIRGINIA COAL WORKERS' ) DATE ISSUED: 05/31/2011  
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 Decision and Order – Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Jonathan P. Rolfe (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 appeals the Decision and Order – Awarding Benefits (2009-BLA-5675) of Administrative Law Judge Daniel L. Leland (the administrative law judge) rendered on a survivor’s claim filed on June 5, 2008, 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> 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 13, 2010, the administrative law judge issued a notice giving the parties forty-five days to file a position statement addressing why an order awarding benefits should not be entered in this claim, pursuant to Section 1556 of Public Law No. 111-148, which provides for automatic entitlement to benefits for survivors of miners when the survivor’s claim is filed after January 1, 2005, the claim was pending on March 23, 2010, and the miner was receiving benefits under a final award at the time of his death.

Employer argued, in its response, that due process requires that it be given notice of how the Department of Labor (DOL) intends to implement the statutory amendments. Employer also contended that requiring it to proceed without further notice as to how the DOL intends to implement the amendments to the Act would violate the Administrative Procedure Act, 5 U.S.C. §551 *et seq.*, as incorporated into the Act by 30 U.S.C. §932(a) and 33 U.S.C. §919(d), which guarantees all litigants a full and fair hearing. Employer further alleged that it was entitled to examine claimant to determine if she is an eligible survivor. Claimant maintained that she is automatically entitled to benefits pursuant to amended Section 932(l). The Director, Office of Workers’ Compensation Programs (the Director), submitted a request for summary decision, based on the application of amended Section 932(l).

After considering the parties’ responses, the administrative law judge held that he would not adjudicate employer’s constitutional challenges to Section 1556, but they would be preserved for appeal. The administrative law judge found that employer is not entitled to examine claimant to determine if she is an eligible survivor, as it did not raise this issue before the district director and is therefore, precluded from raising it now. The administrative law judge determined that the miner was awarded benefits on a claim that

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<sup>1</sup> Claimant is the widow of the miner, who died on March 24, 2008. Director’s Exhibits 2, 11-12, 24, 25, 30; Living Miner’s Claim Director’s Exhibits 2, 33.

he filed on July 9, 2001, and that the miner died on March 24, 2008. The administrative law judge, therefore, found that claimant meets the eligibility criteria in Section 1556 of Public Law No. 111-148 and is automatically entitled to benefits, starting on March 1, 2008, the first day of the month of the miner's death.

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. Employer maintains that claimant is not automatically entitled to survivor's benefits, based on the recent amendment to Section 932(*l*), as the operative date for determining eligibility for survivor's benefits is the date on which the miner's claim was filed, not the date of filing of the survivor's claim. Employer further contends that the administrative law judge erred in issuing an automatic award of benefits to claimant without considering any of the medical evidence or the validity of the living miner's award. Employer also requests that this case be held in abeyance pending the outcome of litigation over the constitutionality of Public Law No. 111-148 in a lawsuit filed in the United States District Court for the Northern District of Florida or until sixty days after the DOL issues guidelines or promulgates regulations implementing the amended version of amended Section 932(*l*). Lastly, employer urges the Board to remand the case to the district director to allow employer to develop evidence relevant to the amended provisions of the Act if the Board finds that these provisions are applicable in this case.

Claimant responds and asserts that amended Section 932(*l*) mandates an award of benefits in her claim. Claimant urges the Board to reject employer's due process argument and its contention that the filing date relevant to her derivative entitlement to benefits is the date on which the miner's claim was filed. Claimant further argues that the district director's finding in the miner's claim of complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304, was accepted by employer and "may well be considered a stipulation, a default judgment, or a final judgment that would prevent the employer from relitigating the issue again." Claimant's Response Brief at 6.

The Director responds and agrees with claimant, 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. The Director also maintains that claimant is entitled to benefits, as the miner was receiving benefits pursuant to a final award on his claim at the time of his death, claimant filed her survivor's claim after January 1, 2005, and her claim was pending on March 23, 2010. In addition, the Director urges the Board to reject employer's arguments concerning the alleged due process violation, its request to hold the case in abeyance and its argument

that the administrative law judge erred in failing to consider medical evidence. Employer has filed a reply brief, reiterating its contentions on appeal.<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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the arguments on appeal and the administrative law judge's decision, we hold that the contentions raised by employer regarding the applicability of Section 932(l) are without merit. Employer's argument, that the retroactive application of Section 932(l) represents a violation of due process and an unconstitutional taking, is identical to the arguments 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, reject them here for the reason set forth in that case. *Mathews*, 24 BLR at 1-198-200; *see also Stacy v. Olga Coal Co.*, 24 BLR 1- , BRB No. 10-0113 BLA, slip op. at 8 (Dec. 22, 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*, slip op. at 7. The Board specifically held that, under amended Section 932(l), an eligible survivor who files a claim after January 1, 2005, that is pending on or after the March 23, 2010 effective date of the Section 1556 amendment, 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).

Furthermore, 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

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<sup>2</sup> We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings 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 claim he filed on July 9, 2001. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order-Awarding Benefits at 1.

<sup>3</sup> This case arises within the jurisdiction of the 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 4.

regulations. *See 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.* In addition, as amended Section 932(l) does not afford employer the opportunity to defend the claim once derivative entitlement has been established, employer's request that the case be remanded with instructions for the record to be reopened is 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-Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge