

BRB No. 10-0625 BLA

GLADYS F. PHILLIPS)	
(Widow of McNEIL PHILLIPS, SR.))	
)	
Claimant-Respondent)	
)	
v.)	
)	
CLINCHFIELD COAL COMPANY)	DATE ISSUED: 05/26/2011
c/o WELLS FARGO DISABILITY)	
MANAGEMENT)	
)	
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 Granting Motion for Summary Decision and Awarding Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Michelle S. Gerdano (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 Granting Motion for Summary Decision and Awarding Benefits (2009-BLA-5211) of Administrative Law Judge Paul C. Johnson, Jr., 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).²

On March 23, 2010, amendments to the Act were enacted, affecting claims filed after January 1, 2005 that were pending on or after March 23, 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).

On April 2, 2010, the administrative law judge issued an order requesting position statements from the parties regarding the applicability of the amendments to this claim. In response, employer requested that this matter be held in abeyance pending the outcome of litigation challenging the constitutionality of Public Law No. 111-148. The Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision on May 18, 2010, asserting that no material issue of fact was contested 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. Claimant did not file a response. The administrative law judge determined that amended Section

¹ Claimant is the widow of the miner, who filed his most recent lifetime claim for benefits on September 24, 1986. Director's Exhibit 1. On June 12, 1990, Administrative Law Judge John H. Bedford awarded benefits, and no further action was taken on the miner's claim. The miner died on January 18, 2008, and claimant filed a claim for survivor's benefits on February 12, 2008. Director's Exhibits 2, 9. On August 28, 2008, the district director issued a Proposed Decision and Order awarding survivor's benefits. Director's Exhibit 27.

² The recent amendments to the Act apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Pub. L. No. 111-148, §1556(c), 124 Stat. 119 (2010). Section 1556 of Public Law No. 111-148 amended Section 422(l) of the Act, to provide that a qualified survivor is automatically entitled to benefits without having to establish that the miner's death was due to pneumoconiosis, if the miner filed a successful claim and was receiving benefits at the time of his death. 30 U.S.C. §932(l), amended by Pub. L. No. 111-148, §1556(b), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §932(l)).

422(l) was applicable, and that claimant is the surviving spouse of the deceased miner who was receiving black lung benefits at the time of his death. Accordingly, the administrative law judge denied employer's motion, granted the Director's motion for summary decision, and awarded survivor's benefits.

On appeal, employer argues that the retroactive application of amended Section 422(l) to claims filed after January 1, 2005 constitutes a violation of its due process rights and a taking of private property. Alternatively, employer requests that the Board reverse the award of benefits and stay the proceedings, until such time as the constitutional challenges to Public Law No. 111-148 have been adjudicated and the Department of Labor has promulgated implementing regulations.

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'Keefe 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 422(l) to claims filed after January 1, 2005 constitutes a due process violation and a taking of private property, for the same reasons the Board rejected identical arguments in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-93, 1-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011)(Order). *See also Keene v. Consolidation Coal Co.*, F.3d , 2011 WL 1886106 (7th Cir. 2011). Furthermore, as we did in *Mathews*, we reject employer's request that this case be held in abeyance pending either promulgation of implementing regulations or resolution of the legal challenges to Public Law No. 111-148. *See Mathews*, 24 BLR at 1-201; *Fairman v. Helen Mining Co.*, BLR , BRB No. 10-0494 BLA (Apr. 29, 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 Section 422(l) of the Act, 30 U.S.C. §932(l).

Accordingly, the administrative law judge's Decision and Order Granting Motion for Summary Decision 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