

BRB No. 10-0628 BLA

GLADYS N. GOOLSBY)	
(Widow of TOMMY GOOLSBY))	
)	
Claimant-Respondent)	
)	
v.)	
)	
PEABODY COAL COMPANY)	DATE ISSUED: 05/31/2011
)	
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 Benefits and the Order Denying Employer's Motion for Reconsideration of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

Laura Metcoff Klaus and Mark E. Solomons (Greenberg Traurig LLP), Washington, D.C., for employer.

Ann Marie Scarpino (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 and the Order Denying Employer's Motion for Reconsideration (2010-BLA-5083) of Administrative

Law Judge Joseph E. Kane 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 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 28, 2010, the administrative law judge advised the parties of the applicability of the amendments to this claim, and issued an order directing the parties to submit position statements addressing why an order awarding benefits should not be entered. In response, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision on May 4, 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 and employer did not file responses. The administrative law judge determined that amended Section 422(l), 30 U.S.C. §932(l) was applicable, and that pursuant to 20 C.F.R. §§725.214, 725.215(g), 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 awarded survivor's benefits. Upon employer's Motion for Reconsideration, the administrative law judge determined that "30 U.S.C. §932(l) is clear on its face," Order at 2, and found no basis to alter his award of benefits.

On appeal,² employer argues that imposition of liability in this case is inconsistent with the plain language of Section 422(l), and violates fundamental principles of due process. In this regard, employer contends that the operative date for determining

¹ Claimant is the widow of the miner, who died on February 5, 2009. Director's Exhibit 10. On December 3, 1991, Administrative Law Judge Bernard J. Gilday, Jr. awarded benefits in the miner's lifetime claim, and no further action was taken on the claim. Director's Exhibit 1-37. After the miner's death, claimant filed a claim for survivor's benefits on March 12, 2009. Director's Exhibits 2.

² On April 5, 2011 the Board issued an Order denying claimant's motion to dismiss employer's appeal and denying employer's motion to hold the appeal in abeyance.

eligibility for survivor's benefits under amended Section 422(l) is the date the miner's claim was filed, not the date the survivor's claim was filed. Employer also maintains that automatic entitlement to benefits does not comport with notions of fundamental due process, asserting that it imposes liability retroactively and unreasonably upsets employer's settled investment-backed expectations. Employer asserts that if amended Section 422(l) applies to this case, employer should be dismissed as a party and liability should rest with the Black Lung Disability Trust Fund. Claimant and the Director respond in support of the award of benefits.

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).

The Board has recently held that the operative date for determining eligibility for survivor's benefits under amended Section 422(l) is the date that the survivor's claim was filed, not the date that the miner's claim was filed. *Stacy v. Olga Coal Co.*, BLR , BRB No. 10-0113 BLA, slip op. at 7 (Dec. 22, 2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011). For the reasons set forth in *Stacy*, we reject employer's arguments to the contrary. We further 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 substantially similar 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).

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).

Claimant's counsel has filed a motion for attorney's fees, requesting approval of fees in the amount of \$487.50 for work performed before the administrative law judge. All fee petitions must be filed with, and approved by, the adjudicating officer or tribunal before whom the services were performed. 20 C.F.R. §§725.365, 725.366(a); *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989); *Hemick v. Director, OWCP*, 9 BLR 1-161 (1986); *Vigil v. Director, OWCP*, 8 BLR 1-99 (1985). Thus, the Board is not authorized to approve the fees requested; rather, counsel must seek an award before the administrative law judge. *See also* 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Denying Employer's Motion for Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge