

BRB No. 10-0637 BLA

MARGARET E. MORAN)	
(Widow of CALVIN L. MORAN))	
)	
Claimant-Respondent)	
)	
v.)	
)	
SLAB FORK COAL COMPANY)	
)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell and John C. Eller (Washington and Lee University School of Law), Lexington, Virginia, for claimant.

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

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:

Carrier appeals the Decision and Order Awarding Benefits (2009-BLA-5035) of Administrative Law Judge Richard A. Morgan 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 May 26, 2010, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision in this case, asserting that no material issue of fact was contested, 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. Employer responded, requesting that the claim be held in abeyance. Claimant filed a Motion for Summary Judgment on June 18, 2010, for reasons similar to those of the Director. On July 13, 2010, the administrative law judge issued his Decision and Order, finding that claimant is an eligible survivor of a miner who was receiving benefits at the time of his death; that claimant filed her survivor's claim after January 1, 2005; and that her claim was pending on or after March 23, 2010. Accordingly, the administrative law judge found that claimant was automatically entitled to survivor's benefits pursuant to amended Section 422(l) of the Act, 30 U.S.C. §932(l).

On appeal, carrier argues that the operative date for determining eligibility pursuant to amended Section 422(l) is the date of filing of the miner's claim, and asserts that the Director's interpretation of this section is not entitled to deference because it is inconsistent with the plain language of the statute, the regulations, and his prior positions.

¹ Claimant is the widow of the miner, who died on October 5, 2007. Director's Exhibits 8, 9. On March 30, 2005, Administrative Law Judge Michael P. Lesniak awarded benefits in the miner's claim, and no further action was taken. After the miner's death, claimant filed a claim for survivor's benefits on October 29, 2007. Director's Exhibit 2.

Carrier further contends that retroactive application of the amendments to the Act to claims filed after January 1, 2005 is unconstitutional in that it constitutes a violation of its due process rights and a taking of private property. Lastly, carrier maintains that the administrative law judge erred in issuing an automatic award of benefits that is not rational, consistent with the law, or supported by the evidence, and requests that the case be remanded for the record to be reopened.² Claimant and the Director respond, urging the Board to affirm the administrative law judge's 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'Keeffe 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 carrier's arguments to the contrary. We further reject carrier'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 1-193, 1-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order)(unpub.). *See also Keene v. Consolidation Coal Co.*, F.3d , 2011 WL 1886106 (7th Cir. 2011). Finally, as amended Section 422(l) does not afford carrier the opportunity to defend the claim once derivative entitlement has been established, we deny carrier's request that the case be remanded with instructions for the record to be reopened.

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).

² Carrier filed a motion to hold this appeal in abeyance, pending the promulgation of implementing regulations and resolution of the constitutional challenges to Public Law No. 111-148 in federal court. By Order dated April 7, 2011, the Board denied carrier's motion.

Accordingly, the administrative law judge's Decision and Order 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