

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 18-0268 BLA

PATRICIA MILLS)	
(Widow of STANLEY D. MILLS))	
)	
Claimant-Respondent)	
)	
v.)	
)	
PAL COAL, INCORPORATED)	DATE ISSUED: 05/21/2019
)	
and)	
)	
WEST VIRGINIA CWP 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 Granting Claimant’s Motion for Summary Decision of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Ann Marie Scarpino (Kate S. O’Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting Claimant's Motion for Summary Decision (2018-BLA-05231) of Administrative Law Judge John P. Sellers, III, rendered pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves an award of benefits in a survivor's claim.

Claimant is the widow of the miner, Stanley D. Mills, who filed a claim for benefits on February 3, 2012. He died while his claim was pending before Administrative Law Judge Alan L. Bergstrom. Claimant continued to pursue the miner's claim on his behalf. Judge Bergstrom awarded benefits in the miner's claim on July 20, 2017. Employer appealed the award of miner's benefits to the Board.

Claimant filed an application for survivor's benefits on August 8, 2017, which was eventually assigned to Administrative Law Judge John P. Sellers, III (the administrative law judge), for hearing. On February 14, 2018, claimant filed a motion for summary decision requesting an award of benefits. Claimant maintained that under Section 422(l), 30 U.S.C. §932 (l) (2012), she was automatically entitled to benefits, based on the award of benefits in the miner's claim.¹ The administrative law judge granted claimant's motion and awarded benefits in the survivor's claim. At that time, employer's appeal of the award of benefits in the miner's claim was still pending at the Board.

Employer appealed Judge Sellers's award of survivor's benefits to the Board on March 22, 2018. In its initial brief dated May 15, 2018, employer challenged Judge Sellers's application of Section 422(l) and his reliance on the Board's decision in *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141 (2014). Employer asserted that because the award of benefits in the miner's claim was not yet final and effective, claimant had not satisfied the eligibility criteria for automatic entitlement to survivor's benefits under Section 422(l). Responses from claimant and the Director, Office of Workers' Compensation Programs

¹ Section 422(l) of the Act, 30 U.S.C. §932 (l) (2012), provides that the survivor of a miner who was eligible to receive benefits at the time of death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis.

(the Director), were received on June 20, 2018 and August 30, 2018, respectively. The Director urged the Board to reject employer's arguments, but noted that if the Board ultimately vacated the award in the miner's claim, it should also vacate the award in the survivor's claim.

While employer's appeal of the award of survivor's benefits was pending, by Decision and Order dated September 27, 2018, the Board vacated the award of benefits in the miner's claim and remanded the case for reconsideration.² *Mills v. Pal Coal, Inc.*, BRB Nos. 17-0601 BLA and 17-0601 BLA-A (Sept. 27, 2018) (unpub.). Employer subsequently filed a Motion to Vacate and Remand Derivative Survivor's Award on October 19, 2018. Employer maintains that because the Board vacated the award of benefits in the miner's claim, the automatic award of survivor's benefits under Section 422(l) must also be vacated. Neither the Director, Office of Workers' Compensation Programs, nor claimant has responded to employer's motion.

In light of the Board's decision vacating and remanding the award of benefits in the miner's claim, we grant employer's motion and vacate the administrative law judge's award of derivative benefits in the survivor's claim and remand the case for further consideration. As it is uncontested that claimant meets the filing requirements for application of Section 422(l), however, if the miner's benefits are reinstated on remand the award of survivor's benefits under Section 422(l) also must be reinstated.³ *See Rothwell v. Heritage Coal Co.*, 25 BLR 1-141, 1-145-47; *see also Clay v. Armco, Inc./AK Steel Corp.*, 16-0656 BLA, slip op. at 5-6 (June 21, 2017) (unpub.) (Boggs, J., concurring) (Although survivor's benefits were properly awarded based on the award in the miner's claim, when the award of miner's benefits is vacated and remanded, the derivative survivor's award of

² Due to Judge Bergstrom's retirement, the case was reassigned to Administrative Law Judge Monica F. Markley and remains pending before her.

³ Because we are granting employer's Motion to Vacate and Remand Derivative Survivor's Award, we need not reach the arguments raised in its Brief in Support of Petition for Review challenging the Board's decision in *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141, 1-146 (2014) (A survivor of a miner is entitled to automatic benefits if "at any stage of a black lung proceeding" the miner is determined to be "legally entitled to receive benefits from either the responsible operator or the Trust Fund[.]"). We note, however, *Rothwell* remains controlling precedent. *See Ferguson v. Oak Grove Resources, LLC*, 25 BLR 1-231, 1-236-38 (2017) (Rejecting allegations that in *Rothwell*, the Board erred in holding Section 422(l) does not require a final determination on the miner's eligibility for benefits before a survivor is automatically entitled to benefits.), *aff'd sub nom. Oak Grove Resources, LLC v. Director, OWCP [Ferguson]*, 920 F.3d 1283 (11th Cir. 2019).

benefits should be vacated and remanded as well). Conversely, if benefits are denied in the miner's claim, claimant has the burden to establish the miner had pneumoconiosis arising out of coal mine employment, and his death was due to pneumoconiosis. 20 C.F.R. §§718.202, 718.203, 718.205.

Accordingly, the Decision and Order Granting Claimant's Motion for Summary Decision in the survivor's claim is vacated, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge