



BRB No. 15-0129 BLA

SUE E. CREE	)	
(Widow of RICHARD L. CREE)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CENTRAL CAMBRIA DRILLING	)	
COMPANY	)	
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE	)	DATE ISSUED: 11/02/2015
COMPANY	)	
	)	
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 Drew A. Swank, Administrative Law Judge, United States Department of Labor.

John S. Cupp, Uniontown, Pennsylvania, for claimant.

D. Scott Newman (Burns White, LLC), Pittsburgh, Pennsylvania, for employer.

Barry H. Joyner (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: BOGGS, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2015-BLA-5117) of Administrative Law Judge Drew A. Swank (the administrative law judge) rendered on a survivor's claim<sup>1</sup> filed pursuant to the provisions of the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge issued his decision without holding a hearing in this case, and found that employer does not dispute that it is the properly designated responsible operator. The administrative law judge further found: 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. Noting the Board's holding in *Rothwell v. Heritage Coal Co.*, 25 BLR 1-141 (2014), 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),<sup>2</sup> even though the award of benefits in the underlying miner's claim is not yet final. Accordingly, the administrative law judge awarded survivor's benefits.

On appeal, employer challenges the administrative law judge's finding that claimant satisfied the requirements for automatic entitlement to benefits. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to vacate the administrative law judge's award of benefits and remand this case for a hearing in the survivor's claim.

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<sup>1</sup> Claimant is the widow of the miner. The miner filed a claim for benefits on December 30, 2011, and the district director issued a Proposed Decision and Order awarding benefits on November 14, 2012. *See* Director's Exhibit 4. Employer requested a formal hearing in the miner's claim, and the case is currently pending in the Office of Administrative Law Judges. The miner died on August 5, 2014. Director's Exhibit 3. Claimant filed a survivor's claim on September 2, 2014. Director's Exhibits 1, 9.

<sup>2</sup> On March 23, 2010, amendments to the Act, applicable to claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. 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).

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer challenges the administrative law judge's finding that claimant is derivatively entitled to survivor's benefits under amended Section 932(l), arguing that the miner was not receiving benefits pursuant to a final and effective award; that *Rothwell* is not applicable to this survivor's claim; and that granting survivor's benefits prior to a hearing and a final determination in the miner's claim constitutes a violation of its due process rights and an unconstitutional taking of private property. Employer's Brief at 5-13.

The Director urges the Board to vacate the administrative law judge's decision, arguing that the administrative law judge erred in issuing a decision without holding a hearing. The Director maintains that because the parties did not agree to a decision on the record and no party filed a motion for summary judgment, the administrative law judge was obligated to hold a hearing before issuing his decision. Director's Brief at 2.

We agree with the Director. The regulations require that "[a]ny party to a claim shall have a right to a hearing concerning any contested issue of fact or law unresolved by the district director." 20 C.F.R. §725.450. A full evidentiary hearing need not be conducted, however, if a party moves for summary judgment and the administrative law judge determines that there is no genuine issue as to any material fact and the moving party is entitled to the relief requested as a matter of law. *See* 20 C.F.R. §725.452(c). Additionally, "[i]f the administrative law judge believes that an oral hearing is not necessary (for any reason other than on motion for summary judgment), the judge shall notify the parties by written order and allow at least thirty days for the parties to respond," but if any party makes a timely request in response to the order, "the administrative law judge shall hold the oral hearing." 20 C.F.R. §725.452(d). While the parties may waive the right to a hearing before an administrative law judge, such waiver must be in writing and filed with the Chief Administrative Law Judge or the administrative law judge assigned to hear the case. *See* 20 C.F.R. §725.461(a).

Because the parties did not agree to a decision on the record, and no party filed a motion for summary judgment, the administrative law judge was obligated to hold a

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<sup>3</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner was employed in the coal mining industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

hearing before issuing his decision. Consequently, we vacate the administrative law judge's finding that claimant is derivatively entitled to survivor's benefits, and remand the case for a hearing consistent with the aforementioned regulatory requirements. On remand, employer may raise its additional arguments before the administrative law judge to be considered in the first instance.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is vacated, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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JUDITH S. BOGGS  
Administrative Appeals Judge

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GREG J. BUZZARD  
Administrative Appeals Judge

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RYAN GILLIGAN  
Administrative Appeals Judge