

BRB No. 12-0004 BLA

JANET M. BRINK)
(Widow of GLENN L. BRINK))
)
Claimant-Respondent)
)
v.)
)
BENJAMIN COAL COMPANY,)
INCORPORATED) DATE ISSUED: 09/26/2012
)
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 Granting Director's Motion for Summary Decision and Awarding Survivor's Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Robert J. Bilonick (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Edward K. Dixon and Ryan M. Krescanko (Zimmer Kunz, PLLC), 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: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Director's Motion for Summary Decision and Awarding Survivor's Benefits (11-BLA-5833) of Administrative Law Judge Thomas M. Burke 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, affecting claims filed after January 1, 2005, were enacted. The amendments, in pertinent part, revive Section 932(l) of the Act, which provides that a survivor of a miner who was determined to be 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).

Claimant filed her claim for survivor's benefits on July 16, 2010. Director's Exhibit 2. The district director awarded benefits to claimant pursuant to amended Section 932(l), and employer requested a hearing. Director's Exhibits 7, 11.

On July 11, 2011, the Director, Office of Workers' Compensation Programs (the Director), moved for a summary decision, asserting that, pursuant to amended Section 932(l), claimant was automatically entitled to benefits as a matter of law, and that there was no genuine issue as to any material fact concerning her entitlement. Employer responded, arguing that amended Section 932(l) should not be applied.

In his Decision and Order, the administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 932(l). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the application of amended Section 932(l) to this case. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director responds in support of the administrative law judge's application of amended Section 932(l) to this case, and urges the Board to affirm the administrative law judge's award of benefits. Employer replies, reiterating its contentions.

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,

¹ Claimant is the widow of the miner, who died on August 12, 2009. Director's Exhibit 5. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim. Director's Exhibit 1.

and in accordance with applicable law.² 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 argues that the retroactive application of amended Section 932(l) is unconstitutional, because it effectively creates an irrebuttable presumption that a miner’s death was due to pneumoconiosis, and constitutes an unlawful taking of employer’s property, in violation of the Fifth Amendment to the United States Constitution. Employer’s Brief at 13-18. Employer argues further that amended Section 932(l) is rendered unenforceable by inconsistent language contained in other sections of the Act which, employer asserts, require claimant to establish that the miner’s death was due to pneumoconiosis. Employer’s Brief at 18-21, *citing* 30 U.S.C. §§921(a), 922(a)(2). The United States Court of Appeals for the Third Circuit, however, recently rejected all of these same arguments. *B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 247-63, 25 BLR 2-13, 2-35-63 (3d Cir. 2011). For the reasons set forth in *Campbell*, we reject employer’s arguments.³

In this case, the administrative law judge found that claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under amended Section 932(l): That she filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending on March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death. Therefore, we affirm the administrative law judge’s determination that claimant is entitled to receive benefits pursuant to amended Section 932(l) of the Act. 30 U.S.C. §932(l).

² The record reflects that the miner’s coal mine employment was in Pennsylvania. Director’s Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

³ Employer’s request, that this case be held in abeyance “until all appellate remedies have been exhausted in” *B&G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011), is denied. Employer’s Brief at 5.

Accordingly, the administrative law judge's Decision and Order Granting Director's Motion for Summary Decision and Awarding Survivor's Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge