

BRB No. 93-1768 BLA

TRESA SPEELMAN )  
(Widow of EMMETT SPEELMAN) )  
)  
Claimant-Petitioner )  
)  
v. )  
)  
TUNNELTON MINING COMPANY )  
) DATE ISSUED:  
Employer-Respondent )  
)  
)  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
)  
Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen (United Mine Workers of America), Waynesburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose), Johnstown, Pennsylvania, for employer.

Anne Swiatek (Thomas S. Williamson, Jr., Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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.

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PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order (92-BLA-1457) of

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<sup>1</sup>Claimant is Tresa Speelman, the widow of the miner, Emmett Speelman. The miner filed a claim for benefits on November 14, 1988, Director's Exhibit 1, and the district director issued an award of benefits on May 24, 1988, ordering benefits to be paid as of September 1, 1988. Director's Exhibit 18. The miner died on October 24, 1989, and on February 22, 1990, claimant filed a Request for Modification on the ground that the evidence showed that the miner had complicated pneumoconiosis as of

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May, 1978. Director's Exhibit 25. The district director found that the miner was totally disabled by complicated pneumoconiosis from May 1, 1978, but that, because the miner was employed from May 1, 1978 to September 6, 1988, any benefits due during that time are completely offset by the miner's earnings. Director's Exhibit 26. Claimant then requested a formal hearing. Director's Exhibit 28.

Administrative Law Judge Daniel L. Leland denying modification on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge determined that 30 U.S.C. §932(g) of the Act precludes claimant from receiving benefits from May 1, 1978 to September 1, 1988 because her husband's earnings completely offset his black lung benefits. Accordingly, he found that claimant is not entitled to any additional compensation.

On appeal, claimant contends that the Act provides an exception in 30 U.S.C. §923(d) which allows for the payment of benefits when a miner with complicated pneumoconiosis continues to work. Claimant's Brief at 3-4. Claimant further contends that if 20 C.F.R. §725.536 applies to reduce the benefits of a working miner who suffers from complicated pneumoconiosis, then the regulation is inconsistent with the Act and unconstitutional. Claimant's Brief at 4-5. Employer and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the administrative law judge's Decision and Order.

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 413(d) states: "No miner who is engaged in coal mine employment shall (except as provided in section 411 (c)(3)) [30 U.S.C. §921(c)(3)] be entitled to any benefits under this part while so employed." Section 411(c)(3) establishes the irrebuttable presumption of total disability due to pneumoconiosis for miners with complicated pneumoconiosis.

In his Decision and Order, the administrative law judge acknowledges that, pursuant to Section 413(d), a miner with complicated pneumoconiosis who continues to work may qualify for benefits. Decision and Order at 4. However, the administrative law judge found that, although a miner with complicated pneumoconiosis may establish entitlement to benefits while continuing to work, any benefits that he receives will be offset by the amount of compensation that he received while working pursuant to Section 422(g). In 1981, Section 422(g) was amended as follows:

In addition, the amount of benefits payable under this section with respect to any claim filed on or after the effective date of the Black Lung Benefits Amendments of 1981 shall be reduced, on a monthly or other

appropriate basis, by the amount by which such benefits would be reduced on account of excess earnings of such miner under section 203(b) through (l) of the Social Security Act [42 USC §403(b)-(l)] if the amount paid were a benefit payable under section 202 of such Act.

30 U.S.C. §932(g). Further, the Secretary of Labor implemented the changes by regulation, which states:

In the case of a surviving parent, brother, or sister, whose claim was filed at any time, or of a miner whose claim was filed on or after January 1, 1982, benefit payments are reduced as appropriate by an amount equal to the deduction which would be made with respect to excess earnings under the provisions of sections 203(b), (f), (g), (h), (j) and (l), of the Social Security Act..., as if such benefit payments were benefits payable under section 202 of the Social Security Act....

20 C.F.R. §725.536. (Emphasis added.)

Thus, although the miner may establish entitlement to benefits if he has complicated pneumoconiosis and continues to work, any benefit payments made to him will be reduced by the amount of income earned during the time that he is working.<sup>2</sup> See n. 1.

Claimant contends that because Section 422(g) does not refer to Sections 411(c)(3) or 413(d), these sections are exempt from the 1981 amendments. Claimant's Brief at 4. This contention is without merit. Neither the statute nor the regulation mentions any exception for miners with complicated pneumoconiosis. Inasmuch as the miner's claim was filed in 1988, the 1981 Amendments, including the amendment to Section 422(g), are applicable to the claim.

Claimant further contends that Section 725.536 is unconstitutional and inconsistent with the Act. Claimant's Brief at 4. This contention is without merit,

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<sup>2</sup>We agree that the Director's interpretation of the excess earnings offset provision, 30 U.S.C. 932(g) as implemented by 20 C.F.R. §725.536, is entitled to deference. See *Hillibush v. U.S. Department of Labor*, 853 F.2d 197, 11 BLR 2-223 (3d Cir. 1988); *Bethlehem Mines Corp. v. Simila*, 766 F.2d 128 (3d Cir. 1985); cf. *Director, OWCP v. Eastern Associated Coal Corp. [O'Brockta]*, F.3d , No. 94-3254 (3d Cir. April 24, 1995); *Cort v. Director, OWCP*, 996 F.2d 1549, 17 BLR 2-166 (3d Cir. 1993).

however, as Section 725.536 merely implements Section 422(g) and is consistent with the language of that section.

Accordingly, we affirm the administrative law judges Decision and Order denying modification.

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge