



BRB No. 22-0396 BLA

ROSEMARY BAILEY)
(Widow of SHERMAN BAILEY))
)
Claimant-Respondent)

v.)

HERITAGE COAL COMPANY, LLC)
)
and)

PEABODY ENERGY CORPORATION)
)
Employer/Carrier-)
Petitioners)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 04/11/2023

DECISION and ORDER

Appeal of the Order Granting Claimant’s Motion for Summary Decision of
Lauren C. Boucher, Administrative Law Judge, United States Department of
Labor.

Joseph E. Wolfe and Donna E. Sonner (Wolfe Williams & Reynolds),
Norton, Virginia, for Claimant.

Paul E. Frampton (Bowles Rice LLP), Charleston, West Virginia, for
Employer and its Carrier.

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, ROLFE, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Lauren C. Boucher's Order Granting Claimant's Motion for Summary Decision (2020-BLA-05808) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a survivor's claim filed on February 24, 2020.¹

The ALJ determined that because the Miner was found eligible to receive benefits at the time of his death,² Claimant is automatically entitled to survivor's benefits under Section 422(*l*) of the Act, 30 U.S.C. §932(*l*) (2018).³ Thus, the ALJ awarded benefits.⁴

On appeal, Employer argues the ALJ erred in awarding Claimant survivor's benefits under Section 422(*l*) because the miner's claim was pending on appeal before the Board and was not final. It further argues the ALJ erred in granting summary decision when other issues were raised. Both Claimant and the Director, Office of Workers' Compensation

¹ Claimant is the widow of the Miner, who died on April 15, 2019, while his claim was pending before ALJ Lystra A. Harris. Director's Exhibit 3. Claimant pursued the miner's claim on behalf of her husband's estate and her survivor's claim separately. Director's Exhibits 1, 3.

² ALJ Harris awarded benefits in the miner's claim on February 9, 2022. Employer appealed her award of benefits to the Benefits Review Board.

³ Under Section 422(*l*) of the Act, a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2018).

⁴ On April 18, 2021, Claimant filed a Motion for Summary Decision. Claimant's Motion for Summary Decision. The ALJ granted Claimant's motion on May 27, 2022. Order Granting Claimant's Motion for Summary Decision.

Programs (the Director), filed responses in support of the ALJ's Order granting summary decision.

The Board's scope of review is defined by statute. We must affirm the ALJ's Order if it is rational, supported by substantial evidence, and in accordance with applicable law.⁵ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Initially, we note an award of benefits in a miner's claim need not be final nor effective for a claimant to receive survivor's benefits under Section 422(l). *See Rothwell v. Heritage Coal Co.*, 25 BLR 1-141, 1-145-47 (2014); Order Granting Summary Decision at 2. Moreover, subsequent to Employer's filing of its brief in the present appeal, the Board affirmed ALJ Harris's decision awarding benefits in the miner's claim and finding that Employer and its Carrier are liable for benefits. *Bailey v. Heritage Coal Co., LLC*, BRB No. 22-0190 BLA (Jan. 27, 2023) (unpub.). Therefore, Employer's contentions that the ALJ erred in granting summary judgment, awarding automatic survivor's benefits, and failing to address the "liability issues" are moot.⁶ Employer's Brief at 3-5.

The ALJ found Claimant established each element necessary to demonstrate entitlement under Section 422(l): she filed her claim after January 1, 2005; she is an eligible survivor of the Miner; her claim was pending on or after March 23, 2010; and the Miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(l); Order Granting Summary Decision at 2-3. Because we previously affirmed the award of benefits in the miner's claim and Employer raises no additional challenges to the

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the Miner performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); *see also Bailey v. Heritage Coal Co., LLC*, BRB No. 22-0190 BLA, slip op. at 3 n.6 (Jan. 27, 2023) (unpub.).

⁶ Moreover, Employer forfeited its ability to challenge its liability in this case by failing to independently raise the issue before the ALJ or to respond to Claimant's motion for summary decision. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003); *Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73, 1-75 (1986); Order Granting Summary Decision at 1. Further, even if Employer had not forfeited its liability defense, it would be collaterally estopped based on the Board's holding in the miner's claim that it is liable. *Parklane Hosiery Co. Inc. v. Shore*, 439 U.S. 322, 327 (1979); *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217 (4th Cir. 2006); *see* Director's Brief at 9-10.

award of benefits in the survivor's claim, we affirm it. 30 U.S.C. §932(l); *see Thorne v. Eastover Mining Co.*, 25 BLR 1-121, 1-126 (2013).

Accordingly, the Order Granting Claimant's Motion for Summary Decision is affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge