BRB No. 09-0666 BLA

BEULAH ANN MATHEWS (Widow of BRUCE MATHEWS)	)	
Claimant-Respondent	)	
v.	)	
UNITED POCAHONTAS COAL COMPANY	)	
and	)	
	)	DATE ISSUED: 09/22/2010
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 – Award of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Sarah M. Hurley (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (06-BLA-5675) of Administrative Law Judge Thomas F. Phalen, Jr., rendered on a survivor's claim[1] 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). Adjudicating the claim under 20 C.F.R. Part 718, the administrative law judge credited the miner with at least thirty-nine years of coal mine employment, as supported by the record. The administrative law judge found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), through application of the doctrine of collateral estoppel. The administrative law judge further found that claimant established that pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits.

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, were enacted. The amendments, in pertinent part, revive Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that a 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.[2] 30 U.S.C. §932(*l*).

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[1] Claimant is the widow of the miner, who died on August 10, 2005. Director's Exhibit 7. Claimant filed her claim for survivor's benefits on October 3, 2005. Director's Exhibit 3. At the time of his death, the miner was receiving federal black lung benefits pursuant to a final award on his lifetime claim. Director's Exhibit 1.

[2] As it existed prior to March 23, 2010, Section 422(*l*) provided that:

> In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner, except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981, [*sic*].

30 U.S.C. §932(*l*). On March 23, 2010, Public Law No. 111-148 amended Section 422(*l*) as follows: "(b) Continuation of Benefits – Section 432(*l*) of the Black Lung Benefits Act (30 U.S.C. §932(*l*)) is amended by striking 'except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981'." Pub. L. No. 111-148, §1556(b), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §932(*l*)). Section 1556 of Public Law No. 111-148 provides further that "[t]he amendments made by this section shall apply with respect to claims filed under part B or

By Order dated April 7, 2010, the Board permitted the parties to submit supplemental briefing to address the impact on this case of the new amendments. The Director, Office of Workers' Compensation Programs (the Director), and employer responded, and agree that the recent amendment to Section §932(*l*) is applicable to this case. The Director further asserts that Section 932(*l*) mandates an award of benefits, regardless of whether claimant is able to prove that the miner had pneumoconiosis, or that his death was due to pneumoconiosis. By contrast, employer asserts that retroactive application of the Section 932(*l*) amendment to claims, such as this one, filed after January 1, 2005 is unconstitutional, because it would violate employer's due process rights, and would constitute an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. In the alternative, employer requests that this case be held in abeyance until sixty days after the Department of Labor (DOL) issues guidelines or promulgates regulations implementing the new amendments. In response to the Board's request for additional briefing, the Director has filed a response to employer's arguments, urging the Board to reject employer's constitutional challenge to the retroactive application of amended Section 932(*l*) to claims filed after January 1, 2005.[3]

Regarding the merits of entitlement in claimant's survivor's claim, employer contends that the administrative law judge erred in applying the doctrine of collateral estoppel to find the existence of pneumoconiosis established under 20 C.F.R. §718.202(a). Employer further asserts that the administrative law judge erred in finding that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c). Claimant did not file a brief in response to employer's appeal. The Director declined to file a response brief relevant to the merits of entitlement.

We turn first to employer's argument that it is unconstitutional to apply Section 932(*l*) to claims, such as this one, filed prior to the March 23, 2010, amendments to the Act. Employer concedes that Congress has the right to enact retroactive legislation, as long as the statute serves a legitimate legislative purpose and is furthered by rational

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part C of the Black Lung Benefits Act (30 U.S.C. §921 et seq., 931 et seq.) after January 1, 2005, that are pending on or after the date of enactment of this Act." Pub. L. No. 111-148, §1556(c).

[3] On September 10, 2010 employer filed a brief entitled "Reply Brief on Behalf of the West Virginia CWP Fund, as Carrier for United Pocahontas Coal Company." The brief was not accompanied by a motion to accept additional briefing, nor did it contain any argument as to why the Board should accept this additional brief. Thus, we decline to accept employer's additional brief.

means. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-20, 3 BLR 2-36, 2-43-47 (1975); Employer's Supplemental Brief at 7-8. Employer also concedes that "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery*, 428 U.S. at 15, 3 BLR at 2-43; Employer's Brief at 7. However, relying on *Eastern Enterprises v. Apfel*, 524 U.S. 498, 529-37 (1998), employer contends that retroactive application of amended Section 932(*l*) to claims filed after January 1, 2005 is a violation of due process because Congress provided no "legitimate purpose" for making the legislation retroactive, and arbitrarily chose January 1, 2005 as the operative filing date for the application of amended Section 932(*l*). Employer's Supplemental Brief at 8.

We disagree. As the Director asserts, examination of the legislative history discloses that the sponsor of the amendments, Senator Robert C. Byrd, explained that amended Section 932(*l*) would apply not only to all future miners' and survivors' claims, but that it would "also benefit all of the claimants who have recently filed a claim, and are awaiting or appealing a decision or order, or who are in the midst of trying to determine whether to seek a modification of a recent order." Director's Brief at 6, *citing* 156 Cong. Rec. S2083-84 (daily ed. Mar. 25, 2010)(statement of Sen. Byrd). Thus, the rational purpose for applying amended Section 932(*l*) retroactively is to compensate the survivors of deceased miners "for the effects of disabilities bred in the past." *See Usery*, 428 U.S. at 15, 3 BLR at 2-43 (upholding the retroactive application of the Black Lung Benefits Act of 1972); Director's Brief at 6, 11 n.4.

Nor is there merit to employer's assertion that Congress' choice of January 1, 2005 as the operative filing date for the application of amended Section 932(*l*) violates due process. As the Director points out, the United States Supreme Court has "never insisted that a legislative body articulate its reasons for enacting a statute . . . particularly . . . where the legislature must necessarily engage in a process of line-drawing." Director's Brief at 6, *quoting U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980). "The 'task of classifying persons for . . . benefits . . . inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line.'" *Fritz*, 449 U.S. at 179, *quoting Mathews v. Diaz*, 426 U.S. 67, 83-84 (1976).

Moreover, employer's reliance on *Apfel* is misplaced. In *Apfel*, the Court held that retroactive application of the Coal Industry Retiree Health Benefit Act (Coal Act) to one particular former operator was unconstitutional because it required the former operator to fund health benefits for retired miners who had worked for the operator before it left the coal industry. *Apfel*, 524 U.S. at 528-39. The Court did not hold, as employer implies, that retroactive application of any economic legislation necessarily violates due process.

Moreover, as the Director contends, *Apfel* undercuts employer's assertion. Justice O'Connor, writing for the Court, emphasized that the disproportionate and severe retroactive burden placed upon the former operator by the Coal Act, which rendered the Coal Act unconstitutional, as applied to the former operator, "differ[ed] from coal operators' responsibility for benefits under the Black Lung Benefits Act of 1972. That legislation merely imposed 'liability for the effects of disabilities bred in the past [that] is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor.'" *Apfel*, 524 U.S. at 536, *quoting Usery*, 428 U.S. at 18, 3 BLR at 2-45; Director's Brief at 11 n.4. Thus, *Apfel* is not only distinguishable from the instant case; it does not support employer's position. We hold, therefore, that employer has not met its burden to establish that retroactive application of amended Section 932(*l*) is a violation of due process.

We turn next to employer's assertion that retroactive application of amended Section 932(*l*) to this case constitutes an unlawful taking of employer's property under the Fifth Amendment. The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. There is no dispute that a "takings" analysis may apply to general economic regulations which, in effect, transfer a property interest from one party to another for the greater good, and is not limited to outright acquisitions of property by the government for itself. *See Yee v. City of Escondido*, 503 U.S. 519, 522 (1992); Employer's Supplemental Brief at 11; Director's Brief at 7. Employer and the Director also agree that, while there is no set formula for determining whether a regulatory taking has occurred, the Court has set forth a factually specific, three-prong analysis, inquiring into: 1) the economic impact of the regulation on the complainant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and 3) the character of the governmental action. *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-25 (1985); Employer's Supplemental Brief at 9; Director's Brief at 8.

Employer asserts that the economic impact of amended Section 932(*l*) on employer, and its carrier, the West Virginia CWP Fund (the Fund), is substantial. Employer's Supplemental Brief at 10-11. Employer explains that the Fund based its assessment of premiums for federal black lung insurance for 2005 on the number of claims awarded in prior years under the Act, as it then existed. Employer's Supplemental Brief at 10-11. Employer asserts that retroactive application of amended Section 932(*l*) will substantially alter those projections, because the number of claims filed with a date of last exposure before December 31, 2005 that will be awarded will significantly increase. Employer's Supplemental Brief at 11. Employer contends that the Fund had no notice that Section 932(*l*) would be amended and, thus, it had no opportunity to adjust its premiums to cover the increase in claims that will be awarded as a result of amended Section 932(*l*). Employer's Supplemental Brief at 11.

While amended Section 932(*l*) may affect employer and its carrier, financially, the assessment of the economic impact on an employer "directly depends on the relationship between the employer and the plan to which it had made contributions" and the impact must be "out of proportion" to employer's experience with the plan. *Connolly*, 475 U.S. at 225-26; Director's Brief at 10. In this case, however, employer has offered no direct proof of its financial situation, without which, it is difficult to assess the degree of economic impact that amended Section 932(*l*) will have on employer. Therefore, on the facts of this case, we agree with the Director that employer has not met its burden to establish this prong of the takings analysis. *See United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989).

Employer further asserts that amended Section 932(*l*) interferes with employer's investment-backed expectations by imposing a harsh new liability that employer could not have foreseen in 2005, depriving employer of the opportunity to adjust its conduct to avoid or minimize any adverse effect. Employer's Brief at 10. Contrary to employer's argument, as the Director asserts, since 1974, the federal black lung benefits program has required each policy issued to cover liabilities under the Act to include the Federal Coal Mine Health and Safety Act endorsement. 20 C.F.R. §726.203(a); Director's Brief at 9. This endorsement provides, in pertinent part, that insurers are liable for their principals' obligations under the Act "and any laws amendatory thereto, or supplementary thereto, which may be or become effective while this policy is in force . . . ." 20 C.F.R. §726.203(a); Director's Brief at 9. We agree with the Director that the inclusion of this endorsement in the policies issued to employer by its carrier supports a conclusion that employer has been on notice that it may be liable for any liability arising from amendments to the Act. Moreover, "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Usery*, 428 U.S. at 16, 3 BLR at 2-44. Thus, we conclude that the alleged disruption of employer's investment-backed expectations, under the facts presented here, does not support a conclusion that the application of amended Section 932(*l*) effects an unlawful taking of employer's property.

Employer next asserts that the retroactive character of amended Section 932(*l*) renders it constitutionally suspect. We disagree. First, as the Director asserts, "the enactment of retroactive statutes . . . is a customary congressional practice," Director's Brief at 10, *quoting Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 731 (1984), and Congress may "impose retroactive liability to some degree, particularly where it is 'confined to short and limited periods required by the practicalities of producing national legislation,'" without effecting an unconstitutional taking. *Apfel*, 524 U.S. at 529, *quoting Gray*, 467 U.S. at 731. Moreover, as the Director observes, the character of the governmental action in this case is not one where the government has physically invaded or permanently appropriated any of employer's assets for its own use. *See Connolly*, 475 U.S. at 225; Director's Brief at 11. Instead, retroactive application of

amended Section 932(*l*) "adjust[s] the benefits and burdens of economic life to promote the common good." *Connolly*, 475 U.S. at 225; Director's Brief at 11. For the foregoing reasons, we agree with the Director and hold that, under the facts presented, employer has not met its burden to establish that retroactive application of amended Section 932(*l*) to this case constitutes an unlawful taking of employer's property under the Fifth Amendment. *See Sperry Corp.*, 493 U.S. at 60.

Employer alternatively asserts that, because it had no notice of the change in law effected by the recent amendments, due process and the Administrative Procedure Act (APA), 5 U.S.C. §§554, 556(d), 557, as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), require that the case be remanded, with instructions for the record to be reopened to allow employer the "opportunity to develop its defense with notice of the new burdens of proof and presumptions created by" the Section 932(*l*) amendment. Employer's Supplemental Brief at 4-5. Employer further contends that application of the new amendment may require employer to choose an entirely new strategy in its defense, necessitating different medical experts or medical evidence. Thus, employer argues, due process and the APA require that employer be permitted to develop whatever new evidence it deems necessary to respond to the changes in law, without the constraints of the limitations on evidence set forth at 20 C.F.R. §725.414.

Based on the facts of this case, we hold that employer's contentions lack merit. As discussed above, the amendment to Section 932(*l*) provides that a 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*). Employer agrees that amended Section 932(*l*) is applicable to this case, as claimant filed her claim after January 1, 2005, her claim was pending on March 23, 2010, and the miner was in payment status at the time of his death. Employer's Supplemental Brief at 3. Thus, claimant is derivatively entitled to survivor's benefits pursuant to 30 U.S.C. §932(*l*). Consequently, as amended Section 932(*l*) does not afford employer the opportunity to defend the claim once derivative entitlement has been established, employer's request that the case be remanded with instructions for the record to be reopened, is denied.

Finally, we reject employer's request that this case be held in abeyance until sixty days after DOL issues guidelines or promulgates regulations implementing amended Section 932(*l*). As the Director contends, the mandatory language of amended Section 932(*l*) supports the conclusion that the provision is self-executing, and, therefore, there is no need to hold this case in abeyance, pending the promulgation of new regulations. *See, e.g., Hanson v. Marine Terminals Corp.*, 307 F.3d 1139, 1141-42 (9th Cir. 2002); *Alabama Power Co. v. FERC*, 160 F.3d 7, 12-14 (D.C. Cir. 1998); *Gholston v. Housing Authority of Montgomery*, 818 F.2d 776, 784-87 (11th Cir. 1987). Employer also notes

that the constitutionality of Public Law No. 111-148 has been challenged in a lawsuit filed in the United States District Court for the Northern District of Florida. Employer therefore requests that "[p]otentially affected federal black lung claims . . . be held in abeyance until resolution of this legal challenge . . . ." Employer's Supplemental Brief at 13. Employer does not indicate that any court has yet enjoined the application, or ruled on the validity of, the recent amendments to the Act. Consequently, employer's request to hold this case in abeyance is denied, and we affirm the award of benefits on the basis that claimant is derivatively entitled to survivor's benefits.[4]

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[4] In light of our disposition herein, we need not address the administrative law judge's findings regarding the merits of entitlement, pursuant to 20 C.F.R. §§718.202(a), 718.205(c).