

BRB No. 10-0494 BLA

HELEN L. FAIRMAN)	
(Widow of CLARK M. FAIRMAN))	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED: 04/29/2011
HELEN MINING COMPANY)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Summary Decision of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Christopher Pierson (Burns, White & Hickton, LLC), Pittsburgh, Pennsylvania, for employer.

Paul L. Edenfield (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Summary Decision (2009-BLA-5386) of Administrative Law Judge Michael P. Lesniak awarding benefits on a claim 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). This case involves a survivor's claim filed on March 17, 2008.¹

The administrative law judge held a hearing on September 16, 2009. 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).

On April 5, 2010, the administrative law judge ordered the parties to show cause why benefits should not be awarded in the survivor's claim pursuant to amended Section 932(l). The Director, Office of Workers' Compensation Programs (the Director), responded by moving 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. Claimant

¹ Claimant is the surviving spouse of the miner, who died on January 26, 2008. Hearing Transcript at 7. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim. Administrative Law Judge's Exhibits 1, 2.

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 422(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 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).

similarly contended that she was automatically entitled to benefits under amended Section 932(l). Employer disagreed, and requested that the case be held in abeyance pending resolution of legal challenges to Public Law No. 111-148. Employer further argued that retroactive application of Section 1556 of Public Law No. 111-148 was unconstitutional, and conflicted with other provisions of the Act. Finally, employer urged the administrative law judge to hold the case in abeyance until the Department of Labor (DOL) promulgates implementing regulations.

In a Summary Decision dated May 3, 2010, the administrative law judge noted that the miner was receiving benefits at the time of his death,³ that claimant filed her survivor's claim on March 17, 2008, and that she is an eligible survivor of the miner. The administrative law judge, therefore, 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 administrative law judge's application of amended Section 932(l) to this case. The Director responds, urging affirmance of the administrative law judge's award of benefits. Claimant has not filed a response brief.

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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer asserts that retroactive application of amended Section 932(l) is unconstitutional, as it violates employer's due process rights and constitutes an unlawful taking of employer's property. Employer's Brief at 5-7. Employer requests that this case be held in abeyance until the DOL issues guidelines or promulgates regulations implementing amended Section 932(l). *Id.* at 14-16. Further, employer argues that this case should be held in abeyance pending the resolution of legal challenges to Public Law No. 111-148. *Id.* at 7-8. Additionally, employer argues that amended Section 932(l) is ambiguous and unenforceable because it creates irreconcilable inconsistencies in the Act. *Id.* at 10-14. Finally, employer contends that Section 932(l) improperly relieves claimant of her burden of proof. *Id.* at 16. Employer's arguments lack merit.

³ The Director, Office of Workers' Compensation Programs, submitted a copy of the district director's March 17, 1997 Award of Benefits in the miner's claim, and claimant submitted a copy of the district director's April 18, 1997 Amended Award of Benefits. The administrative law judge admitted these documents into the record as Administrative Law Judge's Exhibits 1 and 2. Summary Decision at 2 n.1.

We reject employer's arguments regarding the constitutionality of the amendments, as applied to this case. The arguments employer makes are identical to the ones that the Board rejected in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-198-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order (unpub.)). We, therefore, reject them here for the reasons set forth in that case. *Mathews*, 24 BLR at 1-198-200; *see also Stacy v. Olga Coal Co.*, BLR , BRB No. 10-0113 BLA, slip op. at 8 (Dec. 22, 2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011).

Further, as we did in *Mathews*, we reject employer's request that this case be held in abeyance until the DOL issues guidelines or promulgates regulations implementing amended Section 932(l). As we noted in *Mathews*, the mandatory language of amended Section 932(l) supports the conclusion that the provision is self-executing, and, therefore, that there is no need to hold this case in abeyance pending the promulgation of new regulations. *Mathews*, 24 BLR at 1-201. Employer's request, that this case be held in abeyance pending resolution of the legal challenges to Public Law No. 111-148, is also denied. *See Mathews*, 24 BLR at 1-201.

We further reject employer's assertion that amended Section 932(l) is rendered unenforceable by language in Sections 411(a) and 412(a)(2) of the Act, 30 U.S.C. §§921(a), 922(a)(2). Employer's Brief at 10. Those two sections provide, in relevant part, that benefits are to be paid at the applicable rate to a survivor where a miner was totally disabled due to pneumoconiosis at the time of his death, "except with respect to a claim filed under part C of this subchapter on or after the effective date of the Black Lung Benefits Amendments of 1981. . . ." 30 U.S.C. §§921(a), 922(a)(2). Contrary to employer's assertion, Section 932(l), as amended, is not rendered inapplicable by the language in Sections 921(a) and 922(a)(2). In Section 1556, Congress specifically amended Section 932(l) by striking its former language stating that the provision could not apply to claims filed on or after the effective date of the Black Lung Benefits Amendments of 1981, and mandated that the amendment "*shall apply* with respect to claims," such as this one, "filed under . . . Part C . . . after January 1, 2005, that are pending on or after the date of enactment of this Act." Pub. L. No. 111-148, §1556(c), 124 Stat. 119 (2010)(emphasis added). Thus, survivors' claims filed after January 1, 2005, in which the survivor has derivative entitlement, are not subject to the inconsistent language that employer highlights in 30 U.S.C. §§921(a), 922(a)(2).

Employer also contends that it was denied due process because the hearing was held prior to the change in law on which the administrative law judge's decision was based. Employer's Brief at 7. In this case, as employer acknowledges, it was provided with a hearing on September 16, 2009. Contrary to employer's argument, the administrative law judge was not required to provide employer with a second hearing after the amendments to the Act were enacted on March 23, 2010. The Act and regulations mandate that an administrative law judge hold a hearing on any claim

whenever a party requests such a hearing, unless such hearing is waived by the parties or a party requests summary judgment pursuant to 20 C.F.R. §725.452.⁴ *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69, 1-72 (2000). In this case, the Director moved for summary judgment, arguing that there was no genuine issue of material fact concerning claimant's entitlement to benefits under amended Section 932(l). See 20 C.F.R. §725.452(c). Because there was no genuine issue of material fact concerning claimant's entitlement to benefits,⁵ the administrative law judge was not required to hold a second hearing. See *Pukas*, 22 BLR at 1-72.

We also reject employer's argument that amended Section 932(l) relieved claimant of her burden of proof, thereby contravening Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §556(d), 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). Amended Section 932(l) did not alter a survivor's burden of proof; it altered the facts that a certain class of survivors must prove to qualify for benefits. Here, 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 derivatively entitled to benefits pursuant to amended Section 422(l) of the Act, 30 U.S.C. §932(l).

⁴ Section 725.452(c) provides:

A full evidentiary hearing need not be conducted 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 that the moving party is entitled to the relief requested as a matter of law. All parties shall be entitled to respond to the motion for summary judgment prior to decision thereon.

20 C.F.R. §725.452(c).

⁵ Employer does not dispute that claimant filed her survivor's claim after January 1, 2005, 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. Moreover, there are no issues of eligibility in this case, since employer conceded that claimant is an eligible survivor. Hearing Transcript at 8.

Accordingly, the administrative law judge's Summary Decision awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge