

BRB No. 10-0516 BLA

PATRICIA DIXON)	
(Widow of ROBERT DIXON))	
)	
Claimant-Respondent)	
)	
v.)	
)	
PITTSBURGH & MIDWAY COAL)	DATE ISSUED: 04/21/2011
MINING COMPANY)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Order Awarding Survivor's Benefits of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman, Denver, Colorado, for claimant.

John C. Morton (Morton Law LLC), Henderson, Kentucky, for employer.

Jonathan P. Rolfe (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 Order Awarding Survivor's Benefits (2008-BLA-5568) of Associate Chief Administrative Law Judge William S. Colwell 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).²

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

On April 8, 2010, the administrative law judge advised the parties of the possible applicability of the amendments to this claim, and issued an order directing the parties to submit position statements. In response, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision on April 23, 2010, asserting that no material issue of fact was contested in this claim, and that under amended Section 422(l), and given the filing date of her claim, claimant was entitled to benefits based on the award to her deceased husband. Employer responded, asserting that an award of benefits was improper in this case because the miner's death was not due to pneumoconiosis. The administrative law judge determined that amended Section 422(l) was applicable, and that employer did not contest the issues of "relationship and dependency." Order at 2; Director's Exhibit 14. Accordingly, the administrative law judge found no disputed issues of fact, and, therefore, granted the Director's motion for summary decision and awarded survivor's benefits.

¹ Claimant is the widow of the miner, who filed his lifetime claim for benefits on March 26, 2002. Director's Exhibit 1. On October 26, 2006, Administrative Law Judge Richard K. Malamphy awarded benefits, and no further action was taken on the miner's claim. *Id.* The miner died on September 8, 2007, and claimant filed a claim for survivor's benefits on October 2, 2007. Director's Exhibits 2, 4.

² The recent amendments to the Act apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Pub. L. No. 111-148, §1556(c), 124 Stat. 119 (2010). Section 1556 of Public Law No. 111-148 amended Section 422(l) of the Act, to provide that a qualified survivor is automatically entitled to benefits without having to establish that the miner's death was due to pneumoconiosis, if the miner filed a successful claim and was receiving benefits at the time of his death. 30 U.S.C. §932(l), amended by Pub. L. No. 111-148, §1556(b), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §932(l)).

Employer appeals, arguing that Section 422(l) should not be interpreted as granting automatic entitlement to benefits, and that any such interpretation violates the constitutional guarantee to due process. The Director and claimant respond in support of the award of benefits. Employer has replied in support of its position.

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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer argues that the recent amendments create a rebuttable presumption of death due to pneumoconiosis rather than an automatic entitlement to survivor's benefits regardless of cause of death. In this regard, employer contends that amended Section 422(l) merely eliminates the need for a survivor to file a claim after the miner's death, but does not revive the Act's pre-1981 form, allowing automatic entitlement to benefits, since amended Section 422(l) conflicts with other sections of the Act that limit the categories of eligible beneficiaries. Employer further asserts that granting automatic entitlement to benefits violates a constitutional guarantee to due process and is contrary to the policy rationale behind the Act. Employer's Brief at 6-13. We disagree.

Contrary to employer's contention, amended Section 422(l) is not rendered ambiguous and unenforceable by earlier, contradictory provisions of the Act. As noted by the Director:

Where provisions in [] two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one.... *U.S. v. Posadas*, 296 U.S. 497, 503 (1936); *see also* 1A Norman A. Singer, SUTHERLAND STATUTORY CONSTRUCTION §22.22 (7th ed. 2010) ("Repeal by implication occurs when an act not purporting to repeal any prior act is wholly or partially inconsistent with a prior statute.... The latest declaration of the legislature prevails. The inconsistent provisions of the prior statute ... are treated as repealed."); *Chrysler Credit Corp. v. Burton*, 599 F. Supp. 1313 (M.D. N.C. 1984) ("If two acts of a legislature are applicable to the same subject, their provisions are to be reconciled if this can be done by fair and reasonable intendment; if, however, they are repugnant to one another, the last one enacted shall prevail.").

Director's Brief at 8. In view of the foregoing, amended Section 422(l), as the most recent enactment, controls in this case, and any contradictory provisions of the Act are deemed nullified.

Next, although employer correctly states that survivors are not required to file claims under amended Section 422(l), employer's conclusion, that a rebuttable presumption is created, is simply in error. Employer's Brief at 8; *see Stacy v. Olga Coal Co.*, ___ BLR ___, BRB No. 10-0113 BLA, slip. op. at 4, (Dec. 22, 2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011); *accord Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 12 BLR 2-60 (3d Cir. 1988).³ We find no merit in employer's assertion that automatic entitlement is "so unreasonable as to be purely arbitrary," a violation of the Fifth Amendment Due Process Clause, and contrary to the policy rationale of the Act. Employer's Brief at 12 n.5; *see Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 26, 3 BLR 2-36, 2-51 (1975). This Board has rejected similar arguments, holding that amended Section 422(l) does not violate the Fifth Amendment Due Process Clause and does not afford an employer the opportunity to defend the claim once derivative entitlement has been established. *See Stacy*, slip. op. at 4; *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010) (recon. denied). The Board has also noted that the rational purpose for applying amended Section 422(l) retroactively was to compensate the survivors of deceased miners "for the effects of disabilities bred in the past," *Mathews*, 24 BLR at 1-197, *citing Usury*, 428 U.S. at 15, 3 BLR at 2-43, which the Director asserts is the central policy behind the Act. Director's Brief at 10. Because claimant filed her claim after January 1, 2005, the claim was pending on March 23, 2010, and the miner was receiving benefits under a final award at the time of his death, we affirm the administrative law judge's finding that claimant is derivatively entitled to survivor's benefits pursuant to Section 422(l) based solely on the miner's lifetime award, without having to prove that the miner died due to pneumoconiosis. *Stacy*, slip op. at 7; *see* 30 U.S.C. §932(l).

³ While employer asserts that *Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 12 BLR 2-60 (3d Cir. 1988) does not stand for the proposition that 30 U.S.C. §932(l) authorizes derivative entitlement to survivor's benefits regardless of the cause of the miner's death, the United States Court of Appeals for the Third Circuit in *Pothering* noted the various amendments to the Act and the underlying discussions in Congress. In pertinent part, the Court cited the Congressional Record describing the pre-1981 law:

At present, survivors of miners who die while receiving black lung benefits or while totally disabled by the disease receive benefits without having to demonstrate a causal connection between the disease and death. . . These survivors will receive benefits even if the miner eventually dies from causes unrelated to black lung. 127 Cong. Rec. 29932 (1981)(Statement in Explanation of Black Lung Benefits and Revenue Amendments of 1981, introduced into the record.)

Pothering, 861 F.2d at 1327, 12 BLR at 2-69.

Accordingly, the administrative law judge's Order Awarding Survivor's Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge