

BRB No. 12-0424 BLA

SANDRA COLEMAN)
(Widow of RONALD COLEMAN))
)
 Claimant-Respondent)
)
 v.)
)
 TRI C COALS, INCORPORATED) DATE ISSUED: 04/12/2013
)
 and)
)
 WEST VIRGINIA COAL WORKERS')
 PNEUMOCONIOSIS FUND)
)
 Employer/Carrier-)
 Petitioners)
)
 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.

Kathy L. Snyder (Jackson Kelly, PLLC), Morgantown, West Virginia, for carrier.

Michelle S. Gerdano (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/Carrier (carrier) appeals the Order Awarding Survivor's Benefits (2012-BLA-5344) of Associate Chief Administrative Law Judge William S. Colwell, rendered on a survivor's claim filed on October 5, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).¹ The district director issued a Proposed Decision and Order awarding benefits on October 11, 2011. Director's Exhibit 7. Pursuant to carrier's request, the case was forwarded to the Office of Administrative Law Judges for a hearing. On January 30, 2012, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision, asserting that there was no genuine issue of material fact concerning whether claimant was entitled to benefits pursuant to amended 30 U.S.C. §932(*l*) of the Act.² The record reflects that counsel for carrier was not served with a copy of the motion and, therefore, did not file a response.³ Claimant also did not respond to the motion.

On May 3, 2012, the administrative law judge issued his Order Awarding Survivor's Benefits, finding that claimant satisfied the criteria for automatic entitlement to benefits pursuant to amended Section 932(*l*), in that her claim was filed after January 1, 2005, the claim was pending after March 23, 2010, and the miner was receiving benefits at the time of his death pursuant to a claim filed during his lifetime.⁴ The administrative law judge further determined that benefits should commence as of September 2011, the month in which the miner died.

¹ Claimant is the widow of the miner, Ronald Coleman, who died on September 15, 2011. Director's Exhibit 6.

² On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148 (2010). The amendments, in pertinent part, revive Section 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*).

³ The Certificate of Service attached to the Director's Motion for Summary Decision does not name carrier's counsel.

⁴ At the time of his death, the miner was receiving federal black lung benefits pursuant to an August 23, 1999 Decision and Order Awarding Benefits issued by Administrative Law Judge Lawrence P. Donnelly. Director's Exhibit 2.

On appeal, carrier argues that because its counsel was not copied on the Director's Motion for Summary Decision and had no opportunity to respond, the administrative law judge's award of benefits violates the regulations and its right to procedural due process. Carrier requests that the case be remanded to the administrative law judge in order that it may respond to the motion. Additionally, carrier argues that retroactive application of amended Section 932(l) to claims filed after January 1, 2005 is unconstitutional.⁵ Carrier contends that the operative date for determining eligibility pursuant to amended Section 932(l) is the date that the miner's claim was filed, not the date that the survivor's claim was filed. Finally, carrier asserts that because claimant has not proven that the miner's death was due to pneumoconiosis, she is not an eligible survivor of the miner.

Claimant has not filed a response brief. The Director responds, asserting that a remand would serve no useful purpose, as claimant satisfies the requirements for automatic entitlement to benefits under amended Section 932(l), carrier "has not identified any factual issues it would have raised in response to the motion, and [the administrative law judge's] resolution of the legal issues was mandated by Board precedent." Director's Letter Brief at 1 n.1. The Director argues that carrier has not been prejudiced since carrier has the opportunity on appeal to present all of its arguments in opposition to the Motion for Summary Decision that it was not provided below. The Director also urges the Board to reject carrier's arguments pertaining to the constitutionality and applicability of amended Section 932(l).

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

Under 20 C.F.R. §725.452(c), "[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." 20 C.F.R. §725.452(c); *see also* 29 C.F.R.

⁵ Carrier's request to hold this case in abeyance is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012); *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *cert. denied*, 568 U.S. (2012).

⁶ The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner's most recent coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 2.

§18.40(a); *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69, 1-72 (2000). The regulations require that “[a]ll parties shall be entitled to respond to the motion for summary judgment.” 20 C.F.R. §725.452(c). In reviewing an administrative law judge’s order granting summary judgment, the Board views the record in the light most favorable to the non-moving party. *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204, 207 (1999).

There is no dispute that carrier’s counsel was not copied on the Director’s Motion for Summary Decision. However, viewing the record in the light most favorable to carrier, we conclude that the Director’s lack of service to carrier’s counsel of the Motion for Summary Decision does not rise to the level of a procedural due process violation. A fundamental requirement of due process is the opportunity to be heard to ensure a fair disposition of the case. *Grannis v. Ordean*, 234 U.S. 385 (1914). The United States Court of Appeals for the Fourth Circuit applies a straightforward test for determining whether an employer has been denied due process: “did the government deprive the employer of ‘a fair opportunity to mount a meaningful defense to the proposed deprivation of its property.’” *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 183, 21 BLR 2-545, 2-559-60 (4th Cir. 1999), quoting *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 807, 21 BLR 2-302, 2-322 (4th Cir. 1998). The Fourth Circuit has emphasized that not every administrative error rises to the level of a violation of due process, in the absence of a showing of prejudice. See *Grigg v. Director, OWCP*, 28 F.3d 416, 420 n.7, 18 BLR 2-299, 2-308 n.7 (4th Cir. 1994).

To defeat a motion for summary decision, the party opposing the motion must establish the existence of a genuine issue of material fact, which is defined as a fact which affects the outcome of the litigation. See *Dunn*, 33 BRBS at 207. On appeal, carrier fails to present any specific facts to show that a genuine issue of material fact exists to preclude an award of benefits under amended Section 932(l).⁷ *Id.* Carrier challenges only the constitutionality and applicability of amended Section 932(l) on grounds that have been addressed by the Board and the Fourth Circuit, as discussed *infra*. Thus, carrier has not shown in this appeal how it was prejudiced or why a remand is necessary in order to respond to the Director’s Motion for Summary Decision. Because carrier has been given an opportunity in this appeal to present all of its arguments in opposition to the Director’ Motion for Summary Decision, we conclude that it has received a fair opportunity to mount a meaningful defense and, therefore, has not been deprived of due process. See *Borda*, 171 F.3d at 183, 21 BLR at 2-559-260; *Grigg*, 28

⁷ Carrier does not challenge the administrative law judge’s finding that claimant is the surviving widow of the miner, see 20 C.F.R. §725.204, nor does carrier assert that the miner was not receiving benefits at the time of death. See Order Awarding Survivor’s Benefits at 1; Director’s Exhibits 2-5.

F.3d at 420 n.7, 18 BLR at 2-308 n.7; *Dunn*, 33 BRBS at 207. We, therefore, deny carrier's request for remand.

With respect to the propriety of the award of benefits, we reject carrier's contention that retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005, constitutes a due process violation and an unlawful taking of private property under the Fifth Amendment of the United States Constitution. *See W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *cert. denied*, 568 U.S. (2012); *B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010). Accordingly, we deny carrier's request to remand this case to the administrative law judge for development of evidence regarding the economic impact of amended Section 932(l), in order to establish that an unconstitutional taking has occurred. *See Stacy*, 671 F.3d at 387, 25 BLR at 2-80.

Additionally, there is no merit to carrier's assertion that amended Section 932(l) is not applicable, based on the filing date of the miner's claim. The Fourth Circuit has affirmed the Board's holding that the operative date for determining eligibility for survivor's benefits under amended Section 932(l) is the date that the survivor's claim was filed, not the date that the miner's claim was filed. *See Stacy*, 671 F.3d at 388, 25 BLR at 2-83; Order Awarding Survivor's Benefits at 2. For the reasons set forth in *Stacy*, we reject carrier's arguments to the contrary. We also reject, as meritless, carrier's argument that claimant must establish that the miner's death was due to pneumoconiosis in order to be an "eligible survivor" of the miner. *See Fairman v. Helen Mining Co.*, 24 BLR 1-225 (2010); Order Awarding Survivor's Benefits at 2.

Because the record establishes that claimant is an eligible survivor of the miner, that claimant filed her survivor's claim after January 1, 2005, that it was pending on March 23, 2010, and that the miner was receiving benefits under a final award at the time of his death, we affirm the administrative law judge's determination that claimant is entitled to receive survivor's benefits pursuant to amended Section 932(l).

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

BETTY JEAN HALL
Administrative Appeals Judge