

BRB No. 10-0666 BLA

SOPHIA DURATZ)
(Widow of DONALD DURATZ))
)
Claimant-Respondent)
)
v.)
)
U.S. STEEL CORPORATION) DATE ISSUED: 08/10/2011
)
Employer-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Daniel L. Leland,
Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, HALL and
BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2010-BLA-5439)
of Administrative Law Judge Daniel L. Leland rendered on a survivor's claim¹ filed

¹ Claimant is the widow of the miner. The administrative law judge indicated that the miner filed a claim for lifetime black lung benefits on July 18, 1994, and that he issued a Decision and Order awarding benefits in the miner's claim on December 11, 1996. Decision and Order at 1. The miner died on April 12, 2009. Survivor's Claim Director's Exhibit 7. Claimant filed a survivor's claim on May 28, 2009. Survivor's Claim Director's Exhibit 2.

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).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, became effective. 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 June 21, 2010, the administrative law judge advised the parties of the applicability of the amendments to this claim, and issued an order directing the parties to submit position statements addressing why benefits should not be awarded to claimant pursuant to amended Section 932(l). Claimant and employer responded. Claimant contended that she is automatically entitled to benefits under Section 1556 of Public Law No. 111-148, based on the award of benefits to her deceased husband and the filing date of her claim. Employer argued that retroactive application of the amendments contained within the Patient Protection and Affordable Care Act (PPACA) is contrary to law, denies the parties due process, and constitutes an unconstitutional taking of private property. Employer also alleged that the entire PPACA is unconstitutional and requested that this case be held in abeyance until the resolution of a legal challenge to the PPACA. In addition, employer contended that the recent amendments create irreconcilable inconsistencies in the Act and, thus, that Section 1556 of the PPACA does not create an entitlement to survivor's benefits simply because the miner was receiving benefits at the time of his death. Employer further argued that this claim should be held in abeyance until the Department of Labor promulgates regulations implementing the recent amendments. Employer also contended that Section 1556 of the PPACA violates the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), because the amendments create irreconcilable inconsistencies in the Act with respect to claimant's burden of proof. Finally, employer maintained that the district director did not determine whether claimant is an eligible survivor of the miner and, therefore, claimant is not entitled to an award of benefits under the recent amendments.

The administrative law judge found that claimant is an eligible survivor of the miner, *see* 20 C.F.R. §§725.212(a), 725.214, 725.215(g), and meets the eligibility requirements for application of amended Section 422(l), as she filed her survivor's claim for benefits after January 1, 2005, the claim was pending on March 23, 2010, the effective date of the amendments, and the miner was receiving lifetime benefits at the time of his death. Accordingly, the administrative law judge found that claimant was entitled to survivor's benefits, commencing as of April 1, 2009.

On appeal, employer reiterates most of the arguments that it raised before the administrative law judge and contends that the administrative law judge erred in relying on evidence that is not in the record to determine that the miner was awarded benefits.² Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging the Board to reject employer's arguments and affirm the administrative law judge's award of benefits.

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.³ 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).

There is no merit in employer's arguments regarding the constitutionality of the amendments, as applied in this case. The allegations employer makes regarding the violation of its right to due process and the unlawful taking of its property 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) (unpub. Order), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011). 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.*, 24 BLR 1-207 (2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011).

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). Those two sections provide, in relevant part, that benefits are to be paid at the applicable rate to a survivor when 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). As the Board recently held

² Employer notes, in its summary of the procedural history of this case, that the district director did not discuss whether claimant is an eligible survivor when he issued his Proposed Decision and Order awarding benefits. Employer's Brief at [2] (unpaginated). Employer does not allege, however, that the administrative law judge erred in determining that claimant was an eligible survivor under the Act. Decision and Order at 3. Accordingly, we affirm the administrative law judge's finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ As the miner's coal mine employment was in Pennsylvania, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Survivor's Claim Director's Exhibit 3.

in *Fairman v. Helen Mining Co.*, 24 BLR 1- , BRB No. 10-0494 BLA (Apr. 29, 2011), Section 932(l), as amended, is not rendered inapplicable by the language in Sections 921(a) and 922(a)(2). In Section 1556 of the PPACA, Congress specifically amended Section 932(l) of the Act 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 is derivatively entitled to benefits, are not subject to the language that employer highlights in 30 U.S.C. §§921(a), 922(a)(2), to the extent that this language may be inconsistent with amended Section 932(l). *Fairman*, slip op. at 4.

In addition, we are not persuaded by employer’s argument that, in the absence of unambiguous statutory language, the application of amended Section 932(l) to alter claimant’s burden of proof violates Section 7(c) of the APA. 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 receipt of benefits. *Fairman*, slip op. at 5. Here, claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement to receive benefits 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.

Employer’s contention that the administrative law judge erred in considering his December 11, 1996 Decision and Order – Awarding Benefits in the miner’s claim, as it is “not included in the Director’s Exhibits or included in the [r]ecord,” is also without merit. Employer’s Brief at [17] (unpaginated). Employer does not allege that the miner’s claim was unsuccessful, nor does it set forth any argument, or evidence, suggesting that the administrative law judge’s action deprived employer of its ability to defend against the survivor’s claim. We affirm, therefore, the administrative law judge’s determination that the miner was awarded benefits on his lifetime claim. *See Brown v. Island Creek Coal Co.*, 7 BLR 1-858 (1985); *Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199 (1984).

Finally, as we noted in *Mathews*, the mandatory language of amended Section 932(l) supports the conclusion that the provision is self-executing. Therefore, 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. *Id.* 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).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge