

BRB No. 10-0710 BLA

PEARL M. KOSIKOWSKI)	
(Widow of THOMAS L. KOSIKOWSKI))	
)	
Claimant-Respondent)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	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 Summary Decision - Awarding Benefits and Cancellation of Hearing of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Emily Goldberg-Kraft (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 Summary Decision - Awarding Benefits and Cancellation of Hearing (2006-BLA-5830) of Administrative Law Judge Michael P. Lesniak rendered on a survivor's 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). The survivor's claim was filed on October 3, 2005.¹

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, and pending on March 23, 2010, were enacted. Those amendments, in pertinent part, revived 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. 30 U.S.C. §932(l).

By Order dated June 3, 2010, the administrative law judge set October 6, 2010 as the date of the formal hearing on this claim and advised the parties of the possible applicability of the recent amendments to this claim.² Claimant thereafter submitted a letter dated August 23, 2010, which the administrative law judge accepted as a motion for summary judgment, stating that she meets all of the conditions and criteria set forth in amended Section 422(l) and, therefore, is entitled to an award of benefits thereunder, as a matter of law. Neither employer, nor the Director, Office of Workers' Compensation Programs (the Director), responded to claimant's letter.

In a Summary Decision - Awarding Benefits and Cancellation of Hearing dated September 8, 2010, the administrative law judge noted that the miner was receiving benefits at the time of his death pursuant to an award of benefits, issued by Administrative Law Judge Gerald M. Tierney and affirmed by the Board in a Decision and Order issued on May 30, 1996. Summary Decision - Awarding Benefits and Cancellation of Hearing at 1; *see Kosikowski v. Consolidation Coal Co.*, BRB No. 96-0150 BLA (May 30, 1996) (unpub.). The administrative law judge also noted that claimant filed her survivor's claim after January 1, 2005, Director's Exhibit 3, and that the claim was pending on March 23, 2010. Summary Decision at 2. The administrative

¹ Claimant is the widow of the miner, who died on September 16, 2005. Director's Exhibit 7. At the time of his death, the miner was receiving federal black lung benefits pursuant to a final award on his lifetime claim. Summary Decision - Awarding Benefits and Cancellation of Hearing at 1; *see also Kosikowski v. Consolidation Coal Co.*, BRB No. 96-0150 BLA (May 30, 1996)(unpub.).

² On April 16, 2010, the Director, Office of Workers' Compensation Programs (the Director), submitted a letter to the administrative law judge, addressing the position of the Director on "certain recent changes to the law which affect this claim." Director's April 16, 2010 Letter at 1. After outlining the changes to the Act, specifically the amendment to Section 422(l), 30 U.S.C. §932(l), the Director stated that it was his position that amended Section 422(l) is applicable to this claim. *Id.*

law judge therefore found that claimant met the eligibility criteria for automatic entitlement to benefits under amended Section 422(l). Accordingly, the administrative law judge awarded survivor's benefits thereunder.

On appeal, employer challenges the administrative law judge's application of amended Section 422(l) to this case. The Director responds, urging affirmance of the administrative law judge's award of benefits. Claimant did not file a response to employer's appeal.

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).

Employer challenges the constitutionality of the retroactive application of the new amendments to this claim, arguing that retroactive application of amended Section 422(l) is unconstitutional, as it violates employer's due process rights and constitutes an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 6-16. Employer further contends that the operative date for determining eligibility pursuant to amended Section 422(l) is the date that the miner's claim was filed, not the date that the survivor's claim was filed. *Id.* at 17-25. Alternatively, employer argues that this case should be held in abeyance until regulations implementing the amendments have been promulgated and/or there is a resolution of the constitutional challenges pending in federal court. *Id.* at 26-27. The Director urges affirmance of the administrative law judge's award of benefits, as the arguments raised by employer are the same as those arguments raised 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.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011) and *Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011), and rejected by the Board.

We reject employer's arguments regarding the constitutionality of the amendments, as applied to this case. We agree with the Director that the arguments employer makes are essentially the ones that the Board rejected in *Mathews*, 24 BLR at 1-198-200. We, therefore, reject them here for the reasons set forth in *Mathews*.

³ The record indicates that the miner's last coal mine employment was in Ohio. Director's Exhibit 15. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. See *Shupe Director, OWCP*, 12 BLR 1-200, 1-202 (1989).

Mathews, 24 BLR at 1-198-200; *see also Keene v. Consolidation Coal Co.*, F.3d , 2011 WL 1886106 (7th Cir. 2011); *Stacy*, 24 BLR at 1-214.

We also reject employer's contention that the operative filing date under amended Section 422(l), is the date that the miner's claim was filed and not the date of the survivor's claim. In *Stacy*, the Board held that the operative date for determining eligibility for survivors' benefits under amended Section 422(l) is the date that the survivor's claim was filed, not the date that the miner's claim was filed. *Stacy*, 24 BLR at 1-213. Specifically, the Board held that, under amended Section 422(l), an eligible survivor who files a claim after January 1, 2005, that is pending on or after the March 23, 2010 effective date of the amendments, is entitled to benefits, based solely on the miner's lifetime award, without having to prove that the miner died due to pneumoconiosis. *Stacy*, 24 BLR at 1-213; *see* 30 U.S.C. §932(l). Because claimant filed her survivor's claim after January 1, 2005, her claim was pending on March 23, 2010, and the miner was awarded benefits on his claim, we reject employer's contention and hold that the administrative law judge properly found that amended Section 422(l) applies to this case. *Stacy*, 24 BLR at 1-213; Summary Decision at 1.

Further, as we noted in *Mathews*, the mandatory language of amended Section 422(l) supports the conclusion that the provision is self-executing. Therefore, we reject employer's request that this case be held in abeyance pending promulgation of implementing regulations. *Mathews*, 24 BLR at 1-201; *see Stacy*, 24 BLR at 1-214-15; *Fairman v. Helen Mining Co.*, BLR , BRB No. 10-0494 BLA (Apr. 29, 2011). Employer's request, that this case be held in abeyance pending resolution of the legal challenges to the amendments, is also denied.

Because claimant filed her survivor's claim after January 1, 2005, her 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 amended Section 422(l) of the Act, 30 U.S.C. §932(l).

Accordingly, the administrative law judge's Summary Decision - Awarding Benefits and Cancellation of Hearing is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge