

BRB No. 12-0246 BLA

GRETCHEN L. BALL)	
(Widow of RAYMOND J. BALL))	
)	
Claimant-Respondent)	
)	
v.)	
)	
R.G. JOHNSON COMPANY)	DATE ISSUED: 12/21/2012
)	
and)	
)	
STATE WORKERS' INSURANCE FUND)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

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

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, for claimant.

Edward K. Dixon and Meghan F. Wise (Zimmer Kunz, PLLC), Pittsburgh, Pennsylvania, for employer/carrier.

Sarah M. Hurley (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 (employer) appeals the Summary Decision - Awarding Benefits (2010-BLA-5789) of Administrative Law Judge Michael P. Lesniak rendered on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). Claimant filed this survivor's claim on September 24, 2009.¹

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), Public Law No. 111-148 (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 December 5, 2011, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision, arguing that under amended Section 932(*l*), and given the filing date of her claim, claimant is entitled to benefits based on the award of benefits to her deceased husband.² In response, employer argued that it has a right to a hearing with regard to any contested issue of fact or law that has not been resolved by the Director. Specifically, employer asserted that it intended to contest the constitutionality of the PPACA and amended Section 932(*l*). Employer also asserted that it intended to contest claimant's entitlement to survivor's benefits as an "eligible survivor" under amended Section 932(*l*). Claimant responded, concurring with the Director's motion.

In his Summary Decision - Awarding Benefits, the administrative law judge found there was no genuine issue of material fact concerning whether claimant satisfied the criteria for derivative entitlement pursuant to amended Section 932(*l*). Accordingly, the administrative law judge awarded benefits to commence as of August 1, 2009, the first day of the month in which the miner died.

On appeal, employer requests that further proceedings or actions related to this claim be held in abeyance pending resolution of the legal challenges in federal court to

¹ Claimant is the widow of the miner, who died on August 2, 2009. Director's Exhibit 12.

² The miner was receiving federal black lung benefits at the time of his death pursuant to a claim filed on September 27, 2006, based on employer's acceptance of the district director's Proposed Decision and Order awarding benefits dated April 2, 2008. Director's Exhibits 1, 22.

the amendments to the Black Lung Benefits Act in the PPACA. Employer further argues that claimant is not an “eligible survivor” because amended Section 932(l), when read in conjunction with 30 U.S.C. §§921 and 922, requires that she prove that the miner’s death was due to pneumoconiosis. Claimant responds in support of the award of benefits. The Director responds, urging the Board to 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’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer requests that further proceedings or actions related to this claim be held in abeyance pending resolution of the legal challenges in federal court to the amendments to the Black Lung Benefits Act in the PPACA. Consistent with our reasoning in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011)(Order)(unpub.), we reject employer’s request to hold this case in abeyance pending resolution of the legal challenges in federal court to the amendments to the Black Lung Benefits Act in the PPACA.⁴ *See also Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-215 (2010), *aff’d sub nom. W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 383-89, 25 BLR 2-65, 2-76-85 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012); *Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-229 (2011).

Employer also contends that claimant is not an “eligible survivor” within the meaning of amended Section 932(l) because she did not prove that pneumoconiosis caused, or contributed to, the miner’s death. Contrary to employer’s contention, the automatic entitlement provisions of amended Section 932(l) provide benefits to a survivor without the requirement that she prove that the miner’s death was due to pneumoconiosis. *B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 249-50, 25 BLR 2-13, 2-38-39, 2-44 (3d Cir. 2011); *Fairman*, 24 BLR at 1-231. Thus, we

³ As the miner was last employed in the coal mining industry in Pennsylvania, the Board will apply the law of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director’s Exhibits 1, 4.

⁴ Employer’s request that this case be held in abeyance pending the resolution of the constitutional challenges to other provisions of the Patient Protection and Affordable Care Act, Public Law No. 111-148, is moot. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012).

reject employer's assertion that claimant is not an "eligible survivor" within the meaning of amended Section 932(l).

Because claimant filed her survivor's claim after January 1, 2005, her claim was pending after 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 entitled to receive survivor's benefits pursuant to Section 422(l) of the Act, 30 U.S.C. §932(l). Director's Exhibits 2, 22.

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

BETTY JEAN HALL
Administrative Appeals Judge