

BRB No. 10-0189 BLA

MELBA H. AMICK)	
(Widow of CHARLES M. AMICK))	
)	
Claimant-Respondent)	
)	
v.)	
)	
WESTMORELAND COAL COMPANY)	DATE ISSUED: 01/11/2011
)	
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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell (Washington and Lee University School of Law), Lexington, Virginia, for claimant.

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

Paul L. Edenfield (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 Decision and Order Awarding Benefits (2007-BLA-5761) of Administrative Law Judge Richard A. Morgan with respect to a survivor's claim filed

on August 14, 2006,¹ 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). Initially, the administrative law judge noted that the miner was receiving benefits at the time of his death pursuant to the August 29, 2005 award of benefits of Administrative Law Judge Michael P. Lesniak in the miner's claim.² Adjudicating the survivor's claim under 20 C.F.R. Part 718, the administrative law judge credited the miner with at least thirty years of coal mine employment, based on the parties' stipulation. Weighing the medical evidence of record, the administrative law judge found it sufficient to establish the existence of legal pneumoconiosis arising out of the miner's coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b). The administrative law judge further found that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits in this survivor's claim.

On appeal, employer challenges the administrative law judge's award of benefits in this survivor's claim, arguing that the administrative law judge erred in weighing the medical opinion evidence. Employer contends that the administrative law judge erred in his characterization and weighing of Dr. Repsher's opinion at Sections 718.202(a)(4) and 718.205(c). In addition, employer contends that the administrative law judge erred in finding the evidence sufficient to establish *cor pulmonale*, as an indication of the presence of pneumoconiosis. Employer also contends that the administrative law judge erred in admitting x-ray readings into the record as treatment notes, arguing that these additional x-ray readings exceeded the evidentiary limitations. In response, claimant urges affirmance of the administrative law judge's award of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), did not file a substantive brief addressing employer's appeal but, rather, requested an extension of time in which to file his response brief.³

¹ Claimant is the widow of a miner, who died on May 29, 2006. Director's Exhibit 7.

² The Board affirmed the award of benefits in the miner's claim on September 22, 2006. *Amick v. Westmoreland Coal Co.*, BRB No. 05-1000 BLA (Sept. 22, 2006)(Smith, J., concurring and dissenting)(unpub.). The United States Court of Appeals for the Fourth Circuit affirmed the Board's decision on August 18, 2008. *Westmoreland Coal Co. v. Amick*, 289 Fed.Appx. 638, 2008 WL 3850836 (4th Cir. 2008).

³ By Order dated April 29, 2010, the Board granted the motion of the Director, Office of Workers' Compensation Programs (the Director), for an enlargement of time to file a response brief to claimant's appeal and, at the same time, instructed the Director that the response brief should also address the impact on this case, if any, of Section 1556

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. The amendments, in pertinent part, revive Section 422(l) of the Act, 30 U.S.C. §932(l),⁴ 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).

Concerning application of the new amendments, claimant argues that amended Section 932(l) is applicable to this survivor's claim. Specifically, claimant contends that, because the miner was receiving benefits at the time of his death, she, as the miner's survivor, is not required to "refile or otherwise revalidate the claim of such miner" in order to receive survivor's benefits. Claimant cites Section 1556 of Public Law No. 111-148 in support of her position. Claimant's Supplemental Brief at 2. In addition, claimant contends that she is entitled to benefits because she has successfully litigated her survivor's claim before the administrative law judge, whose Decision and Order, she maintains, is without reversible error. *Id.*

The Director states that the new amendments are applicable in this survivor's claim, as there is no dispute regarding the survivor's relationship and dependency to the miner, and because the miner was eligible for benefits at the time of his death. Director's Letter Brief at 2. In addition, the Director states that claimant filed her survivor's claim after January 1, 2005, and that the claim was still pending on March 23, 2010. *Id.* Therefore, the Director contends that claimant is automatically entitled to survivor's benefits and that, because the amendment in Section 1556 of Public Law No. 111-148 to Section 932(l) compels an award of benefits in this case, the Board need not address the merits of employer's appeal of the administrative law judge's Decision and Order Awarding Benefits. *Id.* at 3.

of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims, 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). In addition, the Board granted the other parties thirty days, from the date of the Order, to file supplemental briefs addressing the impact in this case, if any, of the amendments. *Amick v. Westmoreland Coal Co.*, BRB No. 10-0189 BLA (Apr. 29, 2010) (unpub. Order).

⁴ The 2010 amendments to the Act also reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides, in pertinent part, a rebuttable presumption that the miner's death was due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

Employer concedes that the amendment to Section 932(l) may affect this case, because the miner was receiving benefits at the time of his death, claimant filed her survivor's claim after January 1, 2005, and her claim was still pending on March 23, 2010. Employer's Supplemental Brief at 2-3. In addition, employer states that the survivor's claim may be affected by the amendment to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), because the administrative law judge credited the miner with thirty years of coal mine employment and found that the miner was totally disabled during his lifetime. *Id.* at 3-4. Employer argues, however, that the retroactive application of the amendments to this case is unconstitutional, as it violates employer's due process rights and would constitute an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. Employer also contends that, as it had no notice that Section 411(c)(4) could be applicable at the time it was developing its evidence, due process requires that the case be remanded to allow it the opportunity to develop new evidence addressing the change in the law. *Id.* at 5-6. Further, employer asserts that this case should be held in abeyance until sixty days after the Department of Labor (DOL) issues guidelines or promulgates regulations implementing 30 U.S.C. §932(l), as amended, and made applicable by Section 1556 of Public Law No. 111-148.

The recent amendments, in pertinent part, revive Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that an eligible survivor of a miner, who was "determined to be 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). 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 hold that Section 932(l) applies to this case. *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193 (2010)(pending on recon.); *Stacy v. Olga Coal Co.*, BLR , BRB No. 10-0113 BLA (Dec. 22, 2010).

We reject employer's arguments regarding the constitutionality of the amendments, as applied to this case. The arguments made by employer are identical to the ones that the Board rejected in *Mathews*. We, therefore, reject them here for the reasons set forth in that case. *Mathews*, 24 BLR at 1-198-200; *see Stacy*, BRB No. 10-0113 BLA, slip op. at 8.

Further, as we did in *Mathews*, we reject employer's request that this case be held in abeyance until sixty days after DOL issues guidelines or promulgates regulations implementing amended Section 932(l). As we noted in *Mathews*, the mandatory language of amended Section 932(l) supports the conclusion that the provision is self-executing, and, therefore, there is no need to hold this case in abeyance pending the promulgation of new regulations. *Mathews*, 24 BLR at 1-201.

Finally, employer's request, that this case be held in abeyance, is denied. Employer's Supplemental Brief at 13-14. *See Mathews*, 24 BLR at 1-201. Consequently, we affirm the award of benefits on the ground that claimant is derivatively entitled to benefits pursuant to amended Section 422(1) of the Act, 30 U.S.C. §932(l), as she filed her survivor's claim after January 1, 2005, the claim was pending on March 23, 2010, and the miner was eligible to receive benefits at the time of his death.⁵

Accordingly, because claimant is derivatively entitled to benefits in this case, we remand it to the district director for the entry of an award of benefits.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

⁵ In light of our disposition of this case, we need not address employer's challenge to the administrative law judge's findings regarding the merits of entitlement, or its argument concerning the applicability of the presumption at Section 411(c)(4) of the Act, to this claim, 30 U.S.C. §921(c)(4). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984).