

BRB No. 10-0646 BLA

BLUE JEAN ENGLE)	
(Widow of WILLIAM ENGLE))	
)	
Claimant-Respondent)	
)	
v.)	
)	
WHITAKER COAL CORPORATION)	DATE ISSUED: 07/26/2011
)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Leroy Lewis (Law Office of Phillip Lewis), Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (K&L Gates), Washington, D.C., for employer.

Jonathan P. Rolfe (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, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2009-BLA-5107) of Administrative Law Judge John P. Sellers, III, rendered on a survivor's claim filed on January 30, 2008, 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).¹ On September 9, 2008, the district director issued a proposed decision and order denying survivor's benefits. Claimant requested a hearing, which was scheduled for May 11, 2010. Prior to the hearing, 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 April 2, 2010, the administrative law judge issued an Order directing the parties to submit position statements addressing why claimant was not automatically entitled to derivative benefits, based on amended Section 932(l). Claimant responded on April 5, 2010, asserting that, because the miner was receiving black lung benefits at the time of his death, and because her claim was filed after January 1, 2005 and was pending on March 23, 2010, she satisfies the eligibility requirements for derivative entitlement pursuant to amended Section 932(l), and is entitled to benefits. In response, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision, on April 27, 2010, asserting that no material issue of fact was contested in this claim and that claimant was entitled to benefits in accordance with amended Section 932(l). Employer responded on May 5, 2010, asserting that the filing date of the miner's claim determines whether the automatic entitlement provisions apply and because the miner's claim was filed prior to January 1, 2005, claimant does not meet the eligibility requirements for the application of amended Section 932(l). Alternatively, employer argued that the Black Lung Disability Trust Fund (the Trust Fund) is liable for any derivative benefits awarded to claimant.

Following the May 11, 2010 hearing, the administrative law judge issued his Decision and Order Awarding Benefits on July 23, 2010. The administrative law judge found that claimant is the surviving spouse of the miner and that the miner was awarded benefits on his lifetime claim by an Administrative Law Judge.² The administrative law

¹ Claimant is the widow of the miner, William Engle, who died on December 23, 2003. Decision and Order at 2; Director's Exhibits 2-1, 11. The miner was receiving benefits at the time of his death, based on a federal black lung claim he filed on September 14, 1992. Director's Exhibit 1.

² In a Decision and Order issued on June 30, 1995, Administrative Law Judge Sheldon R. Lipson awarded benefits in the miner's claim. Decision and Order at 3; Director's Exhibit 1-67. Employer filed an appeal with the Board, but the appeal was later dismissed at employer's request. See *Engle v. Whitaker Coal Corp.*, BRB No. 95-1857 BLA (Nov. 29, 1995) (unpub. Order); Director's Exhibit 1-44.

judge also determined that Administrative Law Judge Sheldon R. Lipson's decision awarding benefits to the miner became final, as employer's request for dismissal of its appeal to the Board was granted, and that claimant filed her survivor's claim on January 30, 2008. The administrative law judge found that claimant is eligible to receive survivor's benefits pursuant to amended Section 932(l) and rejected employer's contention that claimant was not an eligible survivor. Accordingly, the administrative law judge awarded survivor's benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 932(l) to this case. Claimant and the Director respond in support of the award of benefits. Employer has also replied to the Director's brief, reiterating its arguments.³

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.⁴ 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).

We reject employer's contention regarding the operative filing date for determining eligibility pursuant to amended Section 932(l). In *Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011), the Board held that the operative date for determining eligibility for survivors' 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. The Board specifically held that 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 Section 1556 amendments, is entitled to benefits, based solely on the miner's lifetime award, without having to prove that the miner died due to pneumoconiosis. *Id.*; *see* 30 U.S.C. §932(l).

We also reject employer's contention that the facts of this case may be distinguished from the facts of *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011)(Order), *appeal docketed*, No. 11-1620 (4th Cir. June. 13, 2011), and that retroactive application of the automatic entitlement provisions of amended Section 422(l) to claims filed after January 1, 2005

³ We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant filed her survivor's claim after January 1, 2005, and that her claim was pending on March 23, 2010. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order Awarding Benefits at 2.

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1-218.

constitutes a due process violation because employer “had no notice of the potential effect of accepting liability in the miner’s claim on any future [survivor’s] claim.” Employer’s Brief in Support of Petition for Review at 10. Because employer’s due process arguments in this case are substantially similar to those raised in *Mathews*, we reject them for the reasons set forth in that decision. *Mathews*, 24 BLR at 1-200; *see also Keene v. Consolidation Coal Co.*, --- F.3d ---, 2011 WL 1886106 (7th Cir. 2011). Furthermore, as there has been no violation of employer’s due process rights, we reject employer’s argument that liability for benefits based on derivative entitlement in this survivor’s claim must transfer to the Trust Fund. *See generally Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999).

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. Therefore, we affirm the administrative law judge’s determination that claimant is derivatively entitled to receive survivor’s benefits pursuant to amended Section 422(l) of the Act, 30 U.S.C. §932(l).⁵

⁵ Because claimant is entitled to derivative benefits pursuant to amended Section 422(l) of the Act, 30 U.S.C. §932(l), we decline to address employer’s argument that the case must be remanded and the record reopened for consideration pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Employer’s Brief in Support of Petition for Review at 9 n.2.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge