

BRB No. 10-0714 BLA

MAGGIE MCCOY	)	
(Widow of JOE MCCOY)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
T & C COAL COMPANY,	)	DATE ISSUED: 07/07/2011
INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS'	)	
PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Karin L. Weingart (Spilman, Thomas & Battle, PLLC), Charleston, West Virginia, for employer.

Michelle S. Gerdano (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (10-BLA-5010) of Administrative Law Judge Richard A. Morgan (the administrative law judge) rendered on a survivor's claim<sup>1</sup> 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).

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), 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 July 28, 2010, claimant filed a Motion for Automatic Award of Benefits, asserting that, pursuant to amended Section 932(l), she was derivatively entitled to survivor's benefits based on the award of benefits to her husband during his lifetime. On August 3, 2010, the administrative law judge issued an Order requiring the parties to show cause why benefits should not be awarded in this case. In response, employer conceded claimant's entitlement to benefits under amended Section 422(l), but reserved the right to challenge the constitutionality of amended Section 422(l), and its retroactive application, upon appeal. 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 was entitled to benefits, based on the award to her deceased husband.

The administrative law judge found that claimant is an eligible survivor of the miner, and that claimant met the eligibility criteria for automatic entitlement to benefits pursuant to amended Section 422(l), 30 U.S.C. §932(l). Accordingly, the administrative law judge awarded survivor's benefits.

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<sup>1</sup> Claimant is the widow of the miner, who died on May 2, 2008. Director's Exhibit 11. Claimant filed her claim for survivor's benefits on October 16, 2008. Director's Exhibit 2. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award issued by the district director on December 10, 1986. Director's Exhibit 1.

On appeal, employer argues that the retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005 constitutes a violation of its due process rights and a taking of private property. Alternatively, employer requests that further proceedings or actions related to this claim be held in abeyance, pending the resolution of the constitutional challenges to Public Law No. 111-148 in federal court. Claimant and the Director respond, 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. 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, that the retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005 constitutes a due process violation and a taking of private property, for the same reasons the Board rejected this same argument in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order) (unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011); *see Stacy v. Olga Coal Co.*, 24 BLR 1-207 (Dec. 22, 2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011); *see also Keene v. Consolidation Coal Co.*, F.3d , 2011 WL 1886106 (7th Cir. 2011). Further, as we did in *Mathews*, we reject employer's request that this case be held in abeyance pending resolution of the legal challenges to Public Law No. 111-148. *Mathews*, 24 BLR at 1-201; *see Fairman v. Helen Mining Co.*, BLR , BRB No. 10-0494 BLA (Apr. 29, 2011).

Because claimant, an eligible survivor of the miner, 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 entitled to receive survivor's benefits pursuant to Section 422(l) of the Act, 30 U.S.C. §932(l).

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge