

BRB No. 10-0545 BLA

GENEVA COLLINS)
(Widow of EUGENE COLLINS))
)
Claimant-Respondent)
)
v.)
)
SHANNON-POCAHONTAS MINING)
COMPANY)
)
and)
)
A.T. MASSEY c/o WELLS FARGO) DATE ISSUED: 05/24/2011
DISABILITY MANAGEMENT)
)
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 – Award of Survivor’s Benefits and Order Denying Employer’s Request to Hold the Case in Abeyance and Order Cancelling Hearing of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

Anne Marie Scarpino (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Award of Survivor's Benefits and Order Denying Employer's Request to Hold the Case in Abeyance and Order Cancelling Hearing¹ (09-BLA-5730) of Administrative Law Judge Larry S. Merck (the administrative law judge) rendered on a survivor's claim² 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). Accordingly, on April 9, 2010, the administrative law judge referenced the applicability to this claim of the amendments to the Act, based on the fact that the miner was receiving benefits at the time of his death. Specifically, the administrative law judge required the parties to file position statements addressing why an award should not be entered in the survivor's claim. The Director, Office of Workers' Compensation Programs (the Director), responded that this claim meets the criteria for automatic entitlement, and requested issuance of an order granting benefits to claimant. Employer also responded, conceding that claimant "ostensibly" meets all of the requirements for derivative entitlement. Employer's Position Statement at 2. However, employer reserved the right to challenge the constitutionality of the relevant provision, and its retroactive application. Finally, employer requested that the case be held in abeyance until the enactment of implementing regulations.

¹ The record reflects that on March 22, 2010, claimant requested that her case be decided on the record; subsequently, the hearing scheduled for July 20, 2010 was cancelled.

² Claimant is the widow of the miner, who died on July 19, 2008. Director's Exhibit 8. Claimant filed her claim for survivor's benefits on August 6, 2008. *Id.* at 3. At the time of his death, the miner was receiving federal black lung benefits pursuant to a final award issued on October 18, 1993. Decision and Order at 4; Director's Exhibit 10.

The administrative law judge found that claimant is an eligible survivor of the miner, and noted employer's concession that claimant meets the eligibility requirements for application of amended Section 932(l). The administrative law judge denied employer's request to hold the case in abeyance, finding that no further factual development was necessary, and that claimant is entitled to benefits by operation of law. Accordingly, the administrative law judge awarded survivor's benefits.

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. Alternatively, employer requests that further proceedings or actions related to this claim should be stayed, pending resolution of the constitutional challenges to Public Law No. 111-148 in federal court. Claimant has not filed a response brief in this appeal. 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. 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, Employer's Brief at 3-7, for the reasons the Board rejected this same argument 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.); *see Stacy v. Olga Coal Co.*, 24 BLR 1- , BRB No. 10-0113 BLA (Dec. 22, 2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011). We also deny employer's request to hold this case in abeyance until resolution of the challenge to the constitutionality of Public Law No. 111-148 in federal court, for the same reasons set forth by the Board in *Mathews*, 24 BLR at 1-201; *see Fairman v. Helen Mining Co.*, BLR , BRB No. 10-0494 BLA (Apr. 29, 2011). 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 Section 422(l) of the Act, 30 U.S.C. §932(l).

Accordingly, the administrative law judge's Decision and Order - Award of Survivor's Benefits and Order Denying Employer's Request to Hold the Case in Abeyance and Order Cancelling Hearing is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge