

BRB No. 11-0244 BLA

ANNA L. HERNDON)
(Widow of LEWIS C. HERNDON))
)
Claimant-Respondent)
)
v.)
)
COLE & CRANE REAL ESTATE TRUST) DATE ISSUED: 09/30/2011
)
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.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer/carrier.

Jeffrey S. Goldberg (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 (2010-BLA-05759) of Administrative Law Judge Richard A. Morgan rendered on a survivor's claim 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). The survivor's claim was filed on March 16, 2010.¹

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, and pending on March 23, 2010, were enacted. Those amendments, in pertinent part, revived Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that a 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 August 20, 2010, while the case was before the administrative law judge, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision with the administrative law judge, asserting that, pursuant to amended Section 422(l), claimant was automatically entitled to benefits as a matter of law, and that there was no genuine issue as to any material fact concerning entitlement. In response, employer argued that the automatic entitlement provision did not apply because the operative date for determining eligibility for survivor's benefits is the filing date of the miner's claim, which, in this case, was prior to January 1, 2005. Additionally, employer asserted that claimant was not derivatively entitled to benefits under amended Section 422(l) because the miner's benefits had been terminated in September, 2004, because his Federal Black Lung Benefits were offset by a state award. The Director, in response to employer's arguments, contended that the miner's award had not been terminated, arguing that while benefits had been offset, the miner's claim was still in award status. The Director also argued that the date of the survivor's claim, and not the miner's claim, is the operative date for determining eligibility under amended Section 422(l). Claimant also responded to the Director's Motion for Summary Decision, concurring with the Director that she is automatically entitled to benefits. By Order dated October 6, 2010, the administrative law judge then set this case for a formal hearing on January 4, 2011.

In a Decision and Order Awarding Benefits, dated November 17, 2010, the administrative law judge canceled the formal hearing, finding that the provisions of amended Section 422(l) were applicable, and that there were no issues of material fact in

¹ Claimant is the widow of the miner, who died on November 15, 2007. Director's Exhibit 14. At the time of his death, the miner was receiving federal black lung benefits pursuant to a final award on his lifetime claim. Decision and Order Awarding Benefits at 2.

contention. Specifically, the administrative law judge noted that the miner was awarded benefits by the district director on November 9, 1993, pursuant to his May 19, 1993 application for benefits. Decision and Order Awarding Benefits at 2. The administrative law judge also noted that claimant filed her survivor's claim after January 1, 2005, Director's Exhibit 7, that the claim was pending on March 23, 2010, and that claimant is the eligible survivor of the miner. Decision and Order Awarding Benefits at 3. The administrative law judge therefore found that claimant met the eligibility criteria for automatic entitlement to benefits under amended Section 422(l). Additionally, the administrative law judge rejected employer's contention that claimant is not eligible for derivative benefits because the miner was not receiving benefits at the time of his death due to the offset in federal benefits by a state award of benefits. The administrative law judge found that the relevant inquiry is not whether the miner was receiving benefits at the time of his death, but whether the miner was eligible to receive benefits based on a final award. The administrative law judge also rejected employer's contention that the operative date for determining eligibility is the miner's filing date. Accordingly, the administrative law judge found that claimant meets the eligibility criteria for automatic entitlement, and awarded benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 422(l) to this case. The Director responds, urging affirmance of the administrative law judge's award of benefits. Claimant has not filed a brief in this appeal.

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.² 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).

On appeal, employer asserts that the Department of Labor is barred from applying amended Section 422(l), as the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (2010), of which this amendment is a part, was declared unconstitutional in a United States District Court. Employer argues that this ruling was the functional equivalent of an injunction against the application of the PPACA in its entirety. Employer's Brief at 6, citing *Florida v. U.S. Dep't of Health & Human Servs.*, --- F.Supp. 2d ---, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011). Employer also challenges the constitutionality of the retroactive application of amended Section

² The record indicates that the miner's last coal mine employment was in West Virginia. Director's Exhibit 8. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. See *Shupe Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

422(l), arguing that it violates employer's due process rights and constitutes an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. *Id.* at 6-12. Employer further contends that the operative date for determining eligibility pursuant to amended Section 422(l) is the date that the miner's claim was filed, not the date that the survivor's claim was filed. *Id.* at 13-23. In his response brief, the Director urges affirmance of the administrative law judge's award of benefits, as the arguments raised by employer are the same as those arguments raised 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.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011), and *Stacy v. Olga Coal Co.*, 24 BLR 1-207, 1-214 (2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011), and rejected by the Board. The Director also argues that the Florida District Court's decision is not binding on the Board because the District Court issued an order staying its decision and because the District Court stated that its decision only applied to the specific petitioner in that case, the State of Florida.

Initially, we reject employer's contention that the ruling of the United States District Court in Florida was equivalent to an injunction barring application of amended Section 422(l). Although the Florida decision struck down the PPACA in its entirety, the ruling was stayed when the federal government filed its appeal in the United States Court of Appeals for the Eleventh Circuit. *See Florida v. U.S. Dep't of Health & Human Servs.*, --- F.Supp. 2d ---, 2011 WL 723117 (N.D. Fla. Mar. 31, 2011), clarifying --- F.Supp. 2d ---, 2011 WL 285683 (N.D. Fla. Jan. 31, 2011), *appeal docketed*, No. 11-11021-HH (11th Cir. Mar. 9, 2011).

Furthermore, we reject employer's arguments regarding the constitutionality of the amendments, as applied to this case. We agree with the Director that the arguments employer makes are essentially the ones that the Board rejected in *Mathews*, 24 BLR at 1-198-200. We, therefore, reject them here for the reasons set forth in *Mathews*. *Id.* at 1-198-200; *see also Keene v. Consolidation Coal Co.*, 645 F.3d 844, BLR (7th Cir. 2011); *Stacy*, 24 BLR at 1-214.

We also reject employer's contention that the operative filing date under amended Section 422(l) is the date that the miner's claim was filed. In *Stacy*, the Board held that the operative date for determining eligibility for survivors' benefits under amended Section 422(l) is the date that the survivor's claim was filed, not the date that the miner's claim was filed. *Stacy*, 24 BLR at 1-213. Specifically, the Board held that, under amended Section 422(l), 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 amendments, is entitled to benefits, based solely on the miner's lifetime award, without having to prove that the miner died due to pneumoconiosis. *Stacy*, 24 BLR at 1-213; *see* 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 reject employer's contention and affirm the administrative law judge's finding that claimant is derivatively entitled to survivor's benefits pursuant to amended Section 422(l). 30 U.S.C. §932(l); *Stacy*, 24 BLR at 1-213; Decision and Order Awarding Benefits at 2, 5.

Accordingly, the administrative law judge's Decision and Order 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