

BRB No. 10-0560 BLA

NANCY C. SMEAL)
(Widow of LEROY C. SMEAL))
)
Claimant-Respondent)
)
v.)
)
AL HAMILTON CONTRACTING)
COMPANY)
)
and) DATE ISSUED: 04/29/2011
)
ROCKWOOD CASUALTY INSURANCE)
COMPANY)
)
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 Thomas M. Burke,
Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania,
for claimant.

Sean B. Epstein (Pietragallo Gordon Alfano Bosick & Raspanti, LLP),
Pittsburgh, Pennsylvania, for employer/carrier.

Jonathan 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, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2010-BLA-5417) of Administrative Law Judge Thomas M. Burke (the administrative law judge) rendered on a survivor's claim¹ 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 April 6, 2010, claimant requested that the administrative law judge enter an order of automatic entitlement on this claim, based on the miner's lifetime award of benefits and the recent amendments to Section 422(l) of the Act. On April 26, 2010, the administrative law judge advised the parties of claimant's request, and issued a notice directing the parties to file responses. In response, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision on May 17, 2010, asserting that there is no genuine issue of material fact in this claim, and that under amended Section 422(l), and given the filing date of her claim, claimant was entitled to benefits, based on the award to her deceased husband. Employer disagreed, contesting the constitutionality and the interpretation of amended Section 422(l), and asserting that any award of benefits in this case is premature. The administrative law judge determined that amended Section 422(l) was applicable to this case and that it created an automatic entitlement to survivor's benefits, based on the miner's lifetime award. Accordingly, the administrative law judge awarded survivor's benefits.

On appeal, employer argues that Section 422(l) should not be interpreted as granting automatic entitlement to benefits, and that any such interpretation violates the

¹ Claimant is the widow of the miner. The miner filed a claim on October 12, 1995. Director's Exhibit 1. On July 15, 2005, Administrative Law Judge Michael P. Lesniak issued a Decision and Order awarding benefits. *Id.* The Board affirmed Judge Lesniak's award of benefits. *Smeal v. Al Hamilton Contracting*, BRB No. 05-0860 BLA (Apr. 19, 2006)(unpub.). The miner died on April 15, 2009. Director's Exhibit 7. Claimant filed a survivor's claim on May 19, 2009. Director's Exhibit 2.

constitutional guarantee of due process. Both the Director and claimant respond, urging affirmance of 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.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).

Employer contends that amended Section 422(l) simply eliminates the need for eligible survivors to file a new claim for benefits, but "does not, in and of itself, create an automatic entitlement to benefits." Employer's Brief at 3. Employer also asserts that, until such time as new implementing regulations governing Section 422(l) are enacted, any award of benefits is premature and not in accordance with applicable law. Employer therefore argues that this case should be held in abeyance until the Department of Labor (DOL) promulgates regulations implementing the new amendment. Employer maintains that granting automatic entitlement to benefits violates the constitutional guarantee of due process. We disagree.

Contrary to employer's assertion that amended Section 422(l) does not create automatic entitlement to benefits for eligible survivors, the Board specifically held that, under Section 422(l), 30 U.S.C. §932(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 to the Act by Section 1556 of the Patient Protection and Affordable Care Act (PPACA), is entitled to receive benefits, based solely on the miner's lifetime award, without having to prove that the miner died due to pneumoconiosis. *Stacy v. Olga Coal Co.*, 24 BLR 1- , BRB No. 10-0113 BLA, slip op. at 7 (Dec. 22, 2010), *appeal docketed*, No. 11-1020 (4th Cir. Jan. 6, 2011). Further, contrary to employer's assertion that granting automatic entitlement to benefits violates the constitutional guarantee of due process, the Board has rejected similar arguments, holding that amended Section 422(l) does not violate the Fifth Amendment Due Process Clause and that it does not constitute an unlawful taking of property under the Fifth Amendment. *See Stacy*, slip op. at 8; *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.). Additionally, contrary to employer's assertion that this case should be held in abeyance until the DOL promulgates regulations implementing amended Section 422(l), the Board has held that the mandatory language of amended Section 422(l) supports the conclusion that the provision is self-

² The record indicates that the miner was employed in the coal mining industry in Pennsylvania. Director's Exhibit 3. Accordingly, the law of the United States Court of Appeals for the Third Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

executing. Consequently, there is no need to hold this case in abeyance, pending the promulgation of new regulations. *Stacy*, slip op. at 8; *Mathews*, 24 BLR at 1-201. Thus, 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), based solely on the miner's lifetime award. *See* 30 U.S.C. §932(l).

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

JUDITH S. BOGGS
Administrative Appeals Judge