

BRB No. 13-0416 BLA

MARY M. WHITFIELD)
(Widow of NEEDHAM F. WHITFIELD))
)
 Claimant-Respondent)
)
 v.)
)
 SEXTET MINING CORPORATION)
)
 and)
)
 ARROWPOINT CAPITAL/CONNECTICUT) DATE ISSUED: 03/31/2014
 INDEMNITY 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 Alice M. Craft,
Administrative Law Judge, United States Department of Labor.

Frances Poole (Lay Representative), Madisonville, Kentucky, for claimant.

Austin P. Vowels (Morton Law LLC), Henderson, Kentucky, for
employer/carrier.

Rebecca J. Fiebig (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: SMITH, McGRANERY, and HALL, Administrative Appeals
Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2013-BLA-5445) of Administrative Law Judge Alice M. Craft, rendered on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Claimant¹ filed this claim on September 4, 2012. Director's Exhibit 7. The administrative law judge awarded survivor's benefits, finding that claimant was automatically entitled to receive benefits under amended Section 932(l) of the Act.² 30 U.S.C. §932(l).

On appeal, employer argues that it was deprived of due process because it did not receive proper notice, and service, of the claim. Employer therefore argues that it should be dismissed as the responsible operator in this claim, and that the Black Lung Disability Trust Fund should be liable for any benefits payable to claimant. Employer also challenges the administrative law judge's application of amended Section 932(l) to this claim. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond in support of the administrative law judge's award of benefits. Employer has filed a reply brief, reiterating its arguments on appeal.³

¹ Claimant is the widow of the miner, who died on August 10, 2012. Director's Exhibit 9. At the time of his death, the miner was receiving federal black lung benefits pursuant to a final award on his lifetime claim. Director's Exhibits 4, 5.

² Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this case, Congress revived Section 932(l) of the Act, which provides that a survivor of a miner who was determined to be 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), amended by Pub. L. No. 111-148, §1556(b), 124 Stat. 119, 260 (2010). The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the 2010 amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* We will indicate when a regulatory citation in this decision refers to a regulation as it appears in the September 25, 2013 Federal Register. Otherwise, all regulations cited in this Decision and Order may be found in 20 C.F.R. Parts 718, 725 (2013).

³ Employer does not challenge the administrative law judge's findings that claimant established each fact necessary to demonstrate her entitlement under amended Section 932(l): that she filed her claim after January 1, 2005; that she is an eligible

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).

Liability For Payment of Benefits

Employer does not dispute its designation as the responsible operator liable for the payment of any benefits owed to claimant. Rather, employer asserts that it should be relieved of its liability because it did not receive proper notice and service of this claim, in violation of its due process rights.

The relevant procedural history of this claim is as follows. The miner died on August 10, 2012, and on September 4, 2012, claimant filed her claim for survivor's benefits. Director's Exhibits 7, 9. On September 18, 2012, the district director issued a Proposed Decision and Order awarding benefits. Director's Exhibit 12. The Proposed Decision and Order stated that, pursuant to Section 932(l), as claimant filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending after March 23, 2010; and the miner was determined to be eligible to receive benefits at the time of his death, claimant was entitled to receive benefits without having to prove that the miner's death was due to pneumoconiosis. The Proposed Decision and Order further stated that the "Sextet Mining Corporation [had] been determined to be the liable party based on its designation and the supporting evidence in the miner's claim . . . and that it is responsible for payment of benefits to claimant" Director's Exhibit 12. Finally, the Proposed Decision and Order notified all parties that within 30 days after its issuance, "any party may file a written request for revision or request a formal hearing before the Office of Administrative Law Judges." *Id.* The Proposed Decision and Order

survivor of the miner; that her claim was pending on or after March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death. Employer also does not challenge its designation as the responsible operator in the survivor's claim. Therefore, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁴ The miner's most recent coal mine employment was in Kentucky. Director's Exhibit 1. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

was sent by certified mail to claimant, employer, and employer's carrier. Director's Exhibit 12 at 5. Employer did not respond within the allotted time period.

On October 25, 2012, the district director issued a document entitled "Responsible Operator Agrees to Pay Award of Benefits," that stated that the Proposed Decision and Order awarding benefits had become final, and that employer was deemed to have agreed to pay benefits. Director's Exhibit 13. The October 25, 2012 document was sent by certified mail to claimant, employer, employer's carrier, and employer's counsel of record, who had represented employer in the miner's claim.⁵ *Id.*

On October 30, 2012, John Morton of Morton Law LLC, entered an appearance on behalf of employer. By letter dated November 21, 2012, employer's counsel filed a response, a notice of controversion, and a request for a hearing. Director's Exhibit 14. On December 11, 2012, the case was transferred to the Office of Administrative Law Judges.⁶ Director's Exhibit 16.

Upon receipt of the claim, the administrative law judge ordered the parties to show cause why benefits should not be awarded, without a hearing, pursuant to the derivative entitlement provision of amended Section 932(l). Employer responded, asserting that, as the district director had not issued a Notice of Claim, and as the Proposed Decision and Order had not been served upon employer's counsel, employer had not received proper notice and service of the claim. In her Decision and Order, issued May 14, 2013, the administrative law judge rejected employer's arguments, and found that claimant is derivatively entitled to survivor's benefits, payable by employer.⁷

Employer asserts that because the district director did not issue a formal Notice of Claim, or serve employer's counsel with the Proposed Decision and Order, employer was

⁵ In the miner's claim, employer was represented by Bach Hamilton, LLP. Director's Exhibit 1 at 35. In the survivor's claim, employer is represented by Morton Law LLC. Director's Exhibit 11.

⁶ Although the October 25, 2012 document entitled "Responsible Operator Agrees to Pay Award of Benefits" stated that the award of benefits had become final, it further stated that employer had thirty days to file a written request for revision, or request a formal hearing. Director's Exhibit 13.

⁷ The administrative law judge determined that a hearing was unnecessary, finding that, as employer did not dispute that claimant is an eligible survivor of the miner, "there is no need for a hearing if the Claimant is automatically entitled to benefits based on the award to her husband." Decision and Order at 2. Employer does not contest this determination.

deprived of due process. Employer contends that, therefore, it must be dismissed from the case and liability for the payment of benefits should be transferred to the Black Lung Disability Trust Fund. We disagree.

The Due Process Clause, which applies to adjudicative administrative proceedings, requires that an employer receive notice and an opportunity to be heard before it is held liable for an award of benefits. See *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Arch of Kentucky, Inc. v. Director, OWCP [Hatfield]*, 556 F.3d 472, 478, 24 BLR 2-135, 2-144 (6th Cir. 2009). Notice must be reasonably calculated to inform the employer of the claim for benefits. *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 1048, 14 BLR 2-1, 2-9 (6th Cir. 1990). A delay in notifying an employer of its potential liability violates due process only if the employer is deprived of a fair opportunity to mount a meaningful defense against the claim. See *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84, 22 BLR 2-25, 2-44-45 (6th Cir. 2000); see also *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 184, 21 BLR 2-545, 2-560-61 (4th Cir. 1999); *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 807, 21 BLR 2-302, 2-320 (4th Cir. 1998).

Contrary to employer's contention, while the district director did not issue a formal Notice of Claim, the district director's September 18, 2012 Proposed Decision and Order clearly explained that claimant had filed a claim for survivor's benefits, that she had been found derivatively entitled to benefits pursuant to Section 932(l), and that employer had been found to be liable for the payment of those benefits. Director's Exhibit 12. In addition, both the Proposed Decision and Order and the October 25, 2012 award of benefits afforded employer the opportunity to controvert the claim, and to request a hearing. Moreover, employer's current counsel received notice of the claim and, on November 21, 2012, exercised employer's rights to controvert the claim and requested a hearing. Thus, as the Proposed Decision and Order constituted actual notice of the claim, and afforded employer a fair opportunity to defend against it, employer was not deprived of due process by the district director's declination to issue a formal Notice of Claim, or by the initial lack of service of the Proposed Decision and Order upon employer's counsel. See *Holdman*, 202 F.3d at 883-84, 22 BLR at 2-44-45; *Borda*, 171 F.3d at 184, 21 BLR at 2-560-61; *Lockhart*, 137 F.3d at 807, 21 BLR at 2-320.

Employer further contends that, even if due process has been satisfied, the district director's failure to notify employer of the claim, prior to the issuance of the Proposed Decision and Order, was in violation of the regulatory requirements at 20 C.F.R.

§§725.407⁸ and 725.418(d).⁹ Employer’s Reply Brief at 2-6. Employer’s contention lacks merit.

As the Director asserts, the version of the regulation at 20 C.F.R. §725.418 in effect when the district director acted, contains an exception that specifically allowed the district director to bypass the normal adjudication process and issue a proposed decision and order “at any time during the adjudication” if the district director determined that its issuance would “expedite the adjudication of the claim.”¹⁰ 20 C.F.R. §725.418(a)(2); Director’s Brief at 3-4. Moreover, as discussed *supra* note 2, the Department of Labor recently promulgated regulations implementing amended Section 932(l). Those regulations make clear that a district director who determines that the claimant is a survivor entitled to benefits under Section 932(l) may issue a proposed decision and order at any time during adjudication of the claim, and may designate the responsible operator in the proposed decision and order, without first notifying the responsible operator of its potential liability. 78 Fed. Reg. 59,102, 59,118-19 (Sept. 25, 2013) (to be codified at 20 C.F.R. §725.418(a)(3)). Thus, contrary to employer’s contention, the district director’s

⁸ The regulation at 20 C.F.R. §725.407 provides, in pertinent part, that upon receipt of the miner’s employment history, and the identification of the potentially liable responsible operators, the district director “shall notify each such operator of the existence of the claim.” 20 C.F.R. §725.407(a), (b). The regulation states further that “[t]he district director may not notify . . . operators of their potential liability after a case has been referred to the Office of Administrative Law Judges.” 20 C.F.R. §725.407(d).

⁹ The regulation at 20 C.F.R. §725.418(d) provides, in pertinent part, that “[n]o operator may be finally designated as the responsible operator unless it has received notification of its potential liability pursuant to [20 C.F.R.] §725.407” 20 C.F.R. §725.418(d).

¹⁰ As the Director notes, the Notice of Proposed Rulemaking issued in March 2012 explained that, in light of the regulatory provision at 20 C.F.R. §725.418(a)(2), after the reinstatement of the automatic entitlement provisions of Section 932(l), the Department of Labor (DOL) sought to minimize the delay in payments to eligible survivors through the implementation of an expedited procedure. Under this expedited procedure, the district director began issuing proposed decisions and orders, without first issuing a Notice of Claim. *See* 77 Fed. Reg. 19,456, 19,469 (proposed Mar. 30, 2012); Director’s Brief at 3-4. In sum, DOL determined that the expedited procedure was appropriate because, in automatic entitlement cases, the issue of liability has already been resolved in the living miner’s claim, after notice and the opportunity to present evidence, and there is no reason to repeat that procedure in the survivor’s claim. *See* 77 Fed. Reg. 19,456, 19,469 (proposed Mar. 30, 2012); Director’s Brief at 4.

issuance of the Proposed Decision and Order, without first having issued a formal Notice of Claim, was appropriate and consistent with both the former, and current, regulations.

Finally, employer has not shown how the district director's actions in this case were prejudicial to employer. Employer was notified of the claim, and of its designation as the operator responsible for the payment of benefits; employer was afforded, and exercised, the opportunity to contest the claim, both before the administrative law judge, and the Board; and there is no dispute as to any material issue in this claim. Thus, as the district director's method of notifying employer of the claim did not deprive employer of due process, was consistent with the regulations, and has not been demonstrated to have prejudiced employer, we affirm the administrative law judge's determination that employer is responsible for the payment of survivor's benefits. Decision and Order at 5.

Constitutionality and Interpretation of Section 932(l)

Next, employer contends that application of amended Section 932(l) is unconstitutional, as a violation of employer's due process rights and as an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 6; Employer's Reply Brief at 7. Employer asserts that the Act should be interpreted to exclude benefits for survivors "who died for reasons unrelated" to pneumoconiosis. Employer's Brief at 6-7; Employer's Reply Brief at 7. The arguments employer makes are virtually identical to the ones that the United States Court of Appeals for the Sixth Circuit recently rejected. *Vision Processing, LLC v. Groves*, 705 F.3d 551, 25 BLR 2-231 (6th Cir. 2013); *see also W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 388, 25 BLR 2-65, 2-83 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *cert. denied*, 568 U.S. (2012); *B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011). For the reasons set forth in *Groves*, we reject employer's arguments.¹¹

In this case, claimant satisfied her burden to establish each fact necessary to demonstrate her entitlement under amended Section 932(l): that she filed her claim after January 1, 2005; that she is an eligible survivor of the miner; that her claim was pending after March 23, 2010; and that the miner was determined to be eligible to receive benefits at the time of his death. Therefore, we affirm the administrative law judge's determination that claimant is derivatively entitled to benefits pursuant to amended Section 932(l). 30 U.S.C. §932(l).

¹¹ To the extent employer requests that this case be held in abeyance pending the resolution of other cases awaiting adjudication by the United States Court of Appeals for the Sixth Circuit, its request is denied. Employer's Brief at 7-8; Employer's Reply Brief at 7-8.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge