

BRB No. 14-0044 BLA

HELEN M. ROTHWELL)
(Widow of RONALD L. ROTHWELL))
)
 Claimant-Respondent)
)
 v.)
)
 HERITAGE COAL COMPANY)
) DATE ISSUED: 09/03/2014
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Petitioner) DECISION and ORDER

Appeal of the Order of Remand and Order on Reconsideration of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Maia S. Fisher (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: HALL, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Order of Remand and Order on Reconsideration (2013-BLA-5912) of Administrative Law Judge William S. Colwell 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).

Claimant is the widow of the miner, who filed a claim for benefits on July 10, 2009. Director's Exhibit 8; Miner's Claim, Director's Exhibit 3. The district director issued a Proposed Decision and Order Awarding Benefits to the miner on January 10,

2011. Employer disagreed with the Proposed Decision and Order and requested a hearing before an administrative law judge. The miner died on April 18, 2013, while his claim was pending before Administrative Law Judge Stephen M. Reilly. Director's Exhibit 8. Judge Reilly substituted the miner's widow as claimant, and on September 11, 2013, issued a Decision and Order awarding benefits on the miner's claim.

Meanwhile, claimant filed this claim for survivor's benefits on May 13, 2013. Director's Exhibit 5. On May 14, 2013, the district director issued a Proposed Decision and Order awarding claimant survivor's benefits, pursuant to amended Section 932(*l*) of the Act.¹ 30 U.S.C. §932(*l*) (2012). Employer disagreed with the Proposed Decision and Order and requested a hearing before an administrative law judge. In an Order of Remand issued August 19, 2013, Judge Colwell (the administrative law judge) noted that the miner's claim "has not been finally adjudicated," and remanded the survivor's claim to the district director "until such time as a decision in the miner's claim has become final."

The Director moved for reconsideration, arguing that finality of the miner's claim award was not a prerequisite for the survivor to be found entitled to receive benefits under Section 932(*l*). In an Order on Reconsideration issued on October 17, 2013, the administrative law judge again concluded that the survivor's claim should be remanded to the district director:

While the District Director has discretion to adopt the policy of paying survivors' claims prior to final adjudication of underlying miners' claims, the threshold requirements of automatic entitlement under the [Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148]

¹ As part of the Patient Protection and Affordable Care Act, Public Law No. 111-148, 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 422(*l*) of the Act, 30 U.S.C. §932(*l*), 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*) (2012). The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725 (2014).

have not been met where the miner's claim is still in litigation, as is Mr. Rothwell's claim here^[2]

This tribunal interprets the language of the PPACA as requiring a final award of benefits in the miner's claim prior to issuing an automatic award in the survivor's claim. Therefore, while the District Director has the discretion to place survivors' claims in pay status, absent published precedent by the Benefits Review Board or a circuit court that the award of benefits in a miner's claim need not be final prior to finding automatic entitlement in a survivor's claim, this tribunal shall continue to remand survivors' claims awarded under the automatic entitlement provisions of the PPACA where the underlying awards of the miners' claims are not final.

Order on Reconsideration at 2 (citations omitted). By order dated February 12, 2014, the Board accepted the Director's interlocutory appeal of the administrative law judge's Order of Remand and Order on Reconsideration.

On appeal, the Director argues that the administrative law judge erred in concluding that claimant does not meet the criteria for derivative entitlement under Section 932(l) because the award of benefits in her husband's lifetime claim is not yet final. The Director therefore contends that the administrative law judge erred in remanding the survivor's claim to the district director. The Director urges the Board to vacate the administrative law judge's orders, and remand the case to the administrative law judge for adjudication of the claim. Neither claimant, nor employer, has filed a response.

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.³ 33 U.S.C. §921(b)(3), as incorporated by 30

² The underlying miner's claim award in this case is still not final. After Administrative Law Judge Stephen M. Reilly awarded benefits on the claim in September of 2013, employer appealed the Decision and Order to the Board. Subsequently, however, employer filed a motion requesting that the miner's claim be remanded to the district director for modification proceedings. See 20 C.F.R. §725.310. The Board granted employer's motion on March 26, 2014.

³ The miner's most recent coal mine employment was in Illinois. Miner's Claim, Director's Exhibit 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Seventh Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Congress amended Section 932(l) of the Act to reinstate the right of certain survivors to receive automatic survivor’s benefits on claims filed after January 1, 2005, that were pending on or after March 23, 2010, without having to prove that the miner’s death was due to pneumoconiosis. See *Vision Processing, LLC v. Groves*, 705 F.3d 551, 554-55, 25 BLR 2-231, 2-238-39 (6th Cir. 2013); *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 381-82, 25 BLR 2-65, 2-71-72 (4th Cir. 2011); *B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 253, 25 BLR 2-13, 2-44 (3d Cir. 2011). Specifically, the right applies to an eligible survivor of “a miner who was determined to be eligible to receive benefits under [the Act] at the time of his or her death” 30 U.S.C. §932(l).

The administrative law judge interpreted that language to mean that a survivor is entitled to benefits automatically under Section 932(l) only after an award of benefits in an underlying miner’s claim has become final. Although the district director and Judge Reilly both determined that the miner was entitled to benefits, the administrative law judge concluded that claimant did not meet the requirements for automatic entitlement under Section 932(l), because the award of benefits in the miner’s claim was not yet final.

The Director argues that, contrary to the administrative law judge’s interpretation, the plain text of Section 932(l) does not require finality of a miner’s claim award for a survivor to be awarded benefits automatically. The Director further contends that his interpretation of Section 932(l) is consistent with the rest of the Act and with its administration, as well as Section 932(l)’s implementing regulation. Moreover, the Director argues that requiring finality in a miner’s claim award would be inconsistent with Congress’s purpose in reinstating Section 932(l). For the reasons that follow, we agree with the Director.

In interpreting Section 932(l), we must give the words in the statute their ordinary and plain meaning. *Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894, 900 (7th Cir. 2003). The administrative law judge concluded that the phrase “determined to be eligible to receive benefits” must mean a *final* determination that the miner is eligible to receive benefits. As the Director points out, however, the statute itself says nothing about a final determination. Director’s Brief at 4. The Act requires only that the miner “was determined to be eligible to receive benefits . . . at the time of his or her death” 30 U.S.C. §932(l). Because its plain text does not provide that the miner must be finally determined to be eligible to receive benefits, the Act does not impose a finality requirement. As written, Section 932(l) provides automatic entitlement to survivor’s benefits to eligible survivors of miners who were determined to be eligible for benefits — including miners whose determinations of eligibility are not yet final, and are subject to potential appeal and reversal.

That interpretation is consistent with the interpretation of similar language elsewhere in the Act. Section 923(d) provides that a miner is not entitled to benefits while engaged in coal mine employment, but that “[a]ny miner who has been *determined to be eligible for benefits* pursuant to a claim filed while such miner was engaged in coal mine employment shall be entitled to such benefits if his or her employment terminates within one year after the date such determination becomes final.” 30 U.S.C. §923(d) (emphasis added). Thus, as the Director observes, Section 923(d) recognizes that whether a miner “has been determined to be eligible for benefits” is distinct from the issue of whether such a determination is final. Director’s Brief at 5 n.3. Because the phrase “determined to be eligible for benefits” in Section 923(d) does not mean a final determination, we can infer that the phrase “determined to be eligible to receive benefits” in Section 932(l) likewise does not mean a final determination. *See Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) (“A term appearing in several places in a statutory text is generally read the same way each time it appears.”); *see also Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 501 (1998) (holding that “similar language contained within the same section of a statute must be accorded a consistent meaning”).

Such a reading is also consistent with the way in which the Director administers the Act regarding the payment of benefits. As the Director notes, a miner who is awarded benefits at any stage of the claim proceedings is entitled to receive benefits, whether or not the award is final. Director’s Brief at 6-8. Specifically, the regulations provide that “benefits under the Act shall be paid when they become due,” which occurs “after the issuance of an effective order requiring the payment of benefits by a district director, administrative law judge, Benefits Review Board, or court, notwithstanding the pendency of a motion for reconsideration before an administrative law judge or an appeal to the Board or court”⁴ 20 C.F.R. §725.502(a)(1). An effective order remains in effect, and benefits remain due, “unless [the order] is vacated by an administrative law judge on reconsideration, or . . . by the Benefits Review Board or an appropriate court, or is superseded by an effective order issued pursuant to [20 C.F.R.] §725.310.”⁵ *Id.* If an

⁴ A proposed order issued by a district director becomes effective after thirty days “if no party timely requests revision of the proposed decision and order or a hearing.” 20 C.F.R. §725.502(a)(2). An order issued by an administrative law judge becomes effective “when it is filed in the office of the district director.” *Id.* An order issued by the Board becomes “effective when it is issued.” *Id.* An order issued by a court becomes effective in accordance with the court’s rules. *Id.*

⁵ Therefore, Judge Reilly’s Decision and Order awarding benefits to the miner remains in effect, notwithstanding employer’s modification request pending with the district director. *See* 20 C.F.R. §725.502(a)(1).

employer fails or refuses to pay benefits pursuant to an effective order until the claim has been finally adjudicated, the Black Lung Disability Trust Fund (Trust Fund) “shall commence the payment of such benefits and shall continue such payments as appropriate.”⁶ 20 C.F.R. §725.522(a). In short, upon an award of benefits at any stage of a black lung proceeding, a miner is legally entitled to receive benefits from either the responsible operator or the Trust Fund, regardless of an appeal, or a request for modification, of the award. Director’s Brief at 8. Therefore, we agree with the Director that miners who are entitled to receive benefits payments under the regulations, even before their awards are final, are necessarily “determined to be eligible to receive benefits” 30 U.S.C. §932(l); Director’s Brief at 6.

Furthermore, amended Section 932(l)’s implementing regulation is consistent with a reading of the statute that does not require a final award of benefits in a miner’s claim. Under 20 C.F.R. §725.212(a)(3)(ii), an eligible surviving spouse of a miner is entitled to benefits if the miner filed a claim “on or after January 1, 1982, which results or resulted in a final award of benefits, and [the survivor] filed a claim for benefits after January 1, 2005 which was pending on or after March 23, 2010.” We agree with the Director that, by its terms, the regulation covers awards that are not yet final (i.e., a miner’s claim which “results” in a final award), as well as awards that are already final (i.e., a miner’s claim which “resulted” in a final award). 20 C.F.R. §725.212(a)(3)(ii); *see Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844-45 (1984); Director’s Brief at 8.

Finally, the Director notes that, in reviving Section 932(l) and eliminating the need for a survivor to establish that the miner’s death was due to pneumoconiosis, Congress sought to ensure the continuation of benefits for eligible survivors of miners who were determined to be eligible to receive benefits. *See Campbell*, 662 F.3d at 250-51, 25 BLR at 2-39-40. We agree with the Director that forcing an eligible survivor to wait years for a final determination in a miner’s claim before being awarded survivor’s benefits would be contrary to the purpose of Section 932(l). Director’s Brief at 8-9.

In sum, the administrative law judge erred in concluding that an award of benefits in an underlying miner’s claim must be final for a survivor to be entitled to receive benefits under Section 932(l).

⁶ Furthermore, the Director, Office of Workers’ Compensation Programs, notes that even where, as here, the responsible operator timely requests a hearing following the district director’s proposed order awarding benefits in the miner’s claim, the miner is still entitled to receive benefits paid by employer; in the event of employer’s default, the benefits are paid by the Black Lung Disability Trust Fund. *See* 20 C.F.R. §§725.420(a), 725.522(a); Director’s Brief at 6.

Accordingly, the administrative law judge's Order of Remand and Order on Reconsideration are vacated, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge