

BRB No. 10-0565 BLA

VERA K. HORN )  
(Widow of CLYDE HORN) )  
 )  
Claimant-Respondent )  
 )  
v. )  
 )  
WOLF CREEK COLLIERIES )  
 ) DATE ISSUED: 05/09/2011  
Employer-Petitioner )  
 )  
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 Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2010-BLA-5045) of Administrative Law Judge Donald W. Mosser rendered on a survivor's claim<sup>1</sup> 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 relevant procedural history of this case is as follows.

Before the scheduled hearing, by Order dated April 29, 2010, the administrative law judge provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims filed after January 1, 2005. The amendments, in pertinent part, revived Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that an eligible survivor of a miner who was receiving 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). Claimant asserted that, because the miner was receiving black lung benefits at the time of his death, and because her claim was filed after January 1, 2005 and was pending on March 23, 2010, she meets the eligibility requirements for the application of amended Section 932(l), and is entitled to benefits. The Director, Office of Workers' Compensation Programs (the Director), moved for a summary decision, asserting that, pursuant to amended Section 932(l), claimant is automatically entitled to benefits as a matter of law, and that there is no genuine issue as to any material fact concerning her entitlement. Employer agreed that claimant meets the eligibility requirements for the application of amended Section 932(l), but asserted that the proper party for payment of any benefits is the Black Lung Disability Trust Fund.<sup>2</sup>

In a decision dated June 21, 2010, the administrative law judge initially noted that the miner was receiving benefits at the time of his death, pursuant to employer's withdrawal of controversion and the district director's award of benefits, and that claimant filed her survivor's claim on July 16, 2008, after the operative date for the application of amended Section 932(l). After considering the parties' arguments regarding the applicability of amended Section 932(l), the administrative law judge found that claimant met the eligibility criteria for automatic entitlement to benefits. The administrative law judge further found that employer is the responsible operator.

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<sup>1</sup> Claimant is the widow of the miner, who died on June 7, 2008. Director's Exhibit 12. At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim. Living Miner's Exhibit 1 at 19, 26, 58.

<sup>2</sup> Employer preserved for appeal its assertion that retroactive application of Public Law No. 111-148 is unconstitutional.

Accordingly, the administrative law judge granted the Director's motion for a summary decision, and awarded benefits, to be paid by employer.<sup>3</sup> Decision and Order at 2-4.

On appeal, employer asserts that retroactive application of amended Section 932(*l*) is unconstitutional. Employer further challenges the administrative law judge's determination that employer is liable for the payment of benefits in this case. Claimant responds, urging affirmance of the award of benefits. The Director responds, urging affirmance of the award, and of the administrative law judge's determination that employer is the responsible operator.

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'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer initially contends that the retroactive application of amended Section 932(*l*) to claims filed after January 1, 2005 "is arbitrary in that it imposes liability on the Employer and Carrier for claims without requiring proof of a connection to the employment and for which carriers have had no opportunity to assess premiums taking this provision into account." Employer's Brief at 4. For this reason, employer asserts, retroactive application of amended Section 932(*l*) "is in violation of the due process provisions of the Fifth Amendment" to the United States Constitution. Employer's Brief at 4. Employer's argument lacks merit.

As the administrative law judge correctly noted, the recent amendments, in pertinent part, revive Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that an eligible 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*); Decision and Order at 2. Contrary to employer's contention, the retroactive application of the automatic entitlement provisions of amended Section 932(*l*) to claims filed after January 1, 2005, does not constitute a due process violation. *Mathews v. United*

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<sup>3</sup> The administrative law judge further found, and employer does not dispute, that Peter Cave Coal Company, the named employer in the miner's claim, and Wolf Creek Collieries, the named employer in the survivor's claim, are the same entity. Decision and Order at 2 n.2; Living Miner's Exhibit 1 at 21, 43, 174. Moreover, the administrative law judge's finding is supported by the record, which indicates that the miner's benefits were paid by "Peter Cave Coal Company c/o Wolf Creek Collieries." Living Miner's Exhibit 1 at 21.

*Pocahontas Coal Co.*, 24 BLR 1-193, 1-198-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order) (unpub.); Director's Brief at 4. Rather, Congress made clear that the retroactive nature of Section 1556 serves the legitimate purpose of compensating the survivors of deceased miners "for the effects of disabilities bred in the past." *Mathews*, 24 BLR at 1-197, *quoting Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 3 BLR 2-36, 2-43 (1975); Director's Brief at 4. Nor is there merit to employer's contention that retroactive application of amended 932(l) denied employer and its carrier the "opportunity to assess premiums taking this provision into account." Employer's Brief at 4. As we stated in *Mathews*, since 1974, the federal black lung benefits program has required each policy issued to cover liabilities under the Act to include the Federal Coal Mine Health and Safety Act endorsement. 20 C.F.R. §726.203(a); *see Mathews*, 24 BLR at 1-199; Director's Brief at 5. This endorsement provides, in pertinent part, that insurers are liable for their principals' obligations under the Act, "and any laws amendatory thereto, or supplementary thereto, which may be or become effective while this policy is in force . . ." 20 C.F.R. §726.203(a); *see Mathews*, 24 BLR at 1-199; Director's Brief at 5. Thus, employer has been on notice that it may be liable for any liability arising from amendments to the Act. Therefore, as the administrative law judge properly found that claimant meets the eligibility requirements for the application of amended Section 932(l), we affirm the administrative law judge's award of survivor's benefits.

We further reject employer's assertion that the administrative law judge erred in finding that employer is the responsible operator. Specifically, employer contends that Peter Cave Coal Company (Peter Cave), the named employer in the miner's claim, and Wolf Creek Collieries (Wolf Creek), the named employer in the survivor's claim, no longer exist, as they were subsidiaries of the now bankrupt Horizon Natural Resources. Employer's Brief at 5. Employer asserts that "[a]lthough the Department of Labor has alleged that there is a bond or bonds issued by St. Paul/Travelers which will apply to this claim, no evidence of the existence or terms of any such bond has been adduced," and that due to the "failure of the Department of Labor to produce evidence of the alleged bond, the appropriate entity for payment of benefits . . . is the Black Lung Disability Trust Fund." Employer's Brief at 5. We disagree.

The regulation at 20 C.F.R. §725.494(e) provides that an operator will be deemed capable of assuming liability for benefits if one of three conditions is met: 1) the operator is covered by a policy or contract of insurance in an amount sufficient to secure its liability; 2) the operator was self-insured, during the period in which the miner was last employed by the operator, and there was a security given by the operator pursuant to 20 C.F.R. §726.104(b), that is sufficient to secure the payment of benefits; or 3) the operator possesses sufficient assets to secure the payment of benefits as awarded under the Act. 20 C.F.R. §725.494(e)(1)-(3). In order to qualify as a self-insured operator, the regulations permit the operator to give a security "[i]n the form of an indemnity bond

with sureties [in an amount] that is satisfactory to the [Office of Workers' Compensation Programs]." 20 C.F.R. §726.104(b).

The record reflects that the miner transferred to Wolf Creek from Peter Cave on December 15, 1985, and remained actively employed by Wolf Creek until June 15, 1986. Living Miner's Exhibit 1 at 168. The record also reflects that Wolf Creek was self-insured under the Act through an indemnity bond issued by St. Paul Fire & Marine Insurance Company, now St. Paul Travelers, under bond number 400HM7305. Director's Exhibits 21, 22.

Contrary to employer's arguments, once the Director has properly named a potentially liable operator, the Director no longer bears the burden of establishing that the named operator continues to be capable of paying benefits. Rather, the regulation specifically provides that "[i]t shall be presumed, in the absence of evidence to the contrary, that the designated responsible operator is capable of assuming liability for the payment of benefits in accordance with §725.494(e)." 20 C.F.R. §725.495(b). The named operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability, or that another operator that more recently employed the miner is financially capable of doing so. 20 C.F.R. §725.495(c). Moreover, as the Director contends, documentary evidence pertaining to the liability of a potentially liable operator, or to the identification of a responsible operator must be submitted before the district director, absent extraordinary circumstances. 20 C.F.R. §725.456(b)(1); Director's Brief at 6.

The Director has established that Wolf Creek posted a surety bond when it was authorized to self-insure, pursuant to 20 C.F.R. §726.104(b). Thus, as the record supports the administrative law judge's finding that employer failed to provide any exculpatory evidence before the district director relevant to its liability, we affirm the administrative law judge's determination that employer is the responsible operator liable for the benefits awarded on this claim.

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge