BRB Nos. 09-0780 BLA
and 09-0780 BLA-A

CHRISTIE GROVES (Widow of EARL GROVES) Claimant-Petitioner Cross-Respondent v. VISION PROCESSING, LLC and NATIONAL UNION FIRE INSURANCE COMPANY Employer/Carrier- Respondents Cross-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/29/2010 DECISION and ORDER

Appeal of the Decision and Order Award of Benefits in Living Miner's Claim – Denial of Benefits in Survivor's Claim of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Rita Roppolo (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:

Claimant appeals and employer cross-appeals the July 29, 2009 Decision and Order Award of Benefits in Living Miner's Claim – Denial of Benefits in Survivor's Claim (2007-BLA-5807 and 2007-BLA-5808) of Administrative Law Judge Daniel F. Solomon with respect to a miner's claim filed on March 3, 2006 and a survivor's claim filed on August 1, 2006,[1] 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). Adjudicating the miner's and the survivor's claims under 20 C.F.R. Part 718, the administrative law judge credited the miner with at least twenty-nine years of coal mine employment, based on the parties' stipulation. In addition, the administrative law judge accepted employer's concessions to the existence of pneumoconiosis arising out of coal mine employment, 20 C.F.R. §§718.202(a), 718.203(b), and that employer was the properly named responsible operator. With regard to the miner's claim, the administrative law judge found that the evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), and that the total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits in the miner's claim.[2]

Regarding the survivor's claim, the administrative law judge found that the medical evidence was sufficient to establish the existence of both clinical and legal pneumoconiosis pursuant to Section 718.202(a). However, the administrative law judge found that the medical evidence was insufficient to establish that pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c), *citing Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Accordingly, the administrative law judge denied benefits in the survivor's claim.

On appeal, claimant challenges the administrative law judge's denial of benefits in the survivor's claim. Claimant contends that the administrative law judge erred in

[1] The miner died on July 2, 2006, while his claim was pending. *See* Director's Exhibits 2, 52.

[2] Employer did not challenge the administrative law judge's award of benefits in the miner's claim. Therefore, the award of benefits in the miner's claim became final. *See* 20 C.F.R. §725.479(a).

finding that the medical opinions were insufficient to establish death causation pursuant to Section 718.205(c), particularly the opinions of Drs. Avula and Rasmussen. In response, employer urges affirmance of the administrative law judge's denial of benefits, as the administrative law judge properly found that the opinions of Drs. Avula and Rasmussen failed to establish death causation at Section 718.205(c).[3] Employer, however, also cross-appeals, challenging the administrative law judge's weighing of the medical opinions of Drs. Broudy, Dahhan and Caffrey on the issue of death causation at Section 718.205(c). Employer contends that the administrative law judge erred in rejecting and/or discounting the opinions of Drs. Broudy, Dahhan and Caffrey and contends that, if the Board vacates the administrative law judge's decision denying benefits on the survivor's claim and remands the case, then the administrative law judge should be instructed to reconsider the opinions of Drs. Broudy, Dahhan and Caffrey pursuant to Section 718.205(c). In response to employer's cross-appeal, claimant reiterates the arguments she made in her brief on appeal, that the administrative law judge erred in finding that the medical evidence was insufficient to establish that the miner's death was due to pneumoconiosis.

The Director, Office of Workers' Compensation Programs (the Director), in response to claimant's appeal and employer's cross-appeal, argues that the case should be remanded to the administrative law judge for further consideration of the medical evidence on the issue of death causation at Section 718.205(c), particularly because the administrative law judge did not properly consider the opinion of Dr. Rasmussen. In reply, employer argues that remand of the case is not necessary because the administrative law judge properly found Dr. Rasmussen's opinion insufficient to establish entitlement in the survivor's claim. Claimant responds, agreeing that this case must be remanded to the administrative law judge for further consideration on the issue of death causation.

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*),[4] which provides that

[3] Employer has submitted a combined brief entitled, "Brief on Behalf of Operator/Carrier in Response to Claimant's Appeal and in Support of the Operator's Cross-Appeal."

[4] The 2010 amendments to the Act also reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner was totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

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*).

By Order dated May 10, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of the 2010 amendments. *Groves v. Vision Processing, LLC.*, BRB Nos. 09-0780 BLA and 09-0780 BLA-A (May 10, 2010)(unpub. Order). In response to the Board's Order, claimant and the Director argue that amended Section 422(*l*) is applicable to this survivor's claim. Specifically, claimant and the Director contend that, because the administrative law judge awarded benefits in the miner's claim, claimant filed her survivor's claim after January 1, 2005, and her claim was pending on March 23, 2010, she is automatically entitled to survivor's benefits under the new amendments.[5] Employer, in response, agrees that, if the new amendments are found applicable to this survivor's claim, it appears that claimant would be automatically entitled to continue receiving benefits because of the award in the miner's claim. Employer argues, however, that the "automatic" application of the derivative entitlement provision of the new amendments is a "constitutional violation of due process[,]" Employer's Brief at 6, because employer was never provided with notice or an opportunity to be heard on the new provision providing derivative entitlement. In support of its argument, employer contends that it had no reason to challenge the administrative law judge's decision awarding benefits in the miner's claim at the time it was issued, as it had no reason to believe that the award in that claim would affect the ultimate disposition of the survivor's claim.[6]

[5] The Director, Office of Workers' Compensation Programs, states that there is no dispute regarding the issue of claimant's relationship to, and/or dependency on, the miner, and that the award of benefits in the miner's claim was final as employer never challenged it. Director's Supplemental Brief at 3.

[6] Employer contends that it did not challenge the decision awarding benefits in the miner's claim because of the expense involved in appealing the award and the fact that the award of benefits was minimal, due to the short period of time between the time the miner filed his claim and the time of his death. Employer's Brief at 6.

Further, employer contends that it is clear from its actions, *i.e.*, its filing of both a response to claimant's appeal of the denial of benefits in the survivor's claim and its filing of a cross-appeal, challenging the administrative law judge's rejection of evidence that would support a denial of survivor's benefits, that it has always exhibited its intention to oppose an award of benefits in the survivor's claim. *Id*.

Noting that the fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner[,]" Employer's Supplemental Brief at 6, *citing Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), employer contends that resolution of the issue of whether claimant is automatically entitled to a continuation of benefits based on the award in the miner's claim requires consideration of the three-prong test enunciated in *Mathews v. Eldridge*, 422 U.S. 319 (1976), concerning the constitutional sufficiency of administrative procedures.[7] Employer's Supplemental Brief at 6.

Employer's reliance on *Mathews*, however, is misplaced. *Mathews* holds that the government cannot take away a statutorily created interest, such as disability benefits, without notice and the opportunity to be heard. *See Mathews*, 422 U.S. at 332-333. Such an interest is not at stake in the present case. Rather, employer is, in effect, seeking to re-open the decision awarding benefits in the miner's claim, which it defended before the administrative law judge. That decision became final when employer chose not to challenge it. Consequently, employer's argument that the application of amended Section 422(*l*), providing derivative entitlement to a survivor, is a violation of its due process rights is not meritorious.[8] Contrary to its contention, employer was provided an opportunity to defend against the administrative law judge's award of benefits in the miner's claim. While that claim was before the administrative law judge, employer was given the opportunity to present evidence in support of its position, object to the evidence

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[7] In *Mathews v. Eldridge*, 422 U.S. 319 (1976), the United States Supreme Court stated that:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional procedural requirement would entail.

Mathews, 424 U.S. at 335.

[8] In light of the applicability of Section 422(*l*), 30 U.S.C. §932(*l*), we decline to address employer's additional arguments regarding the applicability of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), to this claim, or its arguments that the evidence of record is sufficient to rebut any of the presumptions available to claimant thereunder. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

presented by claimant and set forth its legal theory of the case. Further, employer had the right to appeal the administrative law judge's decision awarding benefits in the miner's claim to the Board. *See* 20 C.F.R. §802.201. The fact that employer chose not to appeal the award in the miner's claim, on which an award in the survivor's claim now rests, does not mean that employer's due process rights have been violated. *See Mathews*, 422 U.S. at 332-333; *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-20, 3 BLR 2-36, 2-43-47 (1975); *Mathews v. United Pocahontas Coal Co.*, BLR , BRB No. 09-0666 BLA (Sept. 22, 2010). Claimant is, therefore, derivatively entitled to benefits pursuant to amended Section 422(*l*) because she filed her claim after January 1, 2005, the claim was pending on March 23, 2010, and the miner was eligible to receive benefits at the time of his death.

Accordingly, the administrative law judge's Decision and Order Award of Benefits in Living Miner's Claim – Denial of Benefits in Survivor's Claim is reversed with respect to the denial of benefits in the survivor's claim, and this case is remanded to the district director for the entry of an award of survivor's benefits.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge