U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0014 BLA

THELMA JOHNSON (Widow of WILLARD E. JOHNSON) Claimant-Respondent v. MOR COAL, INCORPORATED, c/o HUGHES GROUP, INCORPORATED and SECURITY INSURANCE COMPANY OF HARTFORD, c/o ARROWPOINT CAPITAL Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/16/2015 DECISION and ORDER

Appeal of the Decision and Order of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

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

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

MacKenzie Fillow (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, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2011-BLA-6046) of Administrative Law Judge John P. Sellers, III, awarding benefits 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[1] filed this claim on April 8, 2011. 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 argues that it should therefore 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 disputes its designation as the responsible operator liable for the payment of any benefits owed to claimant. Further, employer 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. The Director also contends, however, that this case should be remanded to the administrative law judge for consideration of employer's challenge to its

[1] Claimant is the widow of the miner, who died on March 20, 2006. 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 1, 2.

[2] As part of the Patient Protection and Affordable Care Act (PPACA), Congress enacted amendments to the Black Lung Benefits Act (the 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 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.

designation as the responsible operator. Employer has filed a reply brief, reiterating its arguments on appeal.[3]

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

Liability For Payment of Benefits

Employer asserts that it should be dismissed as the responsible operator liable for the payment of any benefits owed to claimant 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 March 20, 2006. Director's Exhibit 9. On April 8, 2011, claimant filed her claim for survivor's benefits. Director's Exhibit 7. On April 21, 2011, the district director issued a Proposed Decision and Order awarding benefits. Director's Exhibit 10 at 4. The Proposed Decision and Order stated that, pursuant to Section 932(*l*), claimant was entitled to receive benefits without having to prove that the miner's death was due to pneumoconiosis, 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. *Id.* The Proposed Decision and Order further stated that "Mor Coal Inc[.] has 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 the claimant . . . ." Director's Exhibit 10 at 5. 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.* at 6.

[3] Employer does not challenge the administrative law judge's findings that claimant filed her claim after January 1, 2005; 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. Therefore, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] The miner's coal mine employment was in Kentucky. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction 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).

On May 17, 2011, John Morton of Morton Law LLC,[5] entered an appearance on behalf of employer. By letter of the same date, employer's counsel stated that employer disagreed with all of the findings of fact and conclusions of law in the Proposed Decision and Order, and requested a hearing. Director's Exhibit 11 at 2. On June 23, 2011, the case was transferred to the Office of Administrative Law Judges. Director's Exhibit 16.

At the hearing, employer again challenged all aspects of the Proposed Decision and Order, including its liability for benefits as the responsible operator. Employer asserted that it had not been properly notified of the claim in violation of its due process rights, and that it was not the most recent operator to have employed the miner for at least a year. In his Decision and Order, issued September 25, 2014, the administrative law judge rejected employer's arguments, and found that claimant is derivatively entitled to survivor's benefits, payable by employer.[6]

Employer asserts that because the district director did not issue a formal Notice of Claim, employer was 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 of the United States Constitution, 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 Ky., 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).

[5] In the miner's claim, employer was represented by Baird & Baird, P.S.C.. Director's Exhibit 2 at 15. In the survivor's claim, employer is represented by Morton Law LLC. Director's Exhibit 11 at 2.

[6] The administrative law judge stated that claimant's April 8, 2011 survivor's claim "did not give rise to procedural rights to the Employer, as [claimant] is entitled to continuing benefits under the PPACA as a matter of law." Decision and Order at 4.

Contrary to employer's contention, while the district director did not issue a formal Notice of Claim, the district director's April 21, 2011 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*) of the Act, and that employer had been found to be liable for the payment of those benefits. Director's Exhibit 10. In addition, the Proposed Decision and Order 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 May 17, 2011, exercised employer's rights to controvert the claim and request 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. *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. §§725.407[7] and 725.418(d).[8] Employer's Brief at 6-7, 14-15. Employer's contention lacks merit.

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."[9] 20 C.F.R. §725.418(a)(2); *see Sextet Mining*

[7] 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).

[8] The regulation at 20 C.F.R. §725.418(d) in effect when the district director acted 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).

[9] 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)

Corp. v. Whitfield, 604 Fed. Appx. 442, (6th Cir. Mar. 12, 2015); Director's Brief at 2 n.2. 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. 20 C.F.R. §725.418(a)(3). Thus, contrary to employer's contention, the district director's 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.

However, as the Director asserts, contrary to the administrative law judge's finding, an operator identified as liable for a survivor's continuing benefits is not prohibited from challenging its liability as the responsible operator. Moreover, the revised implementing regulation in effect when the administrative law judge acted specifically provides that "[a]ny operator identified as liable for benefits under this paragraph may challenge the finding of liability . . . ." 20 C.F.R. §725.418(a)(3). In declining to address employer's arguments regarding its responsible operator status, the administrative law judge deprived employer of that opportunity. Thus, while we reject employer's argument that it must be dismissed from the claim, we must, nonetheless, vacate the administrative law judge's determination that employer is responsible for the payment of survivor's benefits, and remand this case for further consideration of any arguments, and evidence, employer submits with respect to its responsible operator status.[10] 20 C.F.R. §725.418(a)(3); Director's Brief at 3.

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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 2 n.3. As the Director notes, however, by specifically incorporating procedures by which an operator can challenge its liability, the revised regulation balances the goal of prompt payment of automatic survivors' benefits with the "need to protect coal mine operators' due process rights." Director's Brief at 3, *quoting* 77 Fed. Reg. at 19,469.

[10] Employer asserts that, if it is found to be liable for benefits on remand, employer should be granted an "offset" for benefits received in the miner's state claim, in the amount of "$489.10 monthly through April 2011 . . . plus $60,000.00 for the settlement award . . . ." Employer's Brief at 22-23; Employer's Reply Brief at 8. This argument is premature. The Board does not have authority to calculate the amount of monthly benefits to which claimant may be entitled; the computation of benefits will be

determined by the district director following the issuance of an effective order requiring the payment of benefits. 20 C.F.R. §725.502(b)(2).

Application 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 20-21. Employer asserts that the Act should be interpreted to exclude benefits for survivors of miners "who died for reasons unrelated" to pneumoconiosis. Employer's Brief at 21. The arguments employer makes are virtually identical to the ones that the United States Court of Appeals for the Sixth Circuit recently rejected. *McCoy Elkhorn Coal Corp. v. Dotson*, 714 F.3d 945, 945-46, 25 BLR 2-249, 2-253 (6th Cir. 2013); *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. 127 (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 *Dotson* and *Groves*, we reject employer's arguments.

Employer further argues that, even if valid, application of the automatic entitlement provision of amended Section 932(*l*) to this claim would be "unfair." Specifically, employer asserts that because the miner's award of federal black lung benefits was completely offset by a state award, employer had no incentive to challenge the award of benefits in the miner's claim, and simply withdrew its controversion. Employer's Brief at 20; Employer's Reply Brief at 7. Thus, employer asserts, the finding of entitlement in the miner's claim cannot be fairly applied to confer automatic entitlement in the survivor's claim. Employer's argument lacks merit. Employer's argument is a variation on the arguments that the Board addressed in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010), to the effect that retroactive application of amended Section 932(*l*) constitutes a due process violation because it subjects employer to a financial burden that it could not have foreseen. The Board held in *Mathews*, however, that Congress legitimately exercised its authority to "adjust the burdens and benefits of economic life," in amending Section 932(*l*) and making it applicable to claims filed after January 1, 2005. *Mathews*, 24 BLR at 1-200, *quoting Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 3 BLR 2-36, 2-43 (1975); *see also Groves*, 705 F.3d at 556-58, 25 BLR at 2-242-45; *Campbell*, 662 F.3d at 255-58, 25 BLR at 2-49-53; *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Therefore, for the reasons set forth in *Mathews*, we reject employer's allegation that application of amended Section 932(*l*) to this case would be "unfair."

Employer also contends that claimant is not an "eligible survivor" within the meaning of amended Section 932(*l*) because she did not prove that pneumoconiosis caused, or contributed to, the miner's death. Employer's Brief at 20-21. Contrary to employer's contention, the automatic entitlement provisions of amended Section 932(*l*)

provide benefits to a survivor without the requirement that she prove that the miner's death was due to pneumoconiosis. *Campbell*, 662 F.3d at 249, 25 BLR at 2-37; *Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-231 (2011). Thus, we reject employer's assertion that claimant is not an "eligible survivor" within the meaning of amended Section 932(*l*).

In sum, 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*). We vacate, however, the administrative law judge's determination that employer is responsible for the payment of survivor's benefits, and remand this case for further consideration of employer's arguments regarding its responsible operator status.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge