

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 11-2363**

AL HAMILTON CONTRACTING COMPANY and
ROCKWOOD CASUALTY,

Petitioners

v.

NANCY C. SMEAL (Widow of Leroy C. Smeal), and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents

On Petition for Review of a Final Order of the Benefits
Review Board, United States Department of Labor

BRIEF FOR THE FEDERAL RESPONDENT

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT REGARDING ORAL ARGUMENT	2
STATEMENT OF JURISDICTION	2
STATEMENT OF THE ISSUES	3
STATEMENT OF THE CASE	4
STATEMENT OF THE FACTS	4
A. Amended Section 422(l)	4
B. Mrs. Smeal’s claim.....	5
STATEMENT OF RELATED CASES AND PROCEEDINGS.....	7
STANDARD OF REVIEW	7
SUMMARY OF THE ARGUMENT	8
ARGUMENT.....	8
CONCLUSION	12
COMBINED CERTIFICATIONS	13

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<i>B&G Construction Co. v. Campbell</i> , 662 F.3d 233 (3d Cir. 2011)	<i>passim</i>
<i>Director, OWCP v. Barnes & Tucker Co.</i> , 969 F.2d 1524 (3d Cir. 1992)	8
<i>I.T.E.C. v. Benamati</i> , No. 10-3126, 2012 WL 1094862 (3d Cir. April 3, 2012))	2, 4, 7, 9
<i>Lombardy v. Director, OWCP</i> , 355 F.3d 211 (3d Cir. 2004)	7
<i>W. Va. CWP Fund v. Stacy</i> , 671 F.3d 378 (4th Cir. 2011)	11
<i>Keene v. Consolidated Coal Co.</i> , 645 F.3d 844 (7th Cir. 2011)	11
 <u>Statutes:</u>	
Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556 (2010)	1, 2, 5
Black Lung Benefits Act, 30 U.S.C. §§ 901-944	1
Section 422(l), 30 U.S.C. § 932(l)	<i>passim</i>
Longshore and Harbor Workers' Compensation Act, Section 19(d), 33 U.S.C. § 919(d)	2
Section 21(a), 33 U.S.C. § 921(a)	2
Section 21(b)(3), 33 U.S.C. § 921(b)(3)	2
Section 21(c), 33 U.S.C. § 921(c)	3

Regulations:

20 C.F.R. §§ 725.350 - 725.351.....6
20 C.F.R. §§ 725.418 - 725.421.....6
20 C.F.R. §§ 725.450 - 725.451.....6

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BRIEF FOR THE FEDERAL RESPONDENT

This appeal involves an award of survivors' benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-44, as amended by the Patient Protection and Affordable Care Act (ACA), Pub. L. No.

111-148, § 1556 (2010), to Nancy C. Smeal, widow of deceased miner Leroy C. Smeal. Al Hamilton Contracting Company (Hamilton), Mr. Smeal's former employer, has petitioned the Court to review the award. The Director, Office of Workers' Compensation Programs, responds in support of the award.

STATEMENT REGARDING ORAL ARGUMENT

The Director does not believe that oral argument is necessary because the resolution of this appeal is controlled by this Court's decisions in *B&G Construction Co. v. Campbell*, 662 F.3d 233 (3d Cir. 2011), and *I.T.E.C. v. Benamati*, No. 10-3126, 2012 WL 1094862 (3d Cir. April 3, 2012).

STATEMENT OF JURISDICTION

Administrative Law Judge Thomas Burke had jurisdiction to adjudicate the claim under Section 19(d) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 919(d).¹ He issued a Decision and Order Awarding Benefits on May 25, 2010. A. 08.²

¹ The BLBA incorporates certain provisions of the Longshore Act, including Sections 19 and 21. 30 U.S.C. § 932(a).

² "A" refers to the Petitioner's Appendix.

Hamilton filed a timely appeal of that order to the United States Department of Labor Benefits Review Board, within the 30-day period required by 33 U.S.C. § 921(a). A. 03. The Board had jurisdiction to review the ALJ's order pursuant to Section 21(b)(3) of the Longshore Act, 33 U.S.C. § 921(b)(3). The Board affirmed the ALJ's award in its entirety in an April 29, 2011 order. *Id.*

Hamilton filed an appeal with this Court on May 23, 2011. A. 01. This Court has jurisdiction to review the Board's order pursuant to Section 21(c) of the Longshore Act, 33 U.S.C. § 921(c). The appeal is timely because it was filed within 60 days of the Board's April 29, 2011 order. 33 U.S.C. § 921(c). The Court has jurisdiction over the petition under 33 U.S.C. § 921(c), as the "injury" in this case, Mr. Smeal's exposure to coal mine dust, occurred in Pennsylvania.

STATEMENT OF THE ISSUES

In 2010, Congress amended BLBA Section 422(l) to restore derivative benefits to the qualifying survivors of coal miners who were awarded benefits during their lifetimes. Mrs. Smeal, the

widow of such a miner, was awarded survivors' benefits pursuant to this amended provision. The questions presented are:

- (1) Does the award violate the Fifth Amendment's Due Process Clause or Takings Clause?
- (2) Is amended Section 422(l) effective in the absence of an implementing regulation?

STATEMENT OF THE CASE

The ALJ summarily awarded benefits. The Board affirmed. Hamilton appealed. On September 14, 2011, this Court stayed briefing in this case pending its decisions in *Campbell* and *Benamati*, which raised the same constitutional issues. On May 31, 2012, after those cases were decided, the Court lifted the stay and instructed the respondents to file briefs within 14 days.

STATEMENT OF THE FACTS

A. Amended Section 422(l).

On March 23, 2010, Congress enacted amendments to the BLBA through the ACA. The amendments, in pertinent part, revived Section 422(l) of the BLBA, 30 U.S.C. § 932(l), which provides that the survivor of a miner who was eligible to receive

benefits at the time of his or her death is derivatively entitled to survivors' benefits, without having to establish that the miner's death was due to pneumoconiosis.³

Section 422(l) reads:

Filing of new claims or refiling or revalidation of claims of miners already determined eligible

In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner[.]

30 U.S.C. § 932(l). Amended Section 422(l) applies to claims for survivor's benefits filed after January 1, 2005, and pending on or after March 23, 2010 -- the ACA's enactment date. Pub. L. No. 111-48 § 1556(c)(2010).

B. Mrs. Smeal's claim.

Mrs. Smeal filed this claim on May 19, 2009, before Section 422(l) was amended. A. 09. Finding that pneumoconiosis caused Mr. Smeal's death within the meaning of the BLBA and its

³ For a detailed discussion of the relevant history of the BLBA in general and Section 422(l) in particular, see *Campbell*, 662 F.3d at 238-245.

implementing regulations, a Department of Labor claims examiner issued a proposed decision and order awarding benefits on December 3, 2009. *Id.* At Hamilton's request, the claim was transferred to the Office of Administrative Law Judges on March 10, 2010. *Id.*⁴

Before a hearing was held, the ACA was enacted. The Director, in a motion for summary disposition, and Mrs. Smeal, by letter, argued that Mrs. Smeal was entitled to survivors' benefits under the amended provision. *Id.* Hamilton responded that the case should be held in abeyance until the Department of Labor revised the BLBA's implementing regulations, arguing that amended Section 422(l) did not, on its face, restore derivative survivors' benefits. *Id.*

On May 25, 2010, the ALJ issued a summary decision awarding survivors' benefits to Mrs. Smeal. A. 09. The ALJ rejected

⁴ Black lung claims are initially heard by district directors or their designees (typically OWCP claims examiners). *See generally* 20 C.F.R. §§ 725.350-725.351, 725.418-725.421. After the district director issues a proposed decision and order awarding or denying benefits, any party may request that the case be transferred to an ALJ for a de novo hearing. 20 C.F.R. §§ 725.450-725.451.

Hamilton’s argument that amended Section 422(l) was not effective until a regulation was promulgated, instead concluding that the amended statute “enables an eligible survivor of a miner to establish entitlement to benefits solely on the fact that the miner had been awarded benefits during his lifetime.” *Id.* There was no dispute that Mrs. Smeal’s claim met amended Section 422(l)’s eligibility requirements. Her deceased husband, who worked as a coal miner for 42 years, was awarded federal black lung benefits in 2005 after an ALJ ruled that he was totally disabled by pneumoconiosis. A. 08, 16, 28.

Hamilton appealed to the Benefits Review Board, which affirmed the award. A. 10, 06.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not been before this Court previously. The same issues were decided in *Campbell* and *Benamati*, however.

STANDARD OF REVIEW

The issues addressed in this brief involve questions of law subject to the Court’s plenary review. *Lombardy v. Director, OWCP*, 355 F.3d 211, 213 (3d Cir. 2004). The Director’s interpretation of

the BLBA is, however, entitled to deference. *Director, OWCP v. Barnes & Tucker Co.*, 969 F.2d 1524, 1527 (3d Cir. 1992).

SUMMARY OF THE ARGUMENT

There is no dispute that amended Section 422(l) applies to Mrs. Smeal's claim or that she satisfies its requirements as an eligible survivor of a miner who was awarded benefits during his lifetime. Hamilton's arguments that the amended provision (1) is unconstitutional and (2) does not explicitly provide for derivative benefits to eligible survivors, and thus has no effect until it is implemented by regulation, were considered and rejected by this Court in *Campbell*. The award should therefore be affirmed.

ARGUMENT

Amended Section 422(l) applies to Mrs. Smeal's claim, which was filed after January 1, 2005, and pending on and after March 23, 2010. Pet. Br. 4; Pub. L. No. 111-48 § 1556(c)(2010). She satisfies its eligibility requirements because her husband was awarded benefits as a miner totally disabled by pneumoconiosis during his lifetime. Pet. Br. 4. Hamilton concedes these facts, but argues that Section 422(l) is (1) unconstitutional and (2) ineffective

in the absence of an implementing regulation. Pet Br. 10-11. Both arguments are wholly undermined by this Court's *Campbell* decision.

Hamilton's constitutional arguments consist of little more than a reference to the then-pending *Campbell* and *Benamati* cases. Pet. Br. 11-12. The liable employer in *Campbell* argued that the ACA's restoration of derivative survivors' benefits in Section 422(l) violated the Fifth Amendment's Due Process and Takings Clauses. 662 F.3d at 246. In a carefully reasoned opinion, this Court upheld the statute against those constitutional attacks. 662 F.3d at 263 (“[S]ection 422(l) as amended does not violate the Fifth Amendment's Due Process Clause or Takings Clause.”).

Relying on *Campbell*, this Court subsequently rejected identical constitutional challenges in *Benamati*. No. 10-3126, 2012 WL 1094862, at *2 (3d Cir. April 3, 2012) (rejecting Due Process and Takings Clause challenges, noting that the employer “offered no [new] issues for [the Court] to consider” beyond those arguments rejected in *Campbell*). *Campbell* is the law of this Circuit, and Hamilton has not even attempted to demonstrate any flaws in its

reasoning. Its constitutional challenge to Mrs. Smeal's award must therefore be rejected.⁵

Hamilton alternatively argues that the Mrs. Smeal's award is "premature as no Regulations have been promulgated which would mandate an entitlement to benefits in this case." Pet. Br. 10. But the basis for Mrs. Smeal's award is not regulation. It is amended Section 422(l) itself. To avoid this problem, Hamilton suggests that the statutory text "does not, in and of itself, create an automatic entitlement to benefits." *Id.* This argument is squarely foreclosed by *Campbell*, which held:

After our intensive study of the [BLBA] and of the PPACA, we are quite clear that the logical reading of the Act as it now stands is that Congress . . . has returned section [422(l)] to its pre-1981 function: ensuring the continuation of benefits for eligible survivors of miners who were totally disabled by pneumoconiosis at the time of their deaths without

⁵ Hamilton suggests, in passing, that its procedural due process rights were violated because the ALJ decided this case without holding a hearing. Pet Br. 11. Hamilton identifies no disputed factual issues that would have required a hearing, however. The employer was given the opportunity, and did respond, to Mrs. Smeal's and the Director's arguments that the claimant was entitled to derivative survivors' benefits by operation of amended Section 422(l). A. 09. Hamilton cites no authority for the remarkable proposition that an ALJ cannot issue a summary decision on undisputed facts without violating the Due Process Clause.

requiring that the survivors show that pneumoconiosis was a cause of death.

Campbell, 662 F.3d at 250. Other courts of appeals that have examined the ACA's black lung amendments have similarly determined that they are self-executing. See *W. Va. CWP Fund v. Stacy*, 671 F.3d 378 (4th Cir. 2011) (denying petition for review and affirming award of benefits under amended Section 422(l)), *petition for cert. filed* May 4, 2012 (No. 11-1020); *Keene v. Consolidated Coal Co.*, 645 F.3d 844, 849 (7th Cir. 2011) (remanding a claim for application of a statutory presumption also revived by the ACA amendments).⁶

In sum, the law of this Circuit is that amended Section 422(l) is constitutional and provides derivative benefits to the eligible survivors of miners who were found to be totally disabled by pneumoconiosis during their lifetimes. There is no dispute that Mrs. Smeal is an eligible survivor, or that amended Section 422(l) applies to her claim. Her award should be affirmed.

⁶ The Department has proposed revised regulations reflecting the ACA amendments to the BLBA, including amended Section 422(l). See Regulations Implementing the Byrd Amendments to the Black Lung Benefits Act, 77 Fed. Reg. 19456 (proposed Mar. 30, 2012).

CONCLUSION

The Director respectfully requests that the Court affirm the decisions of the ALJ and the Board awarding Mrs. Smeal's claim.

Respectfully submitted,

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COMBINED CERTIFICATIONS

I hereby certify that:

1) This brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) because it contains 1,659 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii), and complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Bookman Old Style.

2) On June 14, 2012, paper copies of the Director's brief were served by mail, postage prepaid, and an electronic copy of the brief in portable document format was served, via the CM/ECF system, on the following:

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3) That the texts of the electronic and paper versions of this brief are identical.

4) That a virus detection program (VirusScan Enterprise 8.8, updated October 5, 2011) has been run on the file containing the electronic version of the brief, and no virus was detected.

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