

BRB No. 04-0205 BLA

MAY W. TUCKER)
(Surviving Divorced Spouse of)
JAMES A. TUCKER))
)
Claimant-Respondent)
)
v.)
) DATE ISSUED: 11/23/2004
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Petitioner) DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis, P.C.), Chicago, Illinois, for claimant.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the administrative law judge's Decision and Order-Awarding Benefits in this subsequent survivor's claim.¹ Claimant filed an application for benefits on February 15, 1980. On

¹ Claimant is May W. Tucker, the surviving divorced spouse of James A. Tucker, the miner, who died on February 2, 1980. Director's Exhibit 8. The miner was awarded

April 3, 1980, the claims examiner denied benefits because the evidence did not show that claimant was dependent on the miner at the time of the miner's death. Director's Exhibit 4. Claimant took no further action on this claim. On April 17, 2002, claimant filed a new application for survivor's benefits. Director's Exhibit 6. Benefits were denied by the district director, Director's Exhibit 16, and the case was transferred to the Office of Administrative Law Judges for further adjudication. Director's Exhibit 17.

The administrative law judge noted that the basis for the prior denial was claimant's failure to establish her dependency on the miner. The administrative law judge also noted that because this case involves a subsequent claim, claimant must prove that an applicable condition of entitlement has changed since the denial of her prior claim. Decision and Order at 3. The administrative law judge found that claimant's newly submitted evidence establishes dependency, and therefore, the administrative law judge awarded benefits to claimant.

On appeal, the Director asserts that the administrative law judge erred in awarding benefits. Specifically, the Director contends that once a surviving divorced spouse is denied benefits solely for failure to establish dependency, any subsequent claim by this surviving divorced spouse must be denied as a matter of law. The Director asserts that because the determination of the dependency of a surviving divorced spouse is based on the facts at the time of the miner's death, *see* 20 C.F.R. §725.217, there is no opportunity for the dependency relationship to change. The Director also asserts that the administrative law judge erred in finding that claimant established that she was dependent on the miner at the time of his death. Claimant urges affirmance of the administrative law judge's Decision and Order-Awarding Benefits. Claimant has also filed a Motion for Expedited Decision.

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

Claimant's second application for benefits was filed on April 17, 2002, after the amended regulations took effect. The amended regulations state that a subsequent claim is a claim filed more than one year after the effective date of a final order denying a claim previously filed by the claimant. In addition, the regulations provide that a subsequent

benefits on March 20, 1979. Director's Exhibit 2. Claimant and the miner were divorced on November 28, 1967. Director's Exhibit 4.

claim “shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see §§725.202(d) (miner), 725.212 (spouse)...) has changed since the date upon which the order denying the prior claim became final.” 20 C.F.R. §725.309(d).²

Claimant’s prior claim was denied solely because the evidence did not show that she was dependent on the miner at the time of the miner’s death.³ Director’s Exhibit 4.

² In defining the conditions of entitlement in the claim of a surviving divorced spouse, 20 C.F.R. §725.212 states:

(a) An individual who is the surviving spouse or surviving divorced spouse of a miner is eligible for benefits if such individual:

(1) Is not married;

(2) Was dependent on the miner at the pertinent time; and

(3) The deceased miner either:

(i) Was receiving benefits under section 415 or part C of title IV of the Act at the time of death as a result of a claim filed prior to January 1, 1982; or

(ii) Is determined as a result of a claim filed prior to January 1, 1982, to have been totally disabled due to pneumoconiosis at the time of death or to have died due to pneumoconiosis....

20 C.F.R. §725.212(a).

³ The regulations also set out the criteria to be used in determining whether a surviving divorced spouse was dependent on the miner. The regulation at 20 C.F.R. §725.217 provides that:

An individual who is the miner’s surviving divorced spouse (see §725.216) shall be determined to have been dependent on the miner if, for the month before the month in which the miner died:

(a) The individual was receiving at least one-half of his or her support from the miner (see § 725.233(g)); or

Consequently, since the applicable conditions of entitlement are limited to those conditions upon which the prior denial was based, *see* 20 C.F.R. §725.309(d)(2), the only applicable condition of entitlement in this case is claimant’s dependency on the miner. By regulation, the determination regarding a surviving divorced spouse’s dependency on the miner is to be based on the factual situation in the “month before the month in which the miner died.” 20 C.F.R. §725.217. Because the dependency determination is, thus, based on the factual situation prior to the miner’s death, there is no opportunity for the dependency relationship to change after the miner dies. Therefore, the issue of the dependency of a surviving divorced spouse is not an issue that is capable of change pursuant to 20 C.F.R. §725.309. Because there is, therefore, no basis for a finding of a change in an applicable condition of entitlement in this case, we must reverse the administrative law judge’s award of benefits. Based on this holding, we need not address the arguments raised regarding the administrative law judge’s findings on the issue of dependency.⁴

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- (b) The individual was receiving substantial contributions from the miner pursuant to a written agreement (see §725.233 (c) and (f)); or
 - (c) A court order required the miner to furnish substantial contributions to the individual’s support (see §725.233(c) and (e)).

20 C.F.R. §725.217.

⁴ Moreover, in view of our disposition of this case, claimant’s Motion for Expedited Decision is rendered moot.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge