

BRB No. 92-1380 BLA

ALMA REIGH)
(Daughter of RUSSELL PROSSER))

)
Claimant-Petitioner)

v.)

)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

DATE ISSUED:

)
Respondent) DECISION AND ORDER
ON RECONSIDERATION

Appeal of the Decision and Order of David W. DiNardi, Administrative Law Judge, United States Department of Labor.

Andrew C. Onwudinjo (Krasno, Krasno & Quinn), Pottsville, Pennsylvania, for claimant.

Gary K. Stearman (Thomas S. Williamson, Jr., Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

By motion dated April 10, 1995, the Director, Office of Workers' Compensation Programs (the Director), timely requested reconsideration of the Board's Decision and Order in *Reigh v. Director, OWCP*, 19 BLR 1-64 (1995). See 20 C.F.R. §802.407(a). In *Reigh*, the Board affirmed the administrative law judge's determination that claimant was not entitled to automatic derivative entitlement pursuant to 20 C.F.R. §725.218(a)(2), since the previous finding that the miner's death was due to pneumoconiosis was made in a survivor's claim filed pursuant to

Part B of the Act, and noted that claimant failed to meet the eligibility requirements contained at 20 C.F.R. §§725.309, 725.220 and 725.221.

In this motion, the Director admits that the Board has reached the correct result in *Reigh*, but has now changed her position

regarding the applicability of the derivative entitlement provision at Section 725.218 to claims arising out of Part B. Apologizing for her failure to notify the Board of this change in policy sooner, the Director now asserts that claimant may receive derivative entitlement on the basis of the prior award of benefits under Part B, if eligibility requirements are met. The Director contends that, in this case, however, claimant has failed to meet the eligibility requirements at Sections 725.209, 725.220 and 725.221, and thus requests in this motion that the Board reiterate its affirmance of the denial of benefits below. Claimant filed a response to the Director's motion for reconsideration, asserting that the Director is precluded from challenging the issue of claimant's eligibility requirements as she did not file a cross-appeal on this issue when the case was initially before the Board. The Director replies, contending that a cross-appeal was not required as she did not challenge the ultimate result reached by the administrative law judge, and, in this motion, her request is for reconsideration of a specific holding made by the Board in its Decision and Order.

After consideration of the Director's motion, we grant the Director's request and modify our decision. In this motion, the Director states:

In our view, [S]ection 932(l) unequivocally mandates that all eligible survivors are entitled to automatic derivative benefits based on an award of a claim filed before January 1, 1982 Significantly, the entire Black Lung Benefits Act, including Parts B and C, comprises Subchapter IV of the Federal Coal Mine and Safety Act of 1969. Therefore, this section plainly grants automatic benefits to the eligible survivors of all miners receiving benefits on claims filed before January 1, 1982. The section does not limit automatic derivative entitlement to Part C awards, but rather encompasses survivors of both Part B and Part C miner beneficiaries. . . . For this reason, the Director has determined that she will no longer challenge Part C survivors' claims on the ground that a Part B award does not establish entitlement to benefits. We apologize to the Board for not bringing our change in position to its attention sooner.

Director's Motion for Reconsideration, at pp. 3-4.

The United States Court of Appeals for the Third Circuit, under whose appellate jurisdiction this claim arises, has held that the Board may not utilize its authority as an adjudicatory tribunal to replace a policy choice of the Director with a policy of the Board, unless it is plainly erroneous or inconsistent with the Act or its implementing regulations. See *Director, OWCP v. Barnes and Tucker Co.* [Molnar], 969 F.2d 1524, 16 BLR 2-99 (3d Cir. 1992); *Director, OWCP v. Mangifest*, 826 F.2d

1318, 10 BLR 2-220 (3d Cir. 1987). Although the Director's untimely change in position on this issue subsequent to the issuance and publication of our prior Decision and Order offends traditional notions of judicial economy and administrative efficiency, her current position is not plainly erroneous and is the only position consistent with the clear language of Section 432 of the Black Lung Act. See 30 U.S.C. §932(l). 30 U.S.C. §932(l) states:

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, except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981. (emphasis supplied).

30 U.S.C. §932(l) (emphasis supplied).

By definition, Subchapter IV of Chapter 30 of the United States Code contains both Part B and Part C of the Act. The language of Section 432(l) of the Act specifically provides that entitlement is available to be derived from any determination of entitlement from any claim arising under Subchapter IV which was filed prior to January 1, 1982, where the other conditions of derivative entitlement are met. Thus, based upon the current position of the Director, we modify our prior decision and hold that the statutory language of the Act mandates a result whereby a party filing a Part C claim be able to avail himself of derivative entitlement from a previous award of benefits under a Part B claim. See *Deloe v. Director, OWCP*, 15 BLR 1-9 (1991); see also *Director, OWCP v. Saulsberry*, 887 F.2d 667, 13 BLR 2-80 (6th Cir. 1989).

The Director further contends that, notwithstanding her change in policy noted above, claimant in this case is not entitled to benefits as the administrative law judge erred in finding that she met the unmarried eligibility requirement pursuant to Section 725.209. See 20 C.F.R. §725.209(a). We reject claimant's contention that the Director is precluded from raising the issue of survivorship at this stage of the proceeding. Where the Director is satisfied with the ultimate conclusion that claimant did not qualify for benefits, she cannot be bound to have waived the issue for failure to raise her dissatisfaction in non-dispositive issues in a response brief. *Barnes v. Director, OWCP*, 18 BLR 1-55 (1994), *modif. on recon*, 19 BLR 1-71 (1995); *Dalle Tezze v. Director, OWCP*, 814 F.2d 129, 10 BLR 2-62 (3d Cir. 1987). Thus, we reject claimant's contention that the Director is barred from requesting

reconsideration regarding claimant's failure to meet eligibility requirements pursuant to 20 C.F.R. §§725.209, 725.220 and 725.221.

Furthermore, we agree with the Director that claimant has failed to meet the eligibility requirements in this case. The administrative law judge found that claimant was not currently married at the time her claim was filed in 1989 and had remained dependent for some of her support upon the miner despite her marriage. See Decision and Order at 11-12. Thus, the administrative law judge found that although claimant was married, divorced, remarried and subsequently widowed, she never lost her status as a dependent upon her parents, notwithstanding that her father died twenty seven years prior to the death of her spouse, and her mother, the miner's widow, died nine years prior to the death of claimant's husband. Decision and Order at 12-17.

The administrative law judge's findings, however, are not in accord with law. 20 C.F.R. §725.209(a) states:

. . . An individual who is the beneficiary's child (§725.208) will be determined to be, or to have been, dependent on the beneficiary, if the child:

- (1) Is unmarried; **and**
- (2)(i) Is under 18 years of age; **or**
- (ii) Is 18 years of age or older and is under a disability as defined in section 223(d) of the Social Security Act, 42 U.S.C. 423(d); **or**
- (iii) Is 18 years of age or older and is a student.

20 C.F.R. §725.209(a).

Thus, Section 725.209 requires that claimant be unmarried as a prerequisite to dependency. Accordingly, the administrative law judge's findings that although married, she was still dependent on the miner is contrary to the prerequisite condition required by the regulation. See 20 C.F.R. §725.209.

Under Section 725.209, a surviving child of the beneficiary can not revive her status as an unmarried dependent of her parents upon the death of her husband. The Third Circuit has held that a dependent child's eligibility, once lost, does not reemerge upon subsequent events resulting in the child satisfying conditions of dependency where the child was disabled, and subsequently engaged in several years of gainful employment before the reemergence of disability. See *Kidda v. Director, OWCP*, 7 BLR 1-202 (1984), *aff'd* 769 F.2d 165, 8 BLR 2-28 (3d Cir. 1985).

The principle articulated by the Third Circuit in *Kidda* is naturally extended to situations similar to the one at bar, as claimant cannot regain unmarried status for purposes of establishing dependency upon her parents pursuant to Section 725.209(a)(i) where the child has married and is subsequently widowed. In the case at bar, claimant was initially married in 1947, was married for seven years, divorced, remarried in 1955 and remained married until the death of her husband in 1988. During the duration of her thirty-three year marriage, her father, the miner, died in 1960, and the widow of the miner died in 1979. Claimant cannot successfully argue that she remains dependent upon her parents as an unmarried child given the facts of this case. Once a surviving child loses dependency status, that status cannot be regained through the cessation and reemergence of elements of dependency. *See Kidda, supra*. Therefore, we reverse the finding of the administrative law judge and hold that, as a matter of law, claimant has failed to meet the eligibility requirements at Section 725.209 as an unmarried child of the beneficiary.

Accordingly, we modify our previous decision and reaffirm the administrative law judge's denial of benefits for the reasons stated herein.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

PARTS II.B.2 and X.B.

Based upon the current position of the Director, the Board modified its prior decision and held that under the statutory language of the Act at Section 432(l), a party filing a Part C claim is able to avail himself of derivative entitlement from a previous award of benefits under a Part B claim. The Board noted that by definition, Subchapter IV of Chapter 30 of the United States Code contains both Part B and Part C of the Act, and the language of Section 432(l) of the Act specifically provides that entitlement is available to be derived from any determination of entitlement from any claim arising under Subchapter IV which was filed prior to January 1, 1982, where the other conditions of derivative entitlement are met. ***Reigh v. Director, OWCP***, BLR , BRB No. 92-1380 BLA (June 12, 1996), *modifying on recon.*, 19 BLR 1-64 (1995).

PART V.A.1.

The Board followed the holding of the Third Circuit that it would not utilize its authority as an adjudicatory tribunal to replace a policy choice of the Director with a policy of the Board, unless it is plainly erroneous or inconsistent with the Act or its implementing regulations. ***Reigh v. Director, OWCP***, BLR , BRB No. 92-1380 BLA (June 12, 1996), *modifying on recon.*, 19 BLR 1-64 (1995).

PART V.A.9.

Claimant's contention that the Director is precluded from raising the issue of survivorship for the first time on reconsideration was rejected. Where the Director is satisfied with the ultimate conclusion that claimant did not qualify for benefits, she cannot be bound to have waived the issue for failure to raise her dissatisfaction in non-dispositive issues in a response brief. ***Reigh v. Director, OWCP***, BLR , BRB No. 92-1380 BLA (June 12, 1996), *modifying on recon.*, 19 BLR 1-64 (1995).

PART II.B.2.

The principle articulated by the Third Circuit in ***Kidda*** was extended to situations where a married child attempts to establish dependency, holding that claimant cannot regain unmarried status for purposes of establishing dependency upon her parents pursuant to Section 725.209(a)(1) where the child has married and is

subsequently widowed. In the case at bar, claimant was initially married in 1947, was married for seven years, divorced, remarried in 1955 and remained married until the death of her husband in 1988. During the duration of her thirty-three year marriage, her father, the miner, died in 1960, and the widow of the miner died in 1979. Claimant cannot successfully argue that she remains dependent upon her parents as an unmarried child given the facts of this case. Once a surviving child loses dependency status, that status cannot be regained through the cessation and reemergence of elements of dependency. **Reigh v. Director, OWCP**, BLR , BRB No. 92-1380 BLA (June 12, 1996), *modifying on recon.*, 19 BLR 1-64 (1995).