

BRB No. 03-0339 BLA

DOROTHY M. ROARK)
(Surviving Divorced Spouse of)
ELMER W. ROARK))
)
Claimant-Petitioner)
)
v.)
)
EASTERN ASSOCIATED COAL) DATE ISSUED: 02/03/2004
CORPORATION)
)
and)
)
OLD REPUBLIC INSURANCE COMPANY)
)
Employer/Carrier-)
Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and the Order Denying Request for Reconsideration of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Dorothy M. Roark, Anawalt, West Virginia, *pro se*.

Paul E. Frampton (Bowles, Rice, McDavid, Graff and Love P.L.L.C.), Morgantown, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order Denying Benefits and the Order Denying Request for Reconsideration (02-BLA-0101) of Administrative Law Judge Linda S. Chapman on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. '901 *et seq.* (the Act).² In a Decision and Order Denying Benefits, the administrative law judge credited the miner with twenty-six years of coal mine employment. The administrative law judge found that claimant met the relationship requirement for eligibility for benefits pursuant to 20 C.F.R. §725.216. However, the administrative law judge found that claimant did not meet the dependency requirement pursuant to 20 C.F.R. §725.217(a)-(c). Accordingly, the administrative law judge denied benefits. In a subsequent Order Denying Request for Reconsideration, the administrative law judge again found that claimant met the relationship requirement at 20 C.F.R. §725.216, but did not meet the dependency requirement at 20 C.F.R. §725.217. Accordingly, the administrative law judge again denied benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order Denying Benefits and Order Denying Request for Reconsideration. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.³

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. '921(b)(3), as incorporated into the Act by 30

¹Claimant is the surviving divorced spouse of the miner, who died on April 11, 1999. Claimant's Exhibits 1, 6.

²The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³Since the administrative law judge's length of coal mine employment finding and her finding that claimant met the relationship requirement pursuant to 20 C.F.R. §725.216, which are not adverse to claimant, are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

U.S.C. '932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish eligibility for entitlement to benefits under the Act, claimant, as the miner=s surviving divorced spouse, bears the burden of establishing her dependency upon the deceased miner by satisfying the requirements of Section 725.217. *See* 20 C.F.R. §725.217; *Putman v. Director, OWCP*, 12 BLR 1-127 (1988). Claimant may prove dependency if, for the month prior to the month in which the miner died, she was receiving (a) at least one-half of her support from the miner, or (b) substantial contributions from the miner pursuant to a written agreement, or (c) a court order required the miner to furnish substantial contributions to the individual=s support. *Id.*

Initially, we affirm the administrative law judge's finding that claimant did not meet the dependency requirements at 20 C.F.R. §725.217(a) and (b) because the record contains no evidence that claimant received support or contributions from the miner for the month before the month in which the miner died. In her Decision and Order Denying Benefits, the administrative law judge addressed the financial arrangements between claimant and the miner. The administrative law judge specifically stated:

The miner...was born on May 31, 1918, and died on April 11, 1999 (DX 1). He married the [c]laimant on July 16, 1945; they were divorced on June 28, 1971 (DX 5). The divorce decree provides that as of July 1, 1971, [the miner] was required to pay the [c]laimant alimony in the amount of \$175.00 a month, until further order of the court (DX 5). According to the [c]laimant, neither she nor [the miner] remarried (Tr. 20). [The miner] paid her alimony as required by divorce decree for approximately two years, when he moved to North Carolina. She never received any money from him after that (Tr. 21). At the time of [the miner's] death, they were not living together (Tr. 21-22).

Decision and Order Denying Benefits at 3. Claimant testified that she received Social Security benefits on account of the miner. Hearing Transcript at 21. However, the administrative law judge properly noted that the Social Security benefits claimant received on the miner's account do not qualify as contributions from the miner. *Taylor v. Director, OWCP*, 967 F.2d 961, 16 BLR 2-84 (4th Cir. 1992). Since there is no evidence that claimant received any money or other form of support from the miner after he moved to North Carolina in 1973, the record contains no evidence that claimant received at least one-half of her support from the miner for the month before the month in which the miner died, or that she received substantial contributions from the miner pursuant to a written agreement

for the month before the month in which the miner died. 20 C.F.R. §725.217(a) and (b). Thus, we hold that claimant has not produced evidence supportive of her burden to meet the dependency requirements at 20 C.F.R. §725.217(a) and (b).

Next, we affirm the administrative law judge's finding that claimant did not meet the dependency requirement at 20 C.F.R. §725.217(c) because the record contains no evidence that the \$175.00 monthly alimony payment required from the miner to claimant by the divorce decree constituted substantial contributions to claimant's support in the month before the month in which the miner died. In the Decision and Order Denying Benefits, the administrative law judge stated that "there is a court order requiring [the miner] to furnish regular contributions to the [c]laimant's support." Decision and Order Denying Benefits at 5. The administrative law judge also stated that "[a]lthough [the miner] did not comply with the order for the last 28 years of his life, there is no evidence that this order was ever modified, and by its terms it remained in effect." *Id.* However, the administrative law judge found that the court order did not require the miner to make *substantial* contributions to claimant's support at the time of the miner's death.

In the Order Denying Request for Reconsideration, the administrative law judge noted claimant's assertion that the \$175.00 monthly alimony payment required from the miner to claimant by the divorce decree constituted substantial contributions at the time of the divorce. Order Denying Request for Reconsideration at 1-2. However, the administrative law judge properly found that the regulations provide that the court order must require the miner to furnish substantial contributions to the miner for the month before the month in which the miner died. The administrative law judge stated:

Unfortunately, there is no evidence in the record to establish that \$175.00 a month would have been a substantial contribution, or a material factor in the cost of the [c]laimant's support, at the time of [the miner's] death. As I pointed out in my original Decision and Order, it is reasonable to assume that at the time the divorce decree was entered almost thirty years ago, the sum of \$175.00 would have gone a lot further in supporting the [c]laimant than it would today. However, there is no information in the record to establish what proportion of the [c]laimant's expenses would be covered by the \$175.00 a month payments, and thus whether those payments would have been a material factor in the cost of the [c]laimant's support at the time of [the miner's] death.

Id. at 2. The administrative law judge stated that "the term 'support' is based on expenses, not income." Decision and Order Denying Benefits at 4. Section

725.233(a) provides that “[t]he term ‘support’ includes food, shelter, clothing, ordinary medical expenses, and other ordinary and customary items for the maintenance of the person supported.” 20 C.F.R. §725.233(a). Further, Section 725.233(c) provides that the terms ‘regular contributions’ and ‘substantial contributions’ mean contributions that are customary and sufficient to constitute a material factor in the cost of the individual’s support.” 20 C.F.R. §725.233(c). Since the record contains no evidence regarding the total amount of claimant’s living expenses, claimant has not produced evidence supportive of her burden to meet the dependency requirement at 20 C.F.R. §725.217(c).⁴ Claimant’s failure to demonstrate that she is a dependent surviving divorced spouse as defined in the regulations precludes her entitlement to survivor’s benefits. *Walker v. Director, OWCP*, 9 BLR 1-233 (1987); *McCoy v. Director, OWCP*, 7 BLR 1-789 (1985).

Accordingly, the administrative law judge's Decision and Order Denying Benefits and Order Denying Request for Reconsideration are affirmed.

SO ORDERED.

⁴At the hearing, claimant stated, “[i]f I had to pay for all my medicine, it would cost me close to \$400, but the ‘Y’ sent me a yellow card, Governor and it pays so much.” Hearing Transcript at 21. However, claimant did not indicate the amount of her other expenses.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge