

BRB No. 00-1058 BLA

LOUISE HOLBROOKS)
(Surviving Divorced Spouse of)
WILLIAM HOLBROOKS))

Claimant-)
Petitioner)

v.)

G.P. COAL COMPANY)

and)

OLD REPUBLIC INSURANCE)
COMPANY, INCORPORATED)

Employer/Carrier-)
Respondents)

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

DATE ISSUED:

DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order - Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Louise Holbrooks, Lookout, Kentucky, *pro se*.

Laura Metcoff Klaus and Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Barry H. Joyner (Howard M. Radzely, Acting 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, United States Department of Labor.

Before: SMITH, DOLDER and McGRANERY Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order - Denying Benefits (00-BLA-0319) of Administrative Law Judge Joseph E. Kane on a survivor's 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). The administrative law judge found that claimant had established eligibility as a surviving divorced spouse since her marriage to the miner had lasted more than ten years as required by the regulation set forth in 20 C.F.R. §725.216 (2000).² Next, the administrative law judge determined that claimant failed to demonstrate her dependency on the miner pursuant to 20 C.F.R. §725.217(a)(1)-(3) (2000) and, therefore, failed to establish eligibility for benefits. Accordingly, the administrative law judge denied benefits. In response to claimant's appeal without counsel, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that he will not file a response brief in this appeal.³

¹ Claimant is the surviving divorced spouse of the miner, William Holbrooks, who died on April 18, 1999. Director's Exhibit 4. Claimant filed her application for benefits on April 30, 1999. Director's Exhibit 1.

Pursuant to his 1979 application for benefits, the miner was awarded benefits on February 24, 1986 by Administrative Law Judge James P. Abell, Jr., and the claim was in payment status until his death on April 18, 1999. Director's Exhibit 18. The miner's widow, Burtis Holbrooks, was awarded survivor's benefits based on the district director's "Award Modification - Survivor's Conversion" dated June 3, 1999. *Id.*

² The 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 65 Fed. Reg. 80,045-80,107 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³ The parties do not challenge the administrative law judge's determination that claimant established the relationship requirement for an eligible surviving divorced spouse pursuant to 20 C.F.R. §725.216 (2000), finding that claimant and

the miner had been married for more than ten years, Decision and Order at 4; Director's Exhibits 2, 3. Inasmuch as this finding is not adverse to claimant, it is affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the amended regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by Order issued on May 16, 2001, to which employer and the Director have responded.⁴ The Director asserts that the amended regulations at issue in the lawsuit do not affect the outcome of this case. Employer initially asserts that the amended regulations should not be applied retroactively to cases before the Board. Employer does not otherwise assert that the issues in this claim are impacted by the amended regulations. Based on the briefs submitted by employer and the Director, and our review of the record, we hold that the ultimate disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

In order to be eligible for benefits as a surviving divorced spouse, claimant, in addition to establishing the relationship requirement pursuant to Section 725.216 (2000), bears the burden of establishing her dependency on the miner

⁴ Pursuant to the Board’s instructions, the failure of a party to submit a brief within 20 days following receipt of the Board’s Order issued on May 16, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case. Claimant has not responded to this Order.

by satisfying the requirements of Section 725.217(a) (2000). 20 C.F.R. §§725.216, 725.217(a), 725.233 (2000); *Walker v. Director, OWCP*, 9 BLR 1-233 (1987); *McCoy v. Director, OWCP*, 7 BLR 1-789, 1-792 (1985). Claimant may establish the requisite dependency if, for the month prior to the month in which the miner died: (1) she was receiving at least one-half of her support from the miner; or (2) she was receiving substantial contributions from the miner pursuant to a written agreement; or (3) a court order required the miner to furnish substantial contribution to the individual's support. 20 C.F.R. §§725.217(a)(1)-(3), 725.233(a)-(g) (2000); *Putnam v. Director, OWCP*, 12 BLR 1-127 (1988); *Trevena v. Director, OWCP*, 7 BLR 1-799 (1985); *Dercole v. Director, OWCP*, 3 BLR 1-76, 1-79 (1981).

Relevant to Section 725.217(a) (2000), a review of the evidence of record reveals a divorce decree dated November 27, 1967 which dissolved the marriage between claimant and the miner, and provided that the miner make monthly payments in the amount of \$75.00 to claimant for the “maintenance and support” of the couple’s four children upon his receipt of workers’ compensation or Social Security benefits. Director’s Exhibit 3. The divorce decree, however, did not provide for any payments to be made for claimant’s support or maintenance. *Id.* In addition, a review of the transcript taken from claimant’s deposition on September 24, 1999 reveals the testimony of claimant that, upon the dissolution of her marriage, the miner did not provide any support to her. Director’s Exhibit 15. Specifically, claimant stated that the miner “never, before or after” the marriage supported her and, that for the most part, she was the main source of support during the marriage. Decision and Order at 4; Director’s Exhibit 15 at 5, 17, 23.

Based on the evidence of record, we affirm the administrative law judge’s determination that claimant failed to demonstrate dependency on the miner as a surviving divorced spouse pursuant to Section 725.217(a). The administrative law judge reviewed the evidence of record and properly found that the record was devoid of a written agreement or court order indicating that the miner provided any monetary support to claimant, for her support, after their divorce in 1967.⁵

⁵ The administrative law judge noted the presence in the record of the divorce decree, dated November 27, 1969, which required the miner to pay \$75.00 per month in child support. Decision and Order at 5; Director's Exhibit 3. However, payments in the form of child support are not considered in calculating the amount of support paid to the divorced spouse. *Walker v. Director, OWCP*, 9 BLR 1-233 (1987); *Trevena v. Director, OWCP*, 7 BLR 1-799 (1985).

Decision and Order at 5; 20 C.F.R. §725.217(a)(2), (3) (2000); see *Walker, supra*; *McCoy, supra*.

In addition, with respect to the issue of whether claimant was receiving at least one-half of her “support” from the miner, the administrative law judge properly set forth the definition of “support” and stated that it means “food, clothing, shelter, ordinary medical expenses, and other ordinary and customary items for the maintenance of the person supported.” Decision and Order at 4; 20 C.F.R. §715.333(a), (g) (2000). In interpreting the definition of “support”, the Board has held that it does not encompass the surviving divorced spouse’s earnings, but follows the plain meaning of the regulations which defines “one-half support” as “one-half the total cost of such individual’s support.” 20 C.F.R. §725.233(a), (g) (2000)(emphasis supplied); *Putnam, supra*; *Trevena, supra*. More specifically, total cost pertains to the expenses of the individual, not the income. *Putnam, supra*. The administrative law judge found that claimant’s monthly income at the time of the miner’s death in April 1999 was \$905.00.⁶ Decision and Order at 5; Director’s Exhibit 15. Although the administrative law judge improperly considered claimant’s monthly income rather than her monthly expenses, we deem the administrative law judge’s error harmless, see *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), inasmuch as the administrative law judge found that the record contains no evidence that claimant was receiving any support from the miner during March 1999. Decision and Order at 5; see Director’s Exhibit 15. Consequently, the administrative law judge’s determination that claimant did not receive one-half of her support from the miner in March 1999, the month prior to the month in which the miner died, is rational and supported by substantial evidence. 20 C.F.R. §725.217(a)(1) (2000); *Putnam, supra*; *Trevena, supra*.

Inasmuch as the administrative law judge properly determined that claimant failed to establish that she was receiving at least one-half of her support from the miner in the month preceding his death or that the miner was required to provide her such support by a court order or a written agreement, we affirm the administrative law judge’s determination that claimant failed to establish her dependency on the miner. See 20 C.F.R. §725.217(a)(1)-(3) (2000); Decision

⁶ In her deposition, claimant testified that she received \$581.00 per month in disability benefits from the Social Security Administration, based on her own disability and not that of the miner, Director’s Exhibit 15 at 8, \$201.00 per month in retirement benefits from GTE and \$123.00 per month in retirement benefits from Pike County, Kentucky, Director’s Exhibit 15 at 21.

and Order at 5. Claimant's failure to demonstrate that she is a surviving divorced spouse as defined in the regulations precludes her entitlement to survivor's benefits. See *Walker, supra*; *McCoy, supra*.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge