

BRB No. 97-1358 BLA

AMANDA M. PARKER)
(Surviving Divorced Spouse of J.D. PARKER))

Claimant-Respondent)

v.)

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

Petitioner)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order and Decision and Order on Reconsideration of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Michelle S. Gerdano (Marvin Krislov, Deputy Solicitor for National Operations, 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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order and Decision and Order on Reconsideration (95-BLA-2070) of Administrative Law Judge Rudolf L. Jansen awarding benefits 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). The administrative law judge determined that claimant, the surviving divorced spouse of the deceased miner, was dependent upon the miner pursuant to 20 C.F.R. §725.217 and thus was eligible to receive benefits commencing July 1, 1994. On appeal, the Director challenges the administrative law judge's award of benefits. Claimant has not filed a brief on appeal.

The Board's scope of review is defined by statute. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a). If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law they are binding on the Board and may not be disturbed. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits under Part 718, a surviving divorced spouse must establish that he or she was receiving at least one half of his or her monthly expenses from the miner in the month before the miner's death. 20 C.F.R. §§725.217(a)(1), 725.233(g).

The facts of this case are as follows: Claimant and the miner were married on April 9, 1949. The miner filed for benefits on July 15, 1975, and benefits were awarded on May 30, 1979. Claimant and the miner divorced on December 17, 1980, and the miner died on July 30, 1994. Claimant never remarried. She filed for survivor's benefits on August 15, 1994. Director's Exhibits 1, 3, 5, 7-12, 14, 15; Hearing Transcript at 16. Following the hearing, the administrative law judge addressed the issue of dependency pursuant to 20 C.F.R. §725.217 and concluded that claimant was not receiving contributions from the miner during "the month before the month in which the miner died" pursuant to a written agreement or court order.¹ Decision and Order at 4-5. He held that claimant had therefore not satisfied the requirements of Section 725.217(a)(2) or (3). The administrative law judge then

¹ Section 725.217 provides three alternative methods by which a surviving divorced spouse may establish dependency:

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

(1) the individual was receiving at least one half of her support from the miner (see 20 C.F.R. §725.233(g));

(2) the individual was receiving substantial contributions from the miner pursuant to a written agreement (see 20 C.F.R. §725.233(e) and (f)); or

(3) a court order required the miner to furnish a substantial contribution to the individual's support (see 20 C.F.R. §725.233(c) and (e)).

20 C.F.R. §725.217.

considered whether the evidence established dependency under Section 725.217(a)(1), that is, whether the claimant received at least one-half of her support from the miner. Based on claimant's testimony and the documentary evidence admitted into evidence, the administrative law judge determined that pursuant to 20 C.F.R. §725.217, claimant qualified as an eligible dependent survivor in that she had received fifty-six percent (56%) of her monthly expenses from the miner in the month before his death. Decision and Order at 6. Specifically, he found that claimant's monthly expenses totaled \$1,294.09, and that the miner's contribution in June of 1994 was \$505.25 for mortgage and heating, plus \$293.85, the amortized repair payment. He found that the miner's total contribution to claimant's expenses therefore equaled \$722.84, which was fifty-six percent (56%) of claimant's total expenses.

The Director asserts that the administrative law judge "properly considered the miner's payment of \$505.25 of the expenses, as forty-seven percent (47%) of the claimant's itemized expenses in June of 1994, which totaled \$1,076.49." Director's Brief at 5. The Director contends, however, that the administrative law judge erred in ignoring the forty-seven percent (47%) figure and in concluding that inasmuch as the miner contributed \$3,526.25 to claimant's home repairs in the year prior to his death, he in essence paid claimant an additional \$293.85 per month. The Director contends that the administrative law judge erred in amortizing the repair payments over a period to include the month before the miner's death and thus finding that the miner contributed fifty-six percent (56%) of claimant's support. The Director argues that the method employed by the administrative law judge to find the percentage of support claimant received from the miner is contrary to the regulation, "which specifically states that the pertinent period is the **month before the month in which the miner died.**"² (Emphasis in original) Director's Brief at 5. We agree.

² The Director also argues that even if the administrative law judge's method of amortizing the payments made by the miner were correct, claimant's actual expenses were such that the amount of contribution would still not rise to fifty percent of claimant's expenses. Because of our disposition of the Director's primary challenge to the award of benefits, we do not reach the merits of this argument.

In the instant case, the administrative law judge properly acknowledged the definition of "support" and the Board's interpretation of its regulatory definition. Decision and Order at 5. In *Putman v. Director, OWCP*, 12 BLR 1-127 (1988), the Board made clear that the definition of one-half support under Section 725.233(a) follows its plain meaning of one-half of the individuals monthly expenses, *not* income. Under Section 725.217(a)(1), the salient month is the month preceding the miner's death. Therefore, the repairs paid for by the miner during some other period cannot be attributed to the spouse's support during the time period in question. The repair expenses were not incurred by claimant in the month preceding the miner's death. Therefore, as a matter of law, we reverse the administrative law judge's award of survivor's benefits as claimant was not dependent upon the miner for one-half of her support in the month before the month in which the miner died.

Accordingly, the Decision and Order and Decision and Order on Reconsideration of the administrative law judge awarding benefits are reversed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge