

BRB No. 00-0588 BLA

MARTHA ROBERTS (Surviving )  
Divorced Spouse of JACK SMITH) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 )  
CHAPPERAL COAL CORPORATION ) DATE ISSUED:  
 )  
Employer-Respondent )  
 )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order Granting Employer's Motion for Summary Decision of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Martha Roberts, Prestonsburg, Kentucky, *pro se*.

Laura Metcoff Klaus (Arter & Hadden LLP), Washington, D.C., for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,<sup>1</sup> without the assistance of counsel, appeals the Decision and Order Granting Employer's Motion for Summary Decision (99-BLA-0947) of Administrative Law Judge Joseph E. Kane 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).<sup>2</sup> The

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<sup>1</sup> Claimant is Martha Roberts, the surviving divorced spouse, who filed an application for survivor's benefits on June 22, 1998. Director's Exhibit 1.

<sup>2</sup> The Department of Labor has amended the regulations implementing the Federal

administrative law judge found that employer conceded that claimant was married to the miner,<sup>3</sup> as required by the regulations set forth in 20 C.F.R. §725.216 (2000). Next, the administrative law judge determined that claimant failed to demonstrate her dependency on the miner pursuant to 20 C.F.R. §725.217 (2000) and, therefore, failed to qualify as a surviving divorced spouse. Accordingly, the administrative law judge granted employer's motion for summary judgment and dismissed claimant's claim.

On appeal, claimant generally challenges the administrative law judge's denial of survivor's benefits. Employer responds to this *pro se* appeal, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating his intention not to participate in this appeal.<sup>4</sup>

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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.

<sup>3</sup> The miner, Jack Smith, filed applications for benefits on December 10, 1979 and April 28, 1983. Director's Exhibit 14. The miner was awarded benefits by the district director on July 24, 1984, and the claim was in payment status until his death on August 3, 1993. Director's Exhibits 4, 16.

<sup>4</sup> Inasmuch as the administrative law judge found that a summary decision was appropriate in this case, he cancelled the formal hearing that had been scheduled for February 29, 2000.

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 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 February 21, 2001, to which both employer and the Director have responded.<sup>5</sup> Based on the briefs submitted by the parties, and our review, we hold that the 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 considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under the Act, claimant, as a surviving divorced spouse, bears the burden of establishing her dependency on the miner by satisfying the requirements of Section 725.217(a). *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, she was receiving (1) at least one-half of her support from the miner, or (2) 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); *Dercole v. Director, OWCP*, 3 BLR 1-76, 1-79 (1981).

Relevant to Section 725.217(a), a review of the evidence of record reveals a divorce decree dated July 27, 1990 which dissolved the marriage between claimant and the miner, awarded the marital property to the miner, and restored to claimant her maiden name. Director's Exhibit 3. A review of the transcript taken from claimant's deposition on April 29, 1999 reveals the undisputed testimony of claimant that, upon the dissolution of her

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<sup>5</sup> The Director's brief, dated March 5, 2001, asserted that the regulations at issue in the lawsuit do not affect the outcome of this case. In a letter dated March 8, 2001, employer agrees with the Director that the revised regulations do not affect the disposition of this case.

marriage, the court did not order the miner to pay her alimony or support. Employer's Exhibit 1 at 5. Claimant also testified that each month she received \$100.00 from her youngest daughter, Ms. Jacquelin Smith Keesee, that was given to the daughter by the miner. *Ibid.* Likewise, in a notarized affidavit dated June 13, 1998, Ms. Keesee stated that her father, the miner, gave her \$100.00 cash each month from July 1991 until August 1993 to give to claimant. Director's Exhibit 5.

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 after their divorce in 1990. 20 C.F.R. §725.217(a)(2), (3); *see Walker, supra*; Decision and Order at 3.

With respect to the issue of whether claimant was receiving at least one-half of her "support" from the miner, the Board has held that the definition of "support" 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." *Putnam v. Director, OWCP*, 12 BLR 1-127, 1-129-130 (1988), *citing* 20 C.F.R. §725.233(a), (g) [emphasis added]. 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 August 1993 was \$1,458.00, and that the amount of \$100.00 she received each month from the miner did not constitute one-half of claimant's monthly income under Section 725.233(g) (2000). Decision and Order at 3; Director's Exhibit 6. 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 record demonstrates that claimant's monthly expenses at the time of the miner's death were \$1,310.00.<sup>6</sup> Director's Exhibit 6; *see* Decision and Order at 3. Consequently, the administrative law judge's determination that claimant did not receive one-half of her support from the miner in July 1993, 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).

Inasmuch as the administrative law judge properly determined that claimant failed to

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<sup>6</sup> Claimant completed and signed an Income Questionnaire on July 20, 1998, indicating that her household expenses in the month prior to the miner's death were as follows: \$300.00 for rent, \$350.00 for food, \$150.00 for clothing, \$110.00 for utilities, and \$400.00 for miscellaneous expenses. These amounts total \$1,310.00. Director's Exhibit 6.

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); Decision and Order at 3. 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 Decision and Order Granting Employer's Motion for Summary Decision of the administrative law judge is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge