

BRB No. 01-0189 BLA

RUTH L. MUNDY)
(Divorced Spouse of BANE G. MUNDY))

Claimant-Petitioner)

v.)

DATE ISSUED:

ROCK CREEK MINING COMPANY,)
INCORPORATED)

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 of Richard A. Morgan, Administrative Law Judge,
United States Department of Labor.

Ruth L. Mundy, Dublin, Virginia, *pro se*.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (2000-

¹Claimant is Ruth Mundy, the surviving divorced spouse of the miner, Bane G. Mundy. Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v.*

BLA-0062) of Administrative Law Judge Richard A. Morgan denying 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). In this petition for modification, the administrative law judge found the evidence of record sufficient to establish that claimant was the surviving divorced spouse of the miner pursuant to 20 C.F.R. §725.216 (2000), but insufficient to establish that claimant satisfied the dependency requirements contained at 20 C.F.R. §725.217 (2000), or the presence of a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Accordingly, benefits were denied.

Claude V. Keen Trucking Co., 19 BLR 1-88 (1995)(Order).

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, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CVO3086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

³The record indicates that the miner died on February 11, 1991, due to cardio-respiratory arrest due to scleroderma. Director's Exhibit 8. Claimant filed a claim for survivor's benefits on January 10, 1997, although her signature is dated July 20, 1994. Director's Exhibit 1. This claim was denied by the district director on April 22, 1998, Director's Exhibit 41, and by Administrative Law Judge Mollie W. Neal in a Decision and Order issued on June 28, 1999, due to claimant's failure to establish that she was an eligible survivor of the miner. Director's Exhibit 52. On August 19, 1999, claimant filed a petition for modification alleging a mistake in a determination of fact which was denied by the district director on September 16, 1999. Director's Exhibits 53, 54. Claimant thereupon requested a formal hearing. Director's Exhibit 55.

⁴We affirm the findings of the administrative law judge that claimant is the surviving divorced spouse of the miner pursuant to 20 C.F.R. §725.216, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

On appeal, claimant contends that the administrative law judge erred by finding that she was not an eligible dependent of the miner. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in 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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 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 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 the miner's surviving divorced spouse, bears the burden of establishing her dependency upon the deceased miner by satisfying the requirements of 20 C.F.R. §725.217 (2001). *See* 20 C.F.R. §725.217 (2001); *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: (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 contributions to the individual's support. 20 C.F.R. §725.217 (2001).

After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the relevant evidence of record, we conclude that the administrative law

⁵The instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, inasmuch as the miner's coal mine employment occurred in the State of Tennessee. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 57-2.

⁶The record indicates that claimant and the miner were married on April 13, 1946, and that claimant obtained a divorce in the Commonwealth of Virginia on October 30, 1958, while the miner obtained a divorce in the State of Tennessee on November 6, 1958. Director's Exhibits 1, 5, 7, 39. Neither decree provided for alimony or child support. Director's Exhibits 7, 39.

⁷The administrative law judge rationally determined that the record did not contain any evidence of a court order or a written agreement to pay support. *See* 20 C.F.R. §725.217(a)(2),(3) (2000); Decision and Order at 7. This finding of the administrative law judge is affirmed as unchallenged on appeal. *Skrack, supra*.

judge's Decision and Order is supported by substantial evidence and that there is no reversible error therein. Regarding the issue of dependency, the term "one-half support" means that the miner made "regular contributions" to the divorced spouse, and that the amount of such contributions "equaled or exceeded one-half of the total cost of such individual's support." 20 C.F.R. §725.233(g) (2001). The administrative law judge properly found that pursuant to Section 725.233(g) (2000), the determination of whether the miner provided "one-half support" is based upon the expenses of the surviving spouse, not her income, and that Section 725.233 requires actual, regular contributions from the miner's own property. 20 C.F.R. §725.233 (2000); Decision and Order at 7; *Putman, supra*; *Walker v. Director, OWCP*, 9 BLR 1-233 (1987).

In the present case, the record indicates that the award in settlement of claimant's son's death claim, was payable solely to claimant, and explicitly stated that no award was made to the miner. Director's Exhibit 53. Thus, the administrative law judge rationally agreed with Administrative Law Judge Mollie W. Neal that this payment did not constitute the property of the miner, regardless of his presence at the hearing, and cannot be construed as support paid to claimant on behalf of the miner. Decision and Order at 7; *see Director, OWCP v. Hill*, 831 F.2d 635, 10 BLR 2-308 (6th Cir. 1987); *Walker, supra*; *Bunchalk v. Director, OWCP*, 8 BLR 1-415 (1985).

The record further contains no evidence regarding the total amount of claimant's living expenses, or indicating that the miner contributed in any way to claimant's support in the month prior to the month in which the miner died. Thus, claimant has not produced evidence supportive of her burden of proof on this issue. *Putman, supra*; *Walker, supra*. Consequently, the administrative law judge rationally found that claimant had not established that she was an eligible dependent of the miner, as she was not receiving one-half of her support from the miner in the month prior to his death. Decision and Order at 7.

⁸We hold that the administrative law judge rationally determined that although Administrative Law Judge Mollie W. Neal mistakenly found that the miner had not attended the settlement hearing, involving a claim against the automobile driver responsible for the death of claimant's and the miner's son, this error was "not material to the resolution of the claim and can hardly amount to the type of mistake which would justify modification." Decision and Order at 6.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge