

BRB No. 02-0428 BLA

MARY LOMBARDY (Surviving Divorced)
Spouse of FRANK LOMBARDY))
Claimant-Petitioner)

v.)

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

DATE

ISSUED:

DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

James A. Horchak (Quatrini, Rafferty, Galloway P.C.), Greensburg, Pennsylvania, for claimant.

Mary Forrest-Doyle (Eugene Scalia, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ the miner's surviving divorced spouse, appeals the Decision and Order (2001-BLA-848) of Administrative Law Judge Daniel L. Leland denying benefits 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).² The administrative law judge properly found that the only issue before him was whether claimant was dependent on the miner at the time of his death. Decision and Order at 2; Director's Exhibits 15, 16. Considering the issue of dependency in this claim filed by a surviving divorced spouse pursuant to the provisions of 20 C.F.R. Part 725, the administrative law judge noted that the parties had stipulated that claimant was not receiving contributions from the miner prior to his death based upon a written agreement or court order as set forth in 20 C.F.R. §725.217(b), (c). Decision and Order at 2-3; Director's Exhibit 16. The administrative law judge further determined that Social Security benefits received by the miner's surviving divorced spouse as a result of the miner's employment do not constitute contributions within the meaning of the Act and thus claimant was not dependent on the miner at the time of his death pursuant to 20 C.F.R. §§725.217(a) and 725.233(b). Decision and Order at 2-3. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to

¹Claimant is Mary Lombardy, the surviving divorced spouse of the miner. The miner, Frank Lombardy, was awarded lifetime benefits under the Act and died on September 5, 1985. Director's Exhibits 7, 16. Claimant filed her survivor's claim, the subject of the instant appeal, on March 24, 2000, which was ultimately denied by the district director on August 25, 2000 as claimant failed to meet the dependency requirements of the Act. Director's Exhibits 1, 12.

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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

find that claimant was dependent on the miner pursuant to 20 C.F.R. §725.233(b). The Director, Office of Workers' Compensation Programs, responds urging affirmance of the administrative law judge's Decision and Order as supported by substantial evidence.

The Board's scope of review is defined by statute. 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 upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act 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. *Walker v. Director, OWCP*, 9 BLR 1-233 (1987); *McCoy v. Director, OWCP*, 7 BLR 1-789 (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 contributions to the individual's support. 20 C.F.R. §725.217(a)-(c); *Dercole v. Director, OWCP*, 3 BLR 1-76 (1981).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein.³ The sole issue on appeal is whether the Social Security benefits which claimant receives as a result of the miner's prior employment constitute support from the miner pursuant to Section 725.217(a).⁴ The regulation at 20 C.F.R. §725.217(a) provides, in relevant part, that:

An individual who is the miner's surviving divorced spouse (see §725.216) shall be determined to have been dependent on the miner if, for the month before the month in which the miner died: (a) The individual was receiving at

³ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was last employed in the coal mine industry in the Commonwealth of Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

⁴ The administrative law judge's determination that claimant has not met the dependency requirements pursuant to 20 C.F.R. §725.217(b), (c) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

least one-half of his or her support from the miner
(see §725.233(g)). . . .

20 C.F.R. §725.217(a). The regulation at 20 C.F.R. §725.233(g) provides that:

The term “one-half support” means that the miner made regular contributions, in cash or in kind, to the support of a divorced spouse at the specified time or for the specified period, and that the amount of such contributions equalled or exceeded one-half the total cost of such individual’s support at such time or during such period.

20 C.F.R. §725.233(g). Additionally, the regulations, in defining contributions, provide that:

The term “contributions” refers to contributions actually provided by the contributor from such individual’s property, or the use thereof, or by the use of such individual’s own credit.

20 C.F.R. §725.233(b). In light of the above regulations, claimant contends that Social Security payments to a surviving divorced spouse are contributions as they are a form of credit pursuant to Section 725.233(b). We disagree.

The Board has overruled its earlier holding that Social Security benefits constitute contributions from the miner under Section 725.233(b), for the purpose of determining “at least one-half support” as the earnings record of the miner is a form of credit for determining the amount of Social Security benefits payable to the miner’s surviving divorced spouse. *See Taylor v. Director, OWCP*, 15 BLR 1-4 (1991), *aff’d sub nom. Taylor v. Director, OWCP*, 967 F.2d 961, 963, 16 BLR 2-84, 2-89 (4th Cir. 1992), *rev’g Fletcher v. Director, OWCP*, 10 BLR 1-11 (1986), *aff’d on recon.*, 10 BLR 1-13 (1986)(*en banc*), *appeal dismissed*, No. 86-2610 (4th Cir. 1987); *see also Logan v. Director, OWCP*, 12 BLR 1-125 (1988)(*en banc*), *rev’d sub nom. Director, OWCP v. Logan*, 868 F.2d 285, 12 BLR 2-175 (8th Cir. 1989). Although not addressed by the United States Court of Appeals for the Third Circuit, within whose jurisdiction the instant case arises, the Board’s holding in *Taylor*, that Social Security benefits do not constitute contributions within the meaning of Sections 725.217(a) and 725.233(b), will be applied to all judicial circuits which have not spoken on the issue.⁵ *See*

⁵ The United States Court of Appeals for the Fourth, Sixth, Seventh and Eighth Circuits have held that Social Security benefit payments do not constitute support contributions, and

Taylor, supra. Further, the term “contributions” includes contributions by the use of the miner’s own credit. *See* 20 C.F.R. §725.233(b). We hold, therefore, that the administrative law judge properly concluded that claimant’s Social Security benefits received as a result of her prior deceased husband do not constitute contributions within the meaning of Section 725.233(b) and that a remand, as requested by claimant, is not required for further consideration of this issue. *See Taylor, supra.*

Consequently, we affirm the administrative law judge’s determination that claimant failed to establish her dependency on the miner pursuant to Section 725.217(a) as this determination is rational and supported by substantial evidence. *See* 20 C.F.R. §§725.217, 725.233(b); 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 administrative law judge's Decision and Order denying benefits in this survivor’s claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

therefore, cannot demonstrate dependency on the miner as defined in the Act. *Taylor v. Director, OWCP*, 967 F.2d 961, 963, 16 BLR 2-84, 2-89 (4th Cir. 1992); *Director, OWCP v. Logan*, 868 F.2d 285, 12 BLR 2-175 (8th Cir. 1989); *Director, OWCP v. Hill*, 831 F.2d 635, 10 BLR 2-308 (6th Cir. 1987); *Director, OWCP v. Ball*, 826 F.2d 603, 10 BLR 2-210 (7th Cir. 1987); *see Flemming v. Nestor*, 363 U.S. 603 (1960).

BETTY JEAN HALL
Administrative Appeals Judge