

BRB No. 05-0716 BLA

ROLAND P. ALLEN)
(Surviving Child of SAMUEL P. ALLEN))
)
Claimant-Petitioner)
)
v.)
)
DIRECTOR, OFFICE OF WORKERS') DATE ISSUED: 09/29/2005
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan,
Administrative Law Judge, United States Department of Labor.

Roland P. Allen, Birmingham, Alabama, *pro se*.

Barry H. Joyner (Howard M. Radzely, 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, McGRANERY
and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order (2005-BLA-05570) of Administrative Law Judge Robert D. Kaplan denying benefits on a subsequent 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). After this case was forwarded to the Office of Administrative Law Judges and assigned for hearing, the administrative law judge determined that claimant's previous claim had been denied on the ground that claimant was married and thus failed to establish

¹ Claimant, Roland P. Allen, is the adult surviving child of the miner, Samuel P. Allen, who died on April 5, 1983. Director's Exhibit 1.

dependency pursuant to 20 C.F.R. §§725.209(a)(1), 725.221, and that the present claim, filed on July 26, 2004, was subject to the provisions at 20 C.F.R. §725.309(d).² Because claimant had submitted no new evidence in support of this subsequent claim, the administrative law judge issued an Order on March 17, 2005, directing claimant to show cause as to why the claim should not be denied and requiring claimant to submit new evidence by April 4, 2005, to establish both that he was unmarried and that the miner's death was due to pneumoconiosis. Following receipt of claimant's response, with enclosures consisting of school records and two x-ray interpretations, the administrative law judge issued a Decision and Order on April 28, 2005, without holding a hearing. The administrative law judge found that because claimant submitted no new evidence relevant to the pertinent issues of claimant's current marital status and whether the miner's death was due to pneumoconiosis, claimant failed to demonstrate a change in one of the applicable conditions of entitlement at Section 725.309(d). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits, and requests that he either be granted a formal hearing or a directed verdict based on Alabama law.³ The Director, Office of Workers' Compensation Programs, (the

² Where a claimant files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc.*, 23 BLER 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). In the present case, on August 30, 2001, the Board affirmed the denial of modification and benefits in claimant's original claim, filed on November 20, 1992, as substantial evidence supported the finding that claimant did not meet dependency requirements for a surviving child because he was married. *Allen v. Director, OWCP*, BRB No. 00-1146 BLA (Aug. 30, 2001)(unpub.). The Board subsequently denied claimant's motion for reconsideration on February 6, 2002, and claimant's appeal to the United States Court of Appeals for the Second Circuit was dismissed as abandoned on August 14, 2002. Director's Exhibit 1. As claimant took no further action until the filing of the instant claim on July 26, 2004, Director's Exhibit 3, claimant must submit new evidence establishing that he is an eligible surviving dependent of the miner pursuant to 20 C.F.R. §§725.209, 725.221, in order to be entitled to benefits. 20 C.F.R. §725.309(d)(2), (3); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-64 (2004)(*en banc*).

³ This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, as the miner was last employed in the coal mine industry in the

Director) responds, noting that claimant is entitled to a hearing and on that basis the denial of benefits should be vacated and the case remanded to the administrative law judge for further proceedings.

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 1-84 (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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we note the Director's concession that, contrary to the administrative law judge's findings, claimant is not required to establish that the miner's death was due to pneumoconiosis, since the miner was receiving benefits at the time of his death pursuant to an award under Part B of the Act. Director's Brief at 2, n.2; Director's Exhibit 1; see 30 U.S.C. §932(1); *Director, OWCP v. Saulsberry*, 887 F.2d 667, 13 BLR 2-80 (6th Cir. 1989); *Deloe v. Director, OWCP*, 16 BLR 1-9 (1991). Consequently, claimant will automatically be entitled to survivor's benefits if he can establish dependency by proving both that he is unmarried and that he either: (1) is under a disability as defined in 42 U.S.C. §423(d) which began before age 22; or (2) is a student. 20 C.F.R. §§725.209(a)(1), (2)(ii)-(iii), (b), 725.221; see *Sullenberger v. Director, OWCP*, 22 BLR 1-54 (2000); *Adler v. Peabody Coal Co.*, 22 BLR 1-43 (2000).

We reject claimant's assertion that he is entitled to benefits under Alabama law and need not prove that he is unmarried. The administrative law judge properly found that this claim is governed by the Act and its implementing regulations, and Alabama law is not relevant as to which facts claimant must establish in order to obtain benefits. Decision and Order at 4; Director's Brief at 2-3, n.3. Moreover, the United States Court of Appeals for the Eleventh Circuit previously upheld the denial of claimant's original claim based in part upon the finding that claimant was ineligible for benefits because he was married. *Allen v. Director, OWCP*, No. 95-6357 (11th Cir., Oct. 29, 1996)(unpub.), *reh'g denied* (Dec. 30, 1996); Director's Exhibit 1. Thus, claimant must submit new evidence establishing a change in his marital status pursuant to Section 725.309(d) in order to satisfy the threshold requirement for establishing dependency at Section 725.209(a)(1). While the administrative law judge accurately found that the record

State of Alabama. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 1.

contains no such evidence, we agree with the arguments of claimant and the Director that the administrative law judge deprived claimant of his statutory right to a hearing. 33 U.S.C. §919(a), as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §725.450; *see Robbins v. Cyprus Cumberland Coal Co.*, 146 F.3d 425 (6th Cir. 1998).

The regulations provide two exceptions to the requirement that a requested hearing be held: (1) where a party moves for summary judgment and the administrative law judge determines that the moving party is entitled to judgment as a matter of law because there is no genuine issue as to any material fact; or (2) where the administrative law judge believes that a hearing is not necessary, for any reason other than on summary judgment motion, and notifies the parties by written order of his intent not to hold a hearing, allowing at least 30 days for the parties to respond; a hearing must still be held if any party makes a timely request in response to the order. 20 C.F.R. §725.452(c), (d). Under the facts of this case, neither exception was applicable because no party moved for summary judgment, and the administrative law judge's show cause order did not provide a 30-day response period or specify that a hearing would not be held unless a party made a timely request in response thereto. *Id.*; Director's Brief at 3-4. We therefore vacate the denial of benefits, and remand this case for the administrative law judge to conduct a hearing unless one of the exceptions set forth at 20 C.F.R. §725.452(c), (d), is applicable on remand.⁴

⁴ The Director has indicated that he intends to file a motion for summary judgment on remand. *See* Director's Brief at 4.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and this case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge