

BRB No. 06-0131 BLA

CATHY VARNEY HATFIELD)	
(Divorced Spouse of PARIS R. VARNEY))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
EASTERN COAL CORPORATION)	DATE ISSUED: 09/28/2006
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	DECISION and ORDER
Party-in-Interest)	

Appeal of the Decision and Order of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Cathy Varney Hatfield, South Williamson, Kentucky, *pro se*.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant,¹ representing herself, appeals the Decision and Order (05-BLA-5380) of Administrative Law Judge Linda S. Chapman denying augmented benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety

¹Claimant, Kathy Varney Hatfield, is the miner's (Paris R. Varney's) divorced spouse. Director's Exhibit 121.

Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).² The administrative law judge determined that claimant is not eligible for augmented benefits as the miner's divorced spouse because she failed to establish her dependency pursuant to 20 C.F.R. §725.207. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's finding that claimant failed to establish her dependency pursuant to 20 C.F.R. §725.207. The Director has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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 augmented benefits as a divorced spouse, claimant must satisfy both a "relationship" and a "dependency" test.³ Augmented

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, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³Paris R. Varney, the miner, initially filed a claim for benefits on July 26, 1979. Director's Exhibit 21. The district director denied the claim on November 9, 1979. *Id.* This denial became final when the miner neither sought a hearing nor submitted new evidence within the prescribed 60 day period, 20 C.F.R. §725.410(c) (2000), nor requested modification within the prescribed one year period. 20 C.F.R. §725.310(a) (2000). Although the miner subsequently attempted to reopen his 1979 claim, Administrative Law Judge Robert J. Feldman, in a "Memorandum Decision and Final Order of Dismissal" dated November 28, 1986, granted employer's motion to dismiss the claim. *Id.*

The miner filed a duplicate claim on August 7, 1990. Director's Exhibit 1. In the initial Decision and Order, Administrative Law Judge Thomas M. Burke denied benefits. Director's Exhibit 51. By Decision and Order dated September 29, 1994, the Board affirmed Judge Burke's denial of benefits. *Varney v. Eastern Coal Corp.*, BRB No. 93-1721 BLA (Sept. 29, 1994) (unpublished).

The miner subsequently requested modification of his denied 1990 claim.

benefits payable on behalf of a divorced spouse begin with the first month in which she satisfies the conditions of relationship and dependency. 20 C.F.R. §725.210. Augmentation of benefits on account of a divorced spouse continues through the month before the month in which the divorced spouse ceases to satisfy these conditions. *Id.*

The administrative law judge properly found that claimant satisfied the relationship test because she was married to the miner for ten years before they were divorced.⁴ 20 C.F.R. §725.206; Decision and Order at 6. The administrative law judge, however, found that claimant was not entitled to augmented benefits as the miner's divorced spouse because she did not satisfy the dependency requirement set forth at 20 C.F.R. §725.207.

Section 725.207 provides that:

For the purpose of augmenting benefits, an individual who is the miner's divorced spouse (§725.206) will be determined to be dependent on the miner if:

- (a) The individual is receiving at least one-half of his or her support from the miner (*see* §725.233(g)); or
- (b) The individual is receiving substantial contributions from the miner pursuant to a written agreement (*see* §725.233(c) and (f)); or
- (c) A court order requires the miner to furnish substantial contributions to the individual's support (*see* §725.233(c) and (e)).

20 C.F.R. §725.207.

Section 725.207(a)

The administrative law judge found that the evidence was insufficient to establish

Director's Exhibit 67. In a Decision and Order dated May 12, 1998, Administrative Law Judge Pamela Lakes Wood awarded benefits to the miner. Judge Wood found that the miner was entitled to benefits commencing on August 1, 1995. Director's Exhibit 108. By Decision and Order dated July 6, 1999, the Board affirmed Judge Wood's award of benefits. *Varney v. Eastern Coal Corp.*, BRB No. 98-1186 BLA (July 6, 1999) (unpublished).

⁴Claimant married the miner on July 23, 1973. Claimant's Exhibit 1 at 17. Claimant and the miner divorced on March 17, 1986. Director's Exhibit 121.

that claimant was receiving at least one-half of her support from the miner.⁵ 20 C.F.R. §725.207(a).

Relevant Evidence

As previously noted, claimant was married to the miner from July 23, 1973 to March 17, 1986. Claimant's Exhibit 1 at 17. As part of the "Decree of Dissolution of Marriage," the miner was order to pay claimant "child support and spousal maintenance in the sum of Three Hundred (\$300.00) Dollars per month each and every month thereafter until further orders of the court."⁶ Director's Exhibit 121.

In a March 5, 2003 letter, claimant indicated that the miner provided her with \$300.00 per month in support "until he went to prison for seven years."⁷ Director's Exhibit 153. During an October 10, 2001 deposition, claimant also acknowledged that that miner did not provide her with the \$300.00 in monthly support payments during the time that she was married to Earsel Hatfield.⁸ Director's Exhibit 155 at 13.

At the time of her October 10, 2001 deposition, claimant testified that the miner had last supported her in 1998.⁹ *Id.* at 37. Since 1998, claimant testified that her

⁵Support, as defined in the regulations, includes "food, shelter, clothing, ordinary medical expenses, and other ordinary and customary items for the maintenance of the person supported." 20 C.F.R. §725.233(a).

⁶The Decree also provided that the miner pay claimant for "child support and spousal maintenance in the sum of Four Hundred Two (\$402.00) Dollars per month, being the same sum that [claimant] and her children now receive from Social Security [as dependents of the miner]." Director's Exhibit 121. However, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that social security payments received by former spouses that are based on the miner's earnings are not "contributions" from the miner. *See Director, OWCP v. Hill*, 831 F.2d 635, 10 BLR 2-308 (6th Cir. 1987).

⁷When she visited the miner in prison, claimant testified that the miner would give her "\$20, sometimes \$40, depending on what he had." Director's Exhibit 155 at 14.

⁸After divorcing the miner, claimant married Earsel Hatfield on June 4, 1987. Director's Exhibit 131. Claimant's second marriage ended on September 6, 1995. Director's Exhibit 121.

⁹ During the October 10, 2001 deposition, claimant further testified that she lived

daughter, as the miner's guardian, had provided her with \$100.00. *Id.* at 36, 39. During the deposition, the following exchange occurred:

Q. So other than the three months that you lived with him in the trailer or that he let you live in the trailer and the \$100 that you received and the couple of times that he gave you \$2 or \$3 at a time you've really received no other support from [the miner], have you?

[Claimant]: No, ma'am, I haven't.

Director's Exhibit 155 at 42.

In her August 8, 2005 post-hearing brief, claimant noted that the miner had provided her with \$5,800 in back alimony, a fact confirmed by the testimony of two witnesses at the hearing. *See* Transcript at 14, 21.

The record also contains evidence that claimant and the miner lived together for some period of time after 2001. However, as noted by the administrative law judge, the documents and testimony "present a confusing and conflicting picture." Decision and Order at 7. In her post-hearing brief, Claimant asserted that she and the miner lived together from December 2001 until February of 2004, at which time claimant notes the miner was admitted to Good Shepherd Community Nursing Center. However, an administrator from the Mingo Manor Nursing Home, in a "Request to Be Selected as Payee" dated November 25, 2002, indicated that the miner had lived at Mingo Manor Nursing Home since June of 2002. *See* Director's Exhibit 148. The record does not indicate when the miner left Mingo Manor Nursing Home.¹⁰ However, in a letter dated June 16, 2004, an admissions coordinator from Good Shepherd Community Nursing Center advised the Department of Labor that the miner had been recently admitted to their facility. Director's Exhibit 165.

with the miner for three months in 1998 after she divorced her second husband, Earsel Hatfield. Director's Exhibit 155 at 33, 37.

¹⁰As part of her appeal to the Board, claimant has submitted a handwritten statement from the "business office" of Mingo Manor Nursing Home which indicates that the miner was admitted to their facility on June 21, 2002 and discharged home on December 12, 2002. *See* attachments to Claimant's November 14, 2005 filing. However, because this evidence is not part of the record, the Board is precluded from considering it on appeal. *See* 20 C.F.R. §802.301(b); *Berka v. North American Coal Corp.*, 8 BLR 1-183 (1985).

The record also reveals that claimant and the miner signed a lease for a two bedroom apartment from December 13, 2002 through December 31, 2003.¹¹ Director's Exhibit 161. In an undated statement addressed to the district director, the miner stated:

This is to let you know that Cathy and I now live together. I support her as ordered by the court.

Director's Exhibit 149.

Discussion

The administrative law judge's finding, that the evidence is insufficient to establish that claimant has received at least one-half of her support from the miner, is supported by substantial evidence. 20 C.F.R. §725.207(a). The administrative law judge accurately noted that, even assuming that claimant and the miner lived together from 2001 to February of 2004, there is no indication which party paid the rent for the apartment. Decision and Order at 9. Because the administrative law judge properly found that there is no evidence that the miner paid the rent for the apartment, we hold that the administrative law judge properly found that this could not be considered support from the miner.

Next, the administrative law judge found that claimant's monthly expenses exceed \$1500.00.¹² See Decision and Order at 4. Consequently, the administrative law judge rationally found that, even assuming that the miner provided claimant with \$300.00 in monthly support, it did not account for one-half of claimant's support.¹³ See Decision

¹¹The miner provided claimant with a "General Power of Attorney" on December 12, 2002. Director's Exhibit 158.

¹²This finding is supported by claimant's hearing testimony. Claimant testified that her monthly expenses include: rent (\$375.00); gas utilities (\$300, at the most, during the winter months); electric (\$129.00); water (\$20.00); newspaper (\$9.00); cable and telephone (\$169.00); car insurance (\$120.00); miner's life insurance (\$120.00); medicine (\$75.00); groceries (\$300.00); medical expenses (\$75.00); credit card debt (\$113); clothing (\$50.00); and entertainment (\$100.00). Transcript at 28-32.

¹³The administrative law judge found that there was no evidence of the alleged payment of \$5,800.00 in back alimony made by the miner to claimant. Decision and Order at 8-9. Moreover, even if the miner provided claimant with a check for \$5,800.00 in back alimony, it would represent money for alimony payments not previously paid. Consequently, this payment does not assist claimant in establishing that the miner provided one-half of her support at any specific period of time.

and Order at 8-9. We, therefore, affirm the administrative law judge's finding that claimant failed to establish that she has ever received at least one-half of her support from the miner. 20 C.F.R. §725.207(a).

Section 725.207(b)

The administrative law judge found that there is no evidence in the record of any written agreement between claimant and the miner that obligated the miner to provide substantial contributions for claimant's support.¹⁴ Decision and Order at 6. The regulations define a "written agreement" as "an agreement signed by the miner providing for substantial contributions by the miner for the individual's support. It must be in effect at the applicable time but it need not be legally enforceable." 20 C.F.R. §725.233(f); Decision and Order at 6 n.3. Because the record does not contain evidence of any such agreement,¹⁵ we affirm the administrative law judge's finding that claimant failed to establish that she was receiving substantial contributions from the miner pursuant to a written agreement. 20 C.F.R. §725.207(b).

Section 725.207(c)

As part of the "Decree of Dissolution of Marriage," the miner was ordered to pay claimant "child support and spousal maintenance in the sum of Three Hundred (\$300.00) Dollars per month each and every month thereafter until further orders of the court." Director's Exhibit 121. The administrative law judge addressed whether this order was sufficient to establish the existence of a court order requiring the miner to furnish substantial contributions to the miner's support. The administrative law judge stated that:

¹⁴A "substantial contribution" is defined as a contribution that is "customary and sufficient to constitute a material factor in the cost of the individual's support." 20 C.F.R. §725.233(c).

¹⁵As previously noted, the record contains a signed, undated statement from the miner (addressed to the district director) stating:

This is to let you know that Cathy and I now live together. I support her as ordered by the court.

Director's Exhibit 149.

Because this agreement only evidences the miner's commitment to provide support "as ordered by the court," it does not constitute a written agreement obligating the miner to provide substantial contributions to claimant. Moreover, it does not quantify the amount of contributions that the miner is obligated to provide claimant.

....Claimant cannot satisfy the requirements of 20 C.F.R. §725.207(c), which requires the existence of a court order requiring [the miner] to make substantial contributions to her support. The Claimant is not legally entitled to \$300 a month in alimony, nor is [the miner] legally obligated to pay it, as the support order terminated upon the Claimant's remarriage. Kentucky law dictates that "unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon...the remarriage of the party receiving maintenance. KY. Rev. Stat. Ann. §403.250(2) (Banks-Baldwin 2003). Thus, in the absence of any statement in the decree ordering [the miner] to continue alimony payments after the Claimant remarries, the effectiveness of the court order expired upon the Claimant's marriage to Mr. Hatfield, terminating [the miner's] obligation to pay such support and ending the Claimant's entitlement to support from [the miner].

Decision and Order at 6-7.

Claimant contends that, because KRS §403.250(2) was not enacted until July 16, 1990, three years after she married Mr. Hatfield, it should not be applied to her case. Claimant's contention has no merit. Prior to the enactment of KRS §403.250 in 1972, termination of alimony in Kentucky was governed by case law. Generally, upon the marriage of the wife to another husband, the right to alimony as against her first husband terminated. *See Lyon v. Lyon*, 243 Ky. 236, 47 S.W.2d 1072 (Ky. 1932).

In 1972, the Kentucky legislature enacted KRS §403.250. KRS §403.250(2) provides that:

Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon the death of either party *or the remarriage of the party receiving maintenance.*

KRS §403.250(2) (emphasis added).

Although claimant correctly notes that the Kentucky legislature amended KRS §403.250 in 1990, it did not amend KRS §403.250(2), the subsection at issue here.¹⁶ Consequently, KRS §403.250(2) was in effect at the time of both of claimant's marriages. Because the divorce decree of claimant and the miner did not expressly provide otherwise, the administrative law judge properly found that the miner's obligation to pay maintenance for claimant terminated upon claimant's marriage to Earsel Hatfield on June

¹⁶In 1990, the Kentucky legislature amended KRS §403.250 by deleting a part of subsection (1) and deleting subsection (3). Subsection (2) was not revised.

4, 1987. Decision and Order at 7; Director's Exhibit 131. Consequently, we affirm the administrative law judge's finding that there was no court order requiring the miner to furnish substantial contributions to claimant's support. 20 C.F.R. §725.207(c).

In light of our affirmance of the administrative law judge's findings that claimant failed to establish her dependency on the miner pursuant to 20 C.F.R. §725.207(a)-(c), we affirm the administrative law judge's finding that claimant is not entitled to augmented benefits as the miner's divorced spouse.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge