

BRB No. 00-1146 BLA

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

Appeal of the Decision and Order Denying Benefits of Mollie W. Neal,
Administrative Law Judge, United States Department of Labor.

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

Barry H. Joyner (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (00-BLA-0039) of Administrative Law Judge Mollie W. Neal 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).¹ This case is before the Board for the

¹ 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 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,

third time.² The administrative law judge found that claimant failed to establish any mistake

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. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. 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*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

² Claimant is a surviving child of the miner, Samuel P. Allen, who died on April 5, 1983, Director's Exhibit 4. The miner had been awarded benefits under Part B by the Social Security Administration in January, 1970, and had been awarded medical benefits only by the Department of Labor in December, 1981, Director's Exhibits 13, 33, 65. Subsequent to the miner's death, claimant filed a survivor's claim for benefits in his own right on November 16, 1992, Director's Exhibit 1. In a Decision and Order issued on August 5, 1994, Administrative Law Judge Donald W. Mosser found that, although claimant established that he was the surviving child of the miner pursuant to 20 C.F.R. §725.220 (2000), claimant failed to meet the dependency requirements for a surviving child of the miner pursuant to 20 C.F.R. §§725.221 and 725.209 (2000) because, in part, he was married, Director's Exhibit 17. Alternatively, Judge Mosser found that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205 (2000). Accordingly, benefits were denied.

Claimant appealed and the Board affirmed Judge Mosser's finding that claimant failed to establish dependency pursuant to Sections 725.221 and 725.209 (2000), Director's Exhibit 27. *Allen v. Director, OWCP*, BRB No. 94-3798 BLA (Apr. 21, 1995)(unpub.). Claimant appealed the Board's Decision and Order to the United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises, who affirmed the administrative law judge's finding that claimant was ineligible for benefits, in part, because he was married, Director's Exhibits 43, 45. *Allen v. Director, OWCP*, No. 95-6357 (11th Circuit, Oct. 29, 1996)(unpub.). The Court also denied claimant's Petition for Rehearing, Director's Exhibit 44. *Allen v. Director, OWCP*, No. 95-6357 (11th Circuit, Dec. 30, 1996)(unpub.).

in a determination of fact, *see* 20 C.F.R. §725.310 (2000), in the prior findings: that claimant

Claimant filed a timely request for modification on May 30, 1997, Director's Exhibit 46. In a Decision and Order issued on July 29, 1998, Administrative Law Judge Gerald M. Tierney found that claimant failed to establish any mistake in a determination of fact in the prior findings: that claimant failed to meet the dependency requirements for a surviving child of the miner pursuant to Sections 725.221 and 725.209 (2000) because, *inter alia*, he was married and that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205 (2000), Director's Exhibit 66. Accordingly, benefits were denied.

Claimant appealed on September 22, 1998, Director's Exhibit 67, but the Board dismissed claimant's appeal as untimely filed, Director's Exhibit 68. *Allen v. Director, OWCP*, BRB No. 98-1651 BLA (Oct. 27, 1998)(unpub. order). The Board also denied claimant's request for reconsideration, Director's Exhibit 71. *Allen v. Director, OWCP*, BRB No. 98-1651 BLA (Nov. 30, 1998)(unpub. order).

Claimant filed a timely request for modification of Judge Tierney's Decision and Order denying benefits on June 14, 1999, Director's Exhibit 72, and the Department of Labor subsequently considered claimant's untimely appeal of Judge Tierney's Decision and Order denying benefits as a request for modification. Director's Exhibits 67, 73.

failed to meet the dependency requirements for a surviving child of the miner because, *inter alia*, he was married and that claimant failed to establish that the miner's death was due to pneumoconiosis. Accordingly, benefits were denied.

On appeal claimant contends that he has established entitlement to benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging that the administrative law judge's Decision and Order Denying Benefits be affirmed.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence, *see Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1985). If the findings of fact and conclusions of law of the administrative law judge 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).

Pursuant to Section 22 of the Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310 (2000), *see* 20 C.F.R. §725.2(c), a party may request modification of a denial on the grounds of a change in conditions or because of a mistake in a determination of fact. The intended purpose of modification based on a mistake in fact is to vest the fact-finder "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted," *see O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971); *Director, OWCP v. Drummond Coal Co. [Cornelius]*, 831 F.2d 240, 10 BLR 2-322 (11th Cir. 1987).

The administrative law judge found that because claimant testified that he was married well before the miner's death and was still married, the evidence failed to establish that a mistake in a determination of fact had been made when it was determined that claimant failed to meet the dependency requirements for a surviving child of the miner pursuant to Sections 725.221 and 725.209 (2000) due, in part, to his marital status. Decision and Order at 3-4. Although claimant admits that he is married, he contends that it is enough that he is a child of the miner and that he does not have to prove that he is unmarried or dependent in order to establish his eligibility for benefits under the Act.

Claimant stated on his original application for benefits, filed on November 16, 1992, that he was married on November 19, 1970, and was still married, Director's Exhibit 1. At the May, 1994, hearing before Judge Mosser, claimant testified that he had been married for "about 22 to 24 years," prior to the miner's death, and was still married and living with his

wife, and was not living with the miner when the miner died, *see* Director's Exhibit 16 at 13-14, 16.

On claimant's subsequent filing of a request for modification on May 30, 1997, claimant again stated that he was married. Director's Exhibit 46. At the subsequent February, 1998, hearing before Judge Tierney, claimant testified that he was currently married and had been married for about twenty-five years, Director's Exhibit 60 at 9. Finally, at the May 19, 2000, hearing before Judge Neal, claimant again admitted that he was still married, *see* May, 2000, Hearing Transcript at 12.

Contrary to claimant's contention, the Act provides that "benefits shall only be paid to a child for so long as he meets the criteria for the term 'child' contained in section 902(g) of this title." 30 U.S.C. §922(a)(3). Section 402(g) of the Act, 30 U.S.C. §902(g), defines the term "child" as a child or a step-child who is:

- unmarried; and
- (2)(A) under eighteen years of age, or
- (B)(i) under a disability as defined in section 423(d) of [the Social Security Act],
- (ii) which began before the age specified in section 402(d)(1)(B)(ii) of [the Social Security Act], or, in the case of a student, before he ceased to be a student; or
- (C) a student.

30 U.S.C. §902(g). The implementing regulations set forth relationship and dependency requirements. The administrative law judge properly found that claimant meets the relationship requirement, as the son of the deceased miner, *see* 20 C.F.R. §725.220. The applicable dependency requirement provides that a child is dependent upon a miner or surviving spouse if the child "is unmarried" and is under eighteen years of age or is eighteen years of age or older and is either disabled as defined under the Social Security Act, or is a student, *see* 20 C.F.R. §§725.209(a), 725.221. Thus, to be a dependent child, claimant must be "unmarried," 30 U.S.C. §902(g); 20 C.F.R. §725.209(a); *see Sullenberger v. Director, OWCP*, 22 BLR 1-54, 1-58 (2000).³

³ Although the implementing regulations governing the dependency of surviving children were revised, in part, *see* 65 Fed. Reg. 79963, 79967 (Dec. 20, 2000), the revisions did not alter the requirement that the surviving child be unmarried, *see* 30 U.S.C. §902(g); 20 C.F.R. §725.209(a)(1).

Consequently, inasmuch as the administrative law judge's finding that claimant is married is supported by substantial evidence, the administrative law judge correctly found that claimant does not meet the dependency criteria for the term "child" contained in Section 402(g) of the Act, and therefore is not entitled to benefits. *See* 30 U.S.C. §§902(g), 922(a)(3); 20 C.F.R. §§725.209(a), 725.221; *Sullenberger, supra*. We affirm, therefore, the administrative law judge's finding that claimant failed to establish any mistake in a determination of fact, *see* 20 C.F.R. §725.310 (2000), in the prior determination that claimant did not meet the dependency requirements for a surviving child of the miner pursuant to Sections 725.221 and 725.209 (2000) because he was married as it is supported by substantial evidence and in accordance with law. Inasmuch as we affirm the administrative law judge's finding that claimant is not an eligible surviving child of the miner, we need not address the administrative law judge's finding pursuant to Section 718.205 (2000).⁴

⁴ The comments accompanying the revised 20 C.F.R. §725.209(a)(1) refer to the comments accompanying the revised regulation at 20 C.F.R. §725.219 regarding the effect of marriage on a child's dependency status under Section 725.209(a)(1), *see* 65 Fed. Reg. 79963 (Dec. 20, 2000). The comments accompanying the revised regulation at 20 C.F.R. §725.219, regarding the effect of marriage on a child's dependency status under Section 725.209(a)(1), state that "[t]he literal language of the statute [30 U.S.C. §902(g)] does not preclude a child's eligibility for all time based upon the existence of marriage." Rather, "[u]pon cessation of the marital relationship, ... the child again 'is unmarried,' which complies with the statutory

requirement. Assuming all other conditions for eligibility are met, an ‘unmarried’ child retains his or her status as a ‘child’ under the plain language of the statute notwithstanding the occurrence of the marriage.” *See* 65 Fed. Reg. 79966 (Dec. 20, 2000). Thus, as the comments accompanying the revised regulation at 20 C.F.R. §725.309 state, the revised Section 725.309 “allow[s] a miner’s survivor to litigate a second claim where one of the grounds on which the first claim was denied, *e.g.*, that the survivor was married, is subject to change, *see* 65 Fed. Reg. 79973 (Dec. 20, 2000). Consequently, the revised regulation at 20 C.F.R. §725.309(d)(3), applicable to subsequent claims filed on or after January 19, 2001, *see* 20 C.F.R. §725.2(c), specifically provides that “[a] subsequent claim filed by a surviving ... child ... shall be denied unless the applicable conditions of entitlement in such claim include at least one condition unrelated to the miner’s condition at the time of his death.” 20 C.F.R. §725.309(d)(3).

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge