



BRB No. 21-0584 BLA

DIANA K. FAULKNER)
(Widow of DWIGHT D. SMITH))

Claimant-Petitioner)

v.)

BANNER COAL & LAND COMPANY)

and)

WEST VIRGINIA COAL WORKERS')
PNEUMOCONIOSIS FUND)

DATE ISSUED: 9/19/2022

Employer/Carrier-)
Respondents)

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

Party-in-Interest)

DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Patricia J. Daum,
Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and M. Rachel Wolfe (Wolfe Williams & Reynolds),
Norton, Virginia, for Claimant.

William M. Bush (Seema Nanda, Solicitor of Labor; Barry H. Joyner,
Associate Solicitor), Washington, D.C., for the Director, Office of Workers'
Compensation Programs, United States Department of Labor.

Before: ROLFE, GRESH, JONES, Administrative Appeals Judges.

Claimant appeals Administrative Law Judge (ALJ) Patricia J. Daum's Decision and Order Denying Benefits (2019-BLA-05195) rendered on a survivor's claim filed on June 26, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).¹

The ALJ initially determined Claimant is a surviving divorced spouse pursuant to 20 C.F.R. §725.216. But the ALJ further found Claimant is not eligible to receive benefits because she did not satisfy the dependency requirements set forth in 20 C.F.R. §§725.212(a)(2) and 725.217. Accordingly, the ALJ denied benefits.

On appeal, Claimant contends the ALJ erred in her analysis of the dependency requirements. Employer has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting that the ALJ's finding that Claimant is not a surviving dependent divorced spouse of the Miner must be reversed. Nevertheless, while Claimant's entitlement to benefits as the Miner's surviving spouse therefore appears clear, because the ALJ made no finding in that regard, the Director further urges that the Benefits Review Board should remand the case for the ALJ to make factual findings regarding Claimant's entitlement to benefits.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.² 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362 (1965).

¹ Claimant is the surviving divorced spouse of the Miner, who died on April 3, 2008. Decision and Order at 7-8; Claimant's Exhibit 2. At the time of his death, the Miner was receiving benefits awarded under the Act. Decision and Order at 3; Claimant's Exhibits 2, 4.

² This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 7.

Factual Background

The Miner and Claimant were divorced on August 9, 2001.³ Director's Exhibit 9. The divorce decree awarded a life estate in their marital home to Claimant with a remainder to their children and required the Miner pay the monthly mortgage for that home until it was "paid in full." *Id.* at 3. Subsequently, the Miner filed for modification of the divorce decree, which was denied on May 28, 2003. Director's Exhibit 11 at 11. The Miner appealed the denial, which was affirmed on July 7, 2003. *Id.* at 12. Then the Miner failed to make the mortgage payments resulting in the foreclosure of the home. *Id.* at 13; Hearing Transcript at 12-13. On May 12, 2006, the Miner was found in contumacious contempt of a previous court order for failing to pay the mortgage and, in order to purge himself of the contempt, he was ordered to pay \$400.00 per month until the remaining \$30,000.00 value of the foreclosed home was paid in full (Contempt Order). Director's Exhibit 11 at 13. The Miner appealed, and the Contempt Order was affirmed. *Id.* at 15-18.

20 C.F.R. §725.217

To establish eligibility for benefits as a surviving divorced spouse of the Miner, Claimant has to prove that she was "dependent on the miner at the pertinent time." 20 C.F.R. §725.212(a)(2). Dependency is established by demonstrating one of the following requirements:

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

³ Claimant married someone else in 2002 and divorced that man before the Miner's death. Decision and Order at 4-5, 8; Hearing Transcript at 17, 27.

20 C.F.R. §725.217. For purposes of establishing “substantial contributions”⁴ pursuant to 20 C.F.R. §725.217(c), the court order must be “in effect at the applicable time” but “this condition is met whether or not the contributions were actually made.” 20 C.F.R. §725.233(e). Moreover, the contributions must come from the Miner’s property, the use of his property, or the use of his credit. 20 C.F.R. §725.233(b).

The ALJ’s Findings

When considering the dependency requirement under 20 C.F.R. §725.217(b), the ALJ found Claimant did not qualify as a dependent because the mortgage payments did not constitute “substantial contributions” the Miner made from his property, the Miner did not retain any property interest in the marital home, and there was no evidence Claimant received any contributions at the “applicable time.” Decision and Order at 9-10. The ALJ relied upon 20 C.F.R. §725.233(b); *Taylor v. Director, OWCP*, 967 F.2d 961 (4th Cir. 1992) (Social Security payments directed to a divorced spouse do not constitute “contributions” under 20 C.F.R. §725.233(b)); and *Ensinger v. Director, OWCP*, 833 F.2d 678 (7th Cir. 1987) (rental income generated from a house that is awarded in a divorce settlement does not constitute “contributions” from a miner).⁵

Under 20 C.F.R. §725.217(c), the ALJ conceded that the \$400.00 payments required of the Miner in order to purge himself of the contempt would have constituted “substantial contributions” if the payments had been made from the Miner’s property.⁶ 20 C.F.R. §725.233(b), (c); Decision and Order at 11. The ALJ then determined any payment required of the Miner did not come from his property or credit “for the same reasoning” she applied under 20 C.F.R. §725.217(b). 20 C.F.R. §725.233(b); Decision and Order at 11-12.

⁴ “Substantial contributions” are contributions that are “customary and sufficient to constitute a material factor in the cost of the individual’s support.” 20 C.F.R. §725.233(c).

⁵ Noting Claimant did not raise any arguments in her post-hearing brief regarding 20 C.F.R. §725.217(a), the ALJ determined Claimant failed to establish dependency under 20 C.F.R. §725.217(a) “for the same reasons she fail[ed] to establish dependency under Section 725.217(b).” Decision and Order at 11-12.

⁶ The ALJ compared Claimant’s monthly expenses of \$500.00 to \$600.00 to the \$400.00 payments that the contempt order required of the Miner. Decision and Order at 11.

Analysis

We agree with the Director's and Claimant's positions that the ALJ erred in determining Claimant was not receiving "substantial contributions" from the Miner under 20 C.F.R. §725.217(c) and that the ALJ's reliance on *Taylor* and *Ensinger* is misplaced. Director's Brief at 3-6, *citing Taylor*, 967 F.2d at 964; *Ensinger*, 833 F.2d at 679; Claimant's Brief at 9-13.

In *Taylor*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that Social Security benefits payable to a divorced spouse based upon a miner's earnings record are not "contributions" under the Act; those payments were not provided from the "miner's property" because the miner maintained "none of the aspects of control over [the divorced spouse's] benefits that would normally be attributed to a property right or credit." *Taylor*, 967 F.2d at 964. Here, the ALJ reasoned that the Miner's mortgage payments were analogous to the Social Security benefits at issue in *Taylor*. Decision and Order at 9-11, *citing Taylor*, 967 F.2d 961. The ALJ determined that because the Miner could not terminate Claimant's right to the mortgage payments and he had no remaining property interest in the marital home, the Miner did not retain "the aspects of control over the payments . . . normally . . . attributable to a 'property right or credit'" and therefore the mortgage payments were not made from his property or credit. *Id.* Accordingly, the ALJ concluded the mortgage payments did not constitute "contributions" under 20 C.F.R. §725.233(b). *Id.* at 9-12.

Unlike the miner in *Taylor*, who retained "none of the aspects of control" over the Social Security payments made to the miner's divorced spouse, here, the Miner demonstrated control when he elected to stop making mortgage payments on Claimant's behalf. Decision and Order at 9-11; Director's Exhibit 11. While failing to pay the mortgage resulted in the Miner being held in contempt of a previous court order, he again demonstrated control when he determined not to purge himself of the Contempt Order after making between five and seven payments. Decision and Order at 10; Hearing Transcript at 13, 19; Director's Exhibit 11. As the Miner maintained the ability to make and to halt the mortgage payments, albeit at the risk of being held in contempt, and he maintained control over whether he purged himself of the Contempt Order, he retained control over any contribution paid or to be paid pursuant to a court order regardless of whether or not Claimant actually received those contributions. Accordingly, *Taylor* is inapplicable.

In *Ensinger*, the United States Court of Appeals for the Seventh Circuit determined any income generated by the rental of a home owned by a miner's divorced spouse as a result of a divorce proceeding could not be considered contributions from the miner's property. 833 F.2d at 680. Unlike the parties in *Ensinger*, the transfer of title here did not "end[] . . . [the] economic relationship" between the Miner and Claimant. Director's Brief

at 4, citing *Ensinger*, 833 F.2d at 679. Here, the Miner was required to continue making mortgage payments on Claimant's home until the mortgage was fully paid. Director's Exhibits 9, 11. When he failed to do so, the Miner was held in contempt and required to pay Claimant the remaining value of the foreclosed home in order to purge himself of the contempt. Director's Exhibit 11. As *Ensinger* addressed whether the rental value of a house entirely owned by the divorced spouse could be considered a contribution by a miner, the attenuated economic relationship in that case is of limited value in the present case.

In discussing 20 C.F.R. §725.217(b), the ALJ asserted without support that the money used to make the mortgage payments was not the Miner's property because the mortgage payments were "owed" to Claimant. Decision and Order at 9-10. To the extent that the ALJ applied this rationale when considering dependency under 20 C.F.R. §725.217(c), it is inconsistent with the plain language of the regulation which specifically defines payments being made pursuant to court orders to constitute "contributions." 20 C.F.R. §§ 725.217(c),725.233(b).

As the rationale in *Taylor* and *Ensinger* are not applicable and the ALJ provided no other rational reason for determining that the contributions that the divorce decree and the Contempt Order require would not qualify as the Miner's property or credit, we see no reason that the required payments should not be considered "contributions" under 20 C.F.R. §725.233(b). Moreover, there is no evidence that the Contempt Order and the divorce decree were not in effect at the time of the Miner's death and the ALJ conceded that "the \$400 payments required by the contempt order would have been 'substantial contributions' if [they were] made from the [M]iner's property." Decision and Order at 11. We therefore reverse the ALJ's determination that Claimant did not establish dependency under 20 C.F.R. §725.217(c).⁷

While the ALJ did not find Claimant satisfied the eligibility requirements for derivative survivor's benefits pursuant to Section 422(l) of the Act, there is no need to remand this case as there are no factual issues for the ALJ to resolve as to derivative entitlement. 30 U.S.C. §932(l); 20 C.F.R. §725.212(a); see Decision and Order at 3.

The ALJ has already rendered the findings essential to our consideration in this case.⁸ Specifically, the ALJ found Claimant is not currently married and thus satisfied 20

⁷ As Claimant established dependency under 20 C.F.R. §725.217(c), we need not reach Claimant's arguments regarding her dependency under 20 C.F.R. §725.217(a). Claimant's Brief at 13-14.

⁸ A surviving divorced spouse of a miner is eligible for benefits if the spouse:

C.F.R. §725.212(a)(1). Decision and Order at 8. Moreover, the ALJ noted the Miner filed his subsequent claim on August 18, 2003, and was awarded benefits on August 13, 2008, and that Claimant filed her claim on June 26, 2017, satisfying 20 C.F.R. §725.212(a)(3)(ii). *Id.* at 2. Further, as discussed above, the ALJ erred in finding Claimant was not a dependent of the Miner. Consequently, the facts of this case dictate reversal of the ALJ's denial of benefits.

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- (1) Is not married;
 - (2) Was dependent on the miner at the pertinent time; and
 - (3) The deceased miner either:
 - (i) Is determined to have died due to pneumoconiosis; or
 - (ii) Filed a claim for benefits on or after January 1, 1982, which results or resulted in a final award of benefits, and the surviving spouse or surviving divorced spouse filed a claim for benefits after January 1, 2005 which was pending on or after March 23, 2010.

20 C.F.R. §725.212(a).

Accordingly, the ALJ's Decision and Order Denying Benefits is reversed.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge