

BRB No. 00-0715 BLA

ELSIE YOUNG)
(Widow of CLIFTON YOUNG))
)
 Claimant-Respondent)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED:
)
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Petitioner) DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits and Supplemental Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Christine Carter (McNew, Carter & Menefee, P.S.C.), Berea, Kentucky, for claimant.

Timothy S. Williams (Judith E. Kramer, 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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY and McATEER, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order - Awarding Benefits and Supplemental Decision and Order¹ (96-BLA-

¹ Pursuant to a timely Request for Reconsideration by the Director, Office of Workers' Compensation Programs (the Director), of the Decision and Order- Awarding Benefits issued on October 26, 1999, the administrative law judge issued a Supplemental Decision and Order on March 9, 2000 denying the Director's request for reconsideration.

1855) of Administrative Law Judge Donald W. Mosser 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 This case is before the Board for a second time. When this case was on appeal before, the Board held that the administrative law judge did not comply with the regulatory requirements concerning claimant's waiver of her right to a hearing and to counsel, that claimant's failure to respond to his October 29, 1996 Order was not a waiver of her right to a hearing, and that the administrative law judge improperly placed the burden on claimant to establish the necessity of a hearing in his October 29, 1996 Order. Thus, the Board vacated his Decision and Order of May 1, 1997 and Order on Reconsideration dated May 27, 1997, denying benefits and remanded the case for further consideration of these issues. The Board also directed the administrative law judge to consider claimant's eligibility for survivor's benefits under 20 C.F.R. §725.217 (2000). *See* Administrative Law Judge's Exhibit 4; *Young v. Director, OWCP*, BRB No. 97-1411 BLA (June 24, 1998). On remand, the administrative law judge found the evidence of record sufficient to establish that claimant was the eligible surviving divorced spouse of the miner at 20 C.F.R. §§725.217(a)(1)(2000).³ Accordingly, benefits were awarded. On appeal, the Director challenges the findings of the administrative law judge that claimant was the eligible divorced surviving spouse of the miner and thus, established modification based on a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).⁴ Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence.⁵

² The Department of Labor has amended the regulations implementing the Federal Coal Mine 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, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³ Claimant married Clifton Young, the miner, on October 27, 1948. Director's Exhibit 6. Pursuant to a divorce decree issued by the Madison Circuit Court in Kentucky, the marriage of claimant and the miner was dissolved on February 15, 1978. Director's Exhibit 8. The divorce decree granted the miner all the marital property and custody of the couple's nine year-old son, and did not provide for any support payments by the miner to the claimant. *Id.*

⁴ In its earlier Decision and Order, the Board held that if the administrative law judge found claimant to be an eligible survivor, on remand, she would be automatically entitled to survivor's benefits based on the miner's receipt of Part B benefits at the time of his death. *See* ALJ Exhibit 4; *Young v. Director, OWCP*, BRB No. 97-1411 BLA (June 24, 1998).

⁵ We affirm the findings of the administrative law judge that claimant meets the relationship test set forth at 20 C.F.R. §725.216 (2000), that claimant is unmarried, and the

attorney fee award in the Supplemental Decision and Order, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, 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, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which the Director and claimant have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Based on the briefs submitted by the Director and claimant, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

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

On appeal, the Director contends that claimant has not met her burden of proving that the deceased miner provided one-half of the cost of her support for the month before the month in which he died as required by 20 C.F.R. §725.217(a)(1), and thus, that claimant did not establish modification as she is not an eligible surviving divorced spouse entitled to benefits. Specifically, the Director argues that claimant did not provide any evidence documenting the cost of her support or proving that the miner provided this support in the month prior to the month of his death such as copies of food or utility bills. The Director further contends that the testimony of witnesses at the hearing did not show that the miner provided a majority of claimant's support and that claimant's only evidence consisted of her testimony that she resided with the miner and received some support, an assertion unsupported by the record. The Director, notwithstanding her challenge to claimant's testimony that she lived with the miner, argues that even if claimant lived with the miner for the month before the month in which he died, used his utilities, and ate meals with him, there is still no evidence that the miner provided more than one-half of the cost of her support. Finally, the Director contends that the administrative law judge erred when he concluded that it was irrelevant that claimant was receiving Social Security benefits and medical benefits in the months before the month in which the miner died as it is conceivable that claimant's

benefits provided more than one-half of the cost of her support.⁶

⁶ The documentary evidence of record reflects that in 1993, claimant received \$71 a month in income from Social Security. Director's Exhibit 11. Claimant's daughter, Dolly Harrison, testified that beginning in 1980, claimant received around \$200 a month in Social Security benefits (SSI). Hearing transcript at p. 39, 41. She also testified that claimant's benefits increased after the miner's death. *Id.* at 41.

In order to establish entitlement to benefits under the Act, claimant, as the miner's surviving divorced spouse, bears the burden of establishing her dependency upon the deceased miner by satisfying the requirements of Section 725.217(a). *See* 20 C.F.R. §725.217(a)(1); *Putman v. Director, OWCP*, 12 BLR 1-127 (1988). Claimant may prove 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.⁷ *Id.* In the instant case, the administrative law judge properly found that for claimant to be an eligible surviving divorced spouse, claimant must establish that she was dependent upon the miner for at least one-half of her support for the month preceding the month of the miner's death.⁸ *See* 20 C.F.R. §§725.217(a)(1), 725.233(g); Decision and Order at 4.

The administrative law judge properly dealt with the regulatory requirement by reviewing the evidence of record to determine if the miner had contributed at least one-half of claimant's support for the month before the month in which he died, by reviewing the extensive hearing testimony, the statements of various witnesses, and the documentary evidence of record. Likewise, the administrative law judge correctly acknowledged the

⁷ The administrative law judge correctly determined that the record did not contain any evidence of a court order or a written agreement to pay support. *See* 20 C.F.R. §725.217(a)(2), (a)(3); Decision and Order at 4. This finding of the administrative law judge is affirmed as unchallenged on appeal. *Skrack, supra.*

⁸ The miner died on December 16, 1991. Director's Exhibit 7.

regulatory definition of “support” and the Board’s interpretation of that definition.⁹ *See* 20 C.F.R. §§725.217(a)(1), 725.233(g); Decision and Order at 4.

In reviewing the testimony of record, the administrative law judge reasonably determined that in the month before the month in which he died, the miner contributed more than one-half of claimant’s support based on the testimony of claimant, her daughter, Dolly Harrison, and her son, David Young, that claimant lived with the miner before his death and that the miner provided claimant with food, shelter, and clothing during the month before he died. *See* Decision and Order at 7-8; Supplemental Decision and Order at 3-4. The administrative law judge also reasonably found that subsequent to their divorce, testimony established that the miner took responsibility for claimant and provided for claimant’s needs for a long period of time up until his death. *Id.*; *Putman, supra*.

⁹ The administrative law judge found that “support” meant food, shelter, clothing, ordinary medical expenses, and other ordinary and customary items. He also found that the meaning of one-half support focused on whether 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 on whether the support equaled or exceeded one-half of the total cost of such individual’s support at such time or during such period of time. *See* 20 C.F.R. §§725.217(a)(1), 725.233(g); Decision and Order at 4; Supplemental Decision and Order at 3.

Contrary to the Director's argument, the regulations do not require that claimant establish the precise amount of the cost of her monthly support.¹⁰ Further, the Director's assertion that the administrative law judge erred in his Supplemental Decision and Order when he concluded that claimant's income was not the basis for determining the meaning of one-half of the total cost of her support is rejected as the administrative law judge applied the correct standard in the instant case, finding that the miner provided claimant with more than one-half of her support "in cash or kind" contributions. Supplemental Decision and Order at 3. *See Putman, supra*. We, therefore, affirm the findings of the administrative law judge that claimant established that she was dependent upon the miner in the month prior to the month of his death for one-half of her support and that she is the eligible surviving divorced spouse. We, therefore, also affirm the administrative law judge's finding that claimant demonstrated a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 and that the award of benefits is, therefore, supported by substantial evidence and in accordance with law.

¹⁰ The administrative law judge correctly noted that the record did not contain the exact dollar amounts of claimant's expenses. *See* Decision and Order at 7-8; Supplemental Decision and Order at 3.

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge