

BRB No. 99-1249 BLA

GLENNA MAE SHIRLEY (Surviving )  
Divorced Spouse of ROY SHIRLEY) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Respondent )

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order - Denial of Survivor's Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Glenna Mae Shirley, Quincey, Ohio, *pro se*.

Helen H. Cox (Henry L. Solano, 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, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,<sup>1</sup> without assistance of counsel, appeals the Decision and Order - Denial of Survivor's Benefits (99-BLA-0312) of Administrative Law Judge Thomas F. Phalen, Jr.

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<sup>1</sup> Claimant is Glenna Mae Shirley, the surviving divorced spouse, who filed an application for survivor's benefits on March 6, 1998. Director's Exhibit 1.

on a 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). The administrative law judge found that claimant's marriage to the miner<sup>2</sup> had lasted more than ten years as required by the regulations set forth in 20 C.F.R. §725.216. Next, the administrative law judge determined that claimant failed to demonstrate her dependency on the miner pursuant to 20 C.F.R. §725.217 and, therefore, failed to qualify as a surviving divorced spouse. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of survivor's benefits. The Director, Office of Workers' Compensation Programs (the Director) responds to this *pro se* appeal, urging affirmance.<sup>3</sup>

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. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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<sup>2</sup> The miner, Roy Shirley, filed an application for benefits on February 12, 1974, which was finally denied by the district director on February 29, 1980. Director's Exhibit 10. The record is devoid of evidence indicating that the miner further pursued this claim. The miner died on October 12, 1997. Director's Exhibit 3.

<sup>3</sup> We affirm the administrative law judge's finding pursuant to Section 725.216 inasmuch as this determination, which is not adverse to claimant, is unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 4.

In order to establish entitlement to benefits under the Act, claimant, as a surviving divorced spouse, bears the burden of establishing her dependency on the miner by satisfying the requirements of Section 725.217(a). *Walker v. Director, OWCP*, 9 BLR 1-233 (1987); *McCoy v. Director, OWCP*, 7 BLR 1-789, 1-792 (1985). Claimant may establish the requisite 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 contribution to the individual's support. 20 C.F.R. §725.217(a)(1)-(3); *Dercole v. Director, OWCP*, 3 BLR 1-76, 1-79 (1981).

Relevant to Section 725.217(a), a review of the evidence of record reveals a divorce decree dated February 23, 1978 which dissolved the marriage between claimant and the miner and only ordered the miner to endorse and deliver his monthly Social Security check in the amount of \$148.00 for his two daughters. Director's Exhibit 10. A review of the hearing transcript from the formal hearing held on April 8, 1999<sup>4</sup> reveals the undisputed testimony of claimant and her daughters, Mrs. Debra Walter and Ms. Kathy Bradley, that between the divorce in February 1978 and the miner's demise in October 1997, the miner did not pay alimony or child support to claimant or her daughters. Hearing Transcript at 20, 25, 40, 44.

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<sup>4</sup> Claimant was represented at the formal hearing before the administrative law judge by one of her daughters, Mrs. Debra Walter, who was not an attorney and had no legal training. Hearing Transcript at 11-12. Nevertheless, a review of the record and hearing transcript reveals that claimant was afforded a full and fair hearing in accordance with 20 C.F.R. §725.362(b) inasmuch as the administrative law judge fully complied with the procedural safeguards delineated in *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984).

We affirm the administrative law judge's determination that claimant failed to demonstrate dependency on the miner as a surviving divorced spouse pursuant to Section 725.217(a). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises,<sup>5</sup> has held that Social Security benefit payments do not constitute support contributions under Section 725.217(a), and therefore, cannot demonstrate dependency on the miner as defined in the Act. *Taylor v. Director, OWCP*, 967 F.2d 961, 963, 16 BLR 2-84, 2-89 (4th Cir. 1992); *see Director, OWCP v. Hill*, 831 F.2d 635, 10 BLR 2-308 (6th Cir. 1987). Consequently, the provision in the divorce decree ordering the miner to endorse his monthly Social Security payments to claimant on behalf of their two daughters does not qualify as support contributions from the miner pursuant to Section 725.217.<sup>6</sup> *See Taylor, supra; Director, OWCP v. Logan*, 868 F.2d 285, 12 BLR 2-175 (8th Cir. 1989); *Director, OWCP v. Ball*, 826 F.2d 603, 10 BLR 2-210 (7th Cir. 1987). Moreover, the administrative law judge reviewed the formal hearing testimony and the evidence of record and properly found that the record was devoid of a written agreement or court order indicating that the miner provided any monetary support to claimant after their divorce in 1978. *See Walker, supra*; Decision and Order at 4. Similarly, the administrative law judge permissibly found that claimant and her two daughters unequivocally confirmed that the miner did not contribute, voluntarily or by court order, any financial support after the divorce. *Ibid.* Inasmuch as claimant failed to establish that she was receiving support from the miner in the month preceding his death or that the miner was required to provide her such support by a court order, we affirm the administrative law judge's determination that claimant failed to establish her dependency on the miner pursuant to Section 725.217(a) as this determination is rational and supported by substantial evidence. *See 20 C.F.R. §725.217(a)(1)-(3)*; Decision and Order at 4. Claimant's failure to demonstrate that she is a surviving divorced spouse as defined in the regulations precludes her entitlement to survivor's benefits. *See Walker, supra; McCoy, supra.*

Accordingly, the Decision and Order - Denial of Survivor's Benefits of the administrative law judge is affirmed.

SO ORDERED.

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<sup>5</sup> Since the miner's most recent coal mine employment occurred in the state of West Virginia, the United States Court of Appeals for the Fourth Circuit has jurisdiction over the instant claim. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989); Director's Exhibit 10.

<sup>6</sup> Mrs. Debra Walter stated that she and her sister ceased receiving the miner's Social Security benefit payments when they reached eighteen years of age. Hearing Transcript at 20.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge