

BRB No. 06-0554 BLA

ROLAND P. ALLEN	)	
(Surviving Disabled Child of	)	
SAMUEL P. ALLEN, Deceased)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	DATE ISSUED: 12/22/2006
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Order Granting Director's Motion for Summary Decision of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

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

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Order Granting Director's Motion for Summary Decision (2005-BLA-0570) of Administrative Law Judge Robert D. Kaplan issued with respect to a subsequent 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). This case is before the Board for a second

time.<sup>1</sup> The Board previously vacated Judge Kaplan's April 28, 2005 Decision and Order,

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<sup>1</sup> Claimant is the adult surviving child of the miner, who died on April 5, 1983. Director's Exhibit 1. Claimant first filed a claim for survivor's benefits on November 16, 1992. *Id.* In a Decision and Order dated August 5, 1994, Administrative Law Judge Donald W. Mosser denied benefits on the ground that claimant did not satisfy the requirements for an eligible survivor pursuant to 20 C.F.R. §725.209. Director's Exhibit 1. Judge Mosser further found that the medical evidence was insufficient to establish that the miner's death was due to pneumoconiosis. *Id.* The Board affirmed Judge Mosser's denial of benefits on appeal. *See Allen v. Director, OWCP*, BRB No. 94-3798 BLA (April 21, 1995) (unpub.); Director's Exhibit 1. The Board's decision was also affirmed by the United States Court of Appeals for the Eleventh Circuit. *See Allen v. Director, OWCP*, No. 95-6357 (11th Cir., Oct. 29, 1996) (unpub.); Director's Exhibit 1. Claimant subsequently filed a request for modification on June 2, 1997. *Id.* A hearing was held on February 26, 1998 before Administrative Law Judge Gerald M. Tierney. *Id.* Judge Tierney issued a Decision and Order denying benefits on July 29, 1998. Director's Exhibit 1. Although claimant filed an appeal with the Board, it was dismissed as untimely filed. *Allen v. Director, OWCP*, BRB No. 98-1651 BLA (Order) (Oct. 27, 1998); Director's Exhibit 1. On June 16, 1999, claimant filed a petition for modification, which was denied by Administrative Law Judge Mollie W. Neal in a Decision and Order dated August 23, 2000. *Id.* On appeal, the Board affirmed Judge Neal's decision. *See Allen v. Director, OWCP*, BRB No. 00-1146 BLA (Aug. 30, 2001) (unpub.); Director's Exhibit 1. Claimant filed a request for reconsideration on February 6, 2002, which was also denied by Board. *See Allen v. Director, OWCP*, BRB No. 94-3798 BLA (Order on Motion for Reconsideration) (Feb. 6, 2002); Director's Exhibit 1. Although claimant filed an appeal with the United States Court of Appeals for the Second Circuit, that appeal was dismissed as abandoned on August 14, 2002. Director's Exhibit 1.

Claimant filed the present claim, a subsequent claim, on July 26, 2004. Director's Exhibit 3. The district director denied the claim on December 1, 2004. Director's Exhibit 10. At claimant's request, the case was referred to the Office of Administrative Law Judges for a formal hearing. The case was assigned to Administrative Law Judge Robert D. Kaplan, who did not hold a hearing, but issued an Order to Show Cause on March 17, 2005, directing claimant to submit, no later than April 4, 2005, "new" evidence establishing that he was not married. The administrative law judge advised claimant that if he did not submit such evidence his claim would be denied. Claimant responded to the administrative law judge's Order, submitting copies of his school records, and two x-ray interpretations. Although claimant argued that he was entitled to benefits based on Alabama law, he did not submit any evidence relevant to his marital status. On April 28, 2005, the administrative law judge issued a Decision and Order denying benefits. On appeal, the Director, Office of Workers' Compensation Programs (the Director), moved for remand on the ground that the administrative law

holding that claimant had been improperly deprived of his right to a formal hearing under 20 C.F.R. §725.452(c), and therefore, the case was remanded for a formal hearing unless one of the exceptions set forth at Section 725.452(c), (d) was found to be applicable. *Allen v. Director, OWCP*, BRB No. 05-0716 BLA (Sept. 9, 2005) (unpub.). On remand, the Director, Office of Workers' Compensation Programs (the Director), filed a motion for summary decision on October 13, 2005, requesting that the administrative law judge deny claimant's application because he failed to produce any evidence that he is unmarried or that he meets the other eligibility criteria for a surviving child pursuant to 20 C.F.R. §§725.209, 725.218. Claimant filed a response to the Director's motion on October 19, 2005. Claimant also filed, on October 17, 2005, a motion for reconsideration with the Board. The administrative law judge deferred ruling on the Director's motion for summary judgment until the Board denied claimant's reconsideration request on November 30, 2005. *Allen v. Director, OWCP*, BRB No. 05-0716 BLA (Order on Motion for Reconsideration) (Nov. 30, 2005). Thereafter, on April 3, 2006, the administrative law judge issued his Order Granting Director's Motion for Summary Judgment. The administrative law judge specifically determined that a full evidentiary hearing was not necessary as there was no genuine issue of material fact regarding whether claimant qualified as an eligible survivor of the miner. Accordingly, benefits were denied.

Claimant appeals, challenging the administrative law judge's denial of benefits. The Director responds, urging the Board to affirm the administrative law judge's ruling granting summary judgment.

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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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.<sup>2</sup> 33 U.S.C. §921(b)(3), as incorporated into the Act by 30

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judge improperly denied claimant's request for a hearing without complying with the requirements of 20 C.F.R. §725.452 authorizing an administrative law judge to dispense with a hearing. Since the administrative law judge had not complied with the requisite procedures, the Board vacated the administrative law judge's Decision and Order, and remanded the case for further proceedings.

<sup>2</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, as the miner was last employed in the coal mine industry in

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

Since claimant is the son of a deceased miner, *see* 20 C.F.R. §725.308, he is eligible to receive benefits if he meets the dependency requirements set forth at 20 C.F.R. §725.209. This regulation states that a child will be considered to have been dependent on a deceased miner if the child “(1) [i]s unmarried; and (2)(i) [the child is] under 18 years of age; or (ii) ... under a disability as defined in section 223(d) of the Social Security Act, 42 U.S.C. 423(d); or (iii) [the child is] 18 years of age or older and is a student [emphasis added].” . 20 C.F.R. §725.209. In order to satisfy the disability provision, such disability “must have begun before the child attained age 22, or in the case of a student, before the child ceased to be a student.” *See* 20 C.F.R. §725.221.

As we noted in our prior decision, where a claimant files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that “one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final.” 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004). The “applicable conditions of entitlement” are “those conditions upon which the prior denial was based.” 20 C.F.R. §725.309(d)(2).

In this case, the Board previously affirmed the denial of claimant’s original application for survivor’s benefits, holding that claimant failed to meet the dependency requirements for a surviving child because he was married. *Allen v. Director, OWCP*, BRB No. 00-1146 BLA (Aug. 30, 2001) (unpub.). The Board subsequently denied claimant’s motion for reconsideration on February 6, 2002, and claimant’s appeal to the United States Court of Appeals for the Second Circuit was dismissed as abandoned on August 14, 2002. Director’s Exhibit 1. As claimant took no further action with regard to that prior denial, until he filed the instant claim on July 26, 2004, Director’s Exhibit 3, claimant must submit new evidence establishing that he is an eligible surviving dependent of the miner pursuant to 20 C.F.R. §§725.209, 725.221, in order to establish a change in an applicable condition of entitlement, and to establish his entitlement to benefits.<sup>3</sup> *See* 20 C.F.R. §725.309(d)(2), (3); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47,

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Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director’s Exhibit 1.

<sup>3</sup> Claimant is not required to establish that the miner’s death was due to pneumoconiosis, since the miner was receiving benefits at the time of his death pursuant to an award issued under Part B of the Act. *See* 30 U.S.C. §932(1).

1-64 (2004) (*en banc*). Specifically, claimant must show that he is not married in order to establish his dependency at Section 725.209, and a change in an applicable condition of entitlement pursuant to Section 725.309.

As noted by the administrative law judge, the evidence in the prior claim established that claimant was married, *see* Director's Exhibit 1, and claimant "has failed to submit any pertinent evidence regarding his current marital status." Decision and Order at 4. Based on claimant's failure to produce any evidence to show that he is no longer married, we affirm the administrative law judge's decision to grant summary judgment. Under Section 725.452(c), an administrative law judge has authority to grant summary judgment "if the administrative law judge determines that there is no genuine issue as to any material fact[,] and that the moving party is entitled to the relief requested as a matter of law." 20 C.F.R. §725.452(c). Since there was no evidence to establish that claimant is no longer married, and marital status is a determinative element for dependency, the administrative law judge correctly determined that there was no genuine issue as to a material fact to be resolved by holding a hearing in this matter.<sup>4</sup> Moreover, since claimant failed to demonstrate, in conjunction with his subsequent claim, that he is no longer married, the administrative law judge properly found that claimant failed to establish a change in an applicable condition pursuant to Section 725.309(d). Consequently, we affirm as supported by substantial evidence, the administrative law judge's decision to grant summary judgment and deny benefits.

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<sup>4</sup> The Director asserts that even if claimant were not married, he would be ineligible for benefits because he does not satisfy the remaining criteria for establishing dependency at 20 C.F.R. §725.209: claimant must be under the age of 18, or over the age of 18 but also a student, or disabled prior to the age of 22. Director's Brief at 4. We need not address these additional factors as we affirm the administrative law judge's conclusion that claimant failed to establish the he is not married, the first requisite element of dependency.

Accordingly, the administrative law judge's Order Granting Director's Motion for Summary Decision is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge