

BRB No. 98-0473 BLA

MARY K. ADKINS (Surviving)
Divorced Spouse of CLYDE ADKINS))
)
Claimant-Respondent)
)
v.)
)
PEABODY COAL COMPANY) DATE ISSUED:
)
and)
)
OLD REPUBLIC INSURANCE COMPANY)
)
Employer/Carrier-)
Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, the Decision on Motion for Reconsideration, and the Order Denying Motion to Vacate of Daniel L. Stewart, Administrative Law Judge, United States Department of Labor.

John Cline (Lay Representative), Scarbro, West Virginia, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer/carrier.

Gary K. Stearman (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: SMITH, BROWN and McGRANERY, Administrative Appeals

Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits, the Decision on Motion for Reconsideration, and the Order Denying Motion to Vacate (96-BLA-0710) of Administrative Law Judge Daniel L. Stewart awarding benefits 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). This case has a lengthy procedural history. During his lifetime, the miner was awarded benefits by the Social Security Administration (SSA) on his Part B claim filed on April 10, 1973, and subsequently was awarded benefits by the Department of Labor (DOL) on a medical benefits only (MBO) claim filed under Part C on December 23, 1980. The miner died on December 10, 1992, and claimant, his surviving divorced spouse, filed claims for survivor's benefits with both SSA and DOL. While claimant's SSA claim was pending, her DOL case was assigned to Administrative Law Judge Daniel L. Stewart, who issued his Decision and Order Awarding Benefits on May 23, 1997. The administrative law judge determined that claimant established both her relationship to the miner pursuant to 20 C.F.R. §725.206 and her dependency on the miner pursuant to 20 C.F.R. §725.217(a)(2), and found that derivative entitlement pursuant to 20 C.F.R. §725.212 was warranted based on the miner's award of benefits. Accordingly, benefits were awarded.

Employer filed a Motion for Reconsideration on June 23, 1997, challenging the administrative law judge's admission of Claimant's Exhibits 1-8 into the record pursuant to 20 C.F.R. §725.456(d), and requesting that the administrative law judge admit Dr. Zaldivar's report into the record. Employer also challenged the administrative law judge's findings regarding claimant's dependency pursuant to Section 725.217(a)(2), and his failure to adjudicate the contested issues of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). On September 26, 1997, the administrative law judge issued a Decision on Motion for Reconsideration, rejecting employer's arguments pursuant to Sections 725.217(a)(2) and 725.456(d), and finding that if derivative entitlement were not appropriate, the x-ray evidence of record established complicated pneumoconiosis at Section 718.304, thus claimant established death due to pneumoconiosis at Section 718.205(c)(3). Consequently, the administrative law judge again awarded benefits on claimant's Part C survivor's claim.

On July 15, 1997, SSA Administrative Law Judge Harry C. Taylor, II, awarded benefits to claimant on her Part B survivor's claim, finding that claimant's application

was timely filed and that she satisfied all of the conditions of entitlement pursuant to 20 C.F.R. §410.210.

Based on SSA's award of benefits to claimant, employer filed a Motion to Vacate and Remand on October 10, 1997, arguing that the SSA award takes precedence over any Part C entitlement. Employer urged the administrative law judge to vacate his Decision on Motion for Reconsideration and remand the case to the district director for final disposition. On December 1, 1997, the administrative law judge issued his Order Denying Motion to Vacate.

Employer appeals, asserting that the SSA award requires the dismissal of claimant's Part C application. Employer also contends that even if the Part C claim is still viable, the administrative law judge erred in awarding benefits pursuant to Section 718.205(c) without considering all relevant evidence. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that while a Part B award operates as a complete offset against claimant's Part C benefits, the regulations do not preclude simultaneous adjudication of claims under Part B and Part C and an award under both. The Director has declined to take a position regarding the administrative law judge's findings on the merits.¹

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).

¹ We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established both her relationship to the miner pursuant to 20 C.F.R. §725.206 and her dependency on the miner pursuant to 20 C.F.R. §725.217(a)(2). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer initially contends that the SSA's award of benefits to claimant under Part B requires the dismissal of her Part C claim by the DOL. We disagree. The Director accurately notes that there is no provision of the Act or its implementing regulations which precludes the simultaneous adjudication of survivor's claims under Part B and Part C, or which mandates dismissal of either claim upon the entry of a final award of benefits in the other.² Rather, the regulations provide that a claimant cannot receive duplicate benefits for concurrent periods of eligibility, see 20 C.F.R. §725.309(f). In the present case, claimant's Part B award works as a complete offset against her Part C benefits pursuant to 20 C.F.R. §725.533(a)(2). Thus, although claimant's award of benefits under Part C has no practical effect, there is no bar against issuance of the award. We therefore reject employer's argument that claimant's Part C survivor's claim is not viable.

² Employer additionally maintains that during the pendency of claimant's SSA application under Part B, pursuant to 20 C.F.R. §725.102(c) and the Board's holding in *Hinkle v. Sewell Coal Co.*, 1 BLR 1-637 (1978), the DOL proceedings on her Part C claim should have been suspended. While the suspension of the DOL proceedings may have promoted judicial economy, the Director correctly notes that employer's reliance on Section 727.103(c) and *Hinkle, supra*, is misplaced. Section 727.103 specifically implements the election and review procedures established by 30 U.S.C. §945, and 20 C.F.R. Part 727 applies to claims filed before April 1, 1980. 20 C.F.R. §725.4. Further, the *Hinkle* decision interpreted the provisions at 20 C.F.R. §725.102(c), which were superseded in August of 1978 by the current version of 20 C.F.R. Part 725. 43 Fed. Reg. 36772 (Aug. 18, 1978), as amended at 48 Fed. Reg. 24290 (May 31, 1983).

Employer next maintains that the administrative law judge erred in awarding benefits pursuant to Section 718.205(c)(3) without considering all relevant evidence.³ Inasmuch as claimant satisfied the conditions of derivative entitlement pursuant to Section 725.212(a), however, based on the miner's award of benefits under Part B and Part C, the administrative law judge was not required to adjudicate the merits of claimant's survivor's claim under Section 718.205. See generally *Director, OWCP v. Saulsberry*, 887 F.2d 667, 13 BLR 2-80 (6th Cir. 1989); *Reigh v. Director, OWCP*, 20 BLR 1-44 (1996), *modifying on recon.* 19 BLR 1-64 (1995); *Deloe v. Director, OWCP*, 15 BLR 1-9 (1991); *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989). Consequently, we need not reach employer's arguments on the merits, and we affirm the administrative law judge's award of benefits.

Accordingly, the Decision and Order Awarding Benefits, the Decision on Motion for Reconsideration, and the Order Denying Motion to Vacate of the administrative law judge are affirmed.

SO ORDERED.

³ Employer also contends that it was prejudiced by the administrative law judge's inconsistency in his evidentiary rulings. Employer's Brief at 4, n. 1. We disagree. Claimant's lay representative submitted Claimant's Exhibits 1-8 in compliance with the 20-day rule pursuant to 20 C.F.R. §725.456(b)(1), and employer objected to their admission into the record at the hearing because this evidence was obtained by claimant at the time the claim was pending before the district director but withheld until the case was forwarded to the Office of Administrative Law Judges. The administrative law judge determined that claimant should not be penalized because her lay representative was not aware of the provisions at Section 725.456(d), and that employer was not unduly prejudiced by admission of these exhibits because it had access to these exhibits which had been submitted as part of the living miner's claim. Hence, the administrative law judge held that extraordinary circumstances existed which warranted the admission into evidence of Claimant's Exhibits 1-8 pursuant to Section 725.456(d). Decision and Order at 6-7; see generally *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989). By contrast, employer did not offer Dr. Zaldivar's report until after the Decision and Order was issued, despite the fact that claimant's lay representative questioned at the hearing, whether the report was contained in the Director's Exhibits, see Hearing Transcript at 47-48, and stated in his closing brief that there was no indication that this evidence was submitted to DOL although employer's counsel had provided him with a copy post-hearing. Because employer did not request the inclusion of Dr. Zaldivar's report into the record until the filing of its Motion for Reconsideration, the administrative law judge properly held it was too late.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge