

BRB No. 03-0592 BLA

THELMA HASH (Surviving)	
Divorced Spouse of SEBERT J. HASH))	
)	
Claimant-Petitioner)	
)	DATE ISSUED: 02/18/2004
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Thelma Hash , Lithia, Florida, *pro se*.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without assistance of counsel, appeals the Decision and Order (2002-BLA-5373) of Administrative Law Judge Robert L. Hillyard denying 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).¹ The administrative law judge found that because claimant's marriage to the miner had lasted more than ten years, claimant

¹ Claimant is Thelma Hash, the surviving divorced spouse, who filed an application for survivor's benefits on February 12, 2003. Director's Exhibit 7.

had satisfied the relationship eligibility requirement set forth in 20 C.F.R. §725.216 for a surviving spouse to receive black lung benefits.² Decision and Order at 4. The administrative law judge further determined, however, that claimant failed to demonstrate her dependency on the miner as required by the regulations at 20 C.F.R. §725.217 and, therefore, failed to qualify for black lung benefits as a surviving divorced spouse. Decision and Order at 4-5. 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, responds urging affirmance of the administrative law judge's decision as supported by substantial evidence.³

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).

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 set forth in Section 725.217. *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 contributions to the individual's support." 20 C.F.R. §725.217(a)-(c);

² The miner, Sebert J. Hash, filed his initial application for benefits on June 28, 1973 which was finally denied on October 2, 1973. Director's Exhibit 1. The miner filed a second claim on November 17, 1977, which was finally denied on April 30, 1980. Director's Exhibit 1. The miner filed another application for benefits on April 12, 1983 in which benefits were ultimately awarded. Director's Exhibit 1. The miner died on January 10, 2001. Director's Exhibit 10.

³ We affirm the administrative law judge's finding pursuant to 20 C.F.R. §725.216 because 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.

Dercole v. Director, OWCP, 3 BLR 1-76, 1-79 (1981).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error.⁴ A review of the evidence of record reveals a divorce decree dated September 18, 1961 which dissolved the marriage between claimant and the miner and ordered the miner to pay claimant only twenty-five dollars per month. Director's Exhibit 9. The record also contains a statement from claimant that although the miner was ordered to pay her twenty-five dollars a month, he had never paid her anything. Director's Exhibit 19. Claimant's statement was corroborated by a statement by the miner that he had never made support payments or paid her alimony. Director's Exhibit 1.

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. The administrative law judge reviewed the evidence of record and properly found that the miner did not contribute, voluntarily or by court order, any financial support after the divorce. *Walker*, 9 BLR 1-233; Decision and Order at 5; Director's Exhibits 1, 9, 19. Thus, claimant cannot prove dependency pursuant to Section 725.217(a)-(b). *Dercole*, 3 BLR 1-76.

With respect to Section 725.217(c), the administrative law judge erred in concluding that the miner's failure to pay any support pursuant to the court order precludes claimant from establishing dependency. Decision and Order at 5. Pursuant to this subsection, it is not relevant whether the miner actually paid support, as the existence of a court order requiring substantial contributions to the former spouse is all that is necessary. 20 C.F.R. §725.217. It is unnecessary to remand this case, however, as the record contains no evidence of claimant's expenses and therefore cannot meet the regulatory requirement of proving that the amount ordered, *i.e.*, twenty-five dollars a month, would have been a material factor in the cost of her support in December 2000, the month before the month in which the miner died.⁵ 20 C.F.R. §§725.217, 725.233(c), (e); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if her evidence is found insufficient to establish a crucial element. *See Director*,

⁴ 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 1.

⁵ Support includes "food, shelter, clothing, ordinary medical expenses, and other ordinary and customary items for the maintenance of the person supported." 20 C.F.R. §725.233(a); *Putman v. Director, OWCP*, 12 BLR 1-127 (1988).

OWCP v. Greenwich Collieries [Ondecko], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Walker*, 9 BLR 1-233; *McCoy*, 7 BLR 1-789; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge rationally found that the evidence of record in this survivor's claim is insufficient to establish that claimant was dependent on the miner for the month preceding the month in which the miner died, claimant has not met her burden of proof on all the elements of entitlement. *Walker*, 9 BLR 1-233; *McCoy*, 7 BLR 1-789. Because claimant failed to establish that she was receiving support from the miner or to provide evidence that the twenty-five dollars a month ordered would have constituted a substantial contribution to her support in the month preceding his death, we affirm the administrative law judge's determination that claimant failed to establish her dependency on the miner pursuant to Section 725.217 as this determination is rational and supported by substantial evidence. *See* 20 C.F.R. §725.217(a)-(c); Decision and Order at 4-5. 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*, 9 BLR 1-233; *McCoy*, 7 BLR 1-789.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge