

BRB No. 05-0217 BLA

LOIS JEAN WILLIAMS)
)
 Claimant-Petitioner)
)
 v.)
)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED: 07/28/2005
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent)
)
) DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Lois Jean Williams, Birmingham, Alabama, *pro se*.

Jeffrey S. Goldberg (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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order – Denying Benefits of Administrative Law Judge Gerald M. Tierney (the administrative law judge) on a duplicate 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

¹ Claimant is Lois Jean Williams, the former spouse of Morgan Williams, the miner, who died on March 11, 1981. Director's Exhibit 1-21. The miner was receiving benefits at the time of his death. Director's Exhibit 1-32. Claimant and the miner began

Claimant filed an application for benefits on May 25, 1989, which was denied by the district director as abandoned on August 22, 1989. Director's Exhibit 1-32. Claimant filed a second application for benefits on September 18, 1991. Director's Exhibit 1-1. On October 1, 1992, the district director denied the claim on the grounds that claimant failed to establish that she was dependent on the miner at the time of his death and that she was an eligible survivor of the miner. Director's Exhibit 1-30. Following a formal hearing, in a decision dated January 24, 1994, Administrative Law Judge Marvin Bober denied the duplicate claim on the grounds that claimant failed to establish that she was either an eligible surviving spouse or an eligible surviving divorced spouse of the miner. Director's Exhibit 1-26. On appeal, the Board affirmed the denial of benefits. *Williams v. Director, OWCP*, BRB No. 94-2359 (July 25, 1995)(unpub.). The United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises, dismissed claimant's petition for review for want of prosecution. *Williams v. Director, OWCP*, No. 96-6840 (July 23, 1998)(unpub. order). On June 28, 1999, claimant requested modification of the prior decision, which was denied by the district director on September 1, 1999 for failure to submit supporting evidence. Director's Exhibit 1. Claimant filed a third survivor's claim on January 8, 2001, which was denied by the district director on June 8, 2001, for failure to establish that she was an eligible survivor of the miner or that she was dependent on the miner at the time of his death. Director's Exhibit 2. On March 24, 2003, claimant filed a fourth claim for survivor's benefits, currently before the Board, which was denied by the district director on June 27, 2003. Director's Exhibit 3. Following a transfer of the case to the Office of Administrative Law Judges for further adjudication, in a decision dated October 26, 2004, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. The Director, Office of Workers' Compensation Programs (the Director) responds urging affirmance of the administrative law judge's Decision and Order - Denying Benefits.

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 Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board 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

living together in Alabama in 1970. They were married on July 17, 1977, and were divorced in August 28, 1980. Director's Exhibits 1-5, 1-20.

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

Claimant’s fourth application for benefits was filed on March 24, 2003, after the amended regulations took effect. The amended regulations state that a subsequent claim is a claim filed more than one year after the effective date of a final order denying a claim previously filed by the claimant. In addition, the regulations provide that a subsequent claim “shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see §§725.202(d) (miner), 725.212 (spouse)...) has changed since the date upon which the order denying the prior claim became final.” 20 C.F.R. §725.309(d).

Claimant’s prior claim was denied because the evidence did not show that she was an eligible survivor of the miner, either as a surviving spouse² or a surviving divorced

² The revised regulations at 20 C.F.R. §725.214 defining a surviving spouse provide that:

An individual shall be considered to be the surviving spouse of a miner if:

- (a) The courts of the State in which the miner was domiciled (see §725.231) at the time of his or her death would find that the individual and the miner were validly married; or
- (b) The courts of the States in which the miner was domiciled (see §725.231) at the time of the miner’s death would find that the individual was the miner’s surviving spouse; or
- (c) Under State law, such individual would have the right of the spouse to share in the miner’s intestate personal property; or
- (d) Such individual went through a marriage ceremony with the miner, resulting in a purported marriage between them which, but for a legal impediment (see §725.230), would have been a valid marriage, unless such individual entered into the purported marriage with knowledge that it was not a valid marriage, or if such individual and the miner were not living in the same household at the time of the miner’s death.

spouse,³ or, even assuming eligibility as a surviving divorced spouse, that she was financially dependent on the miner at the time of his death.⁴ Consequently, since the

20 C.F.R. §725.214.

³ The revised regulations at 20 C.F.R. §725.216 defining a surviving divorced spouse provide that:

An individual will be considered to be the surviving divorced spouse of a deceased miner in a claim considered under this part or reviewed under part 727 of this subchapter (see §725.4(d)), if such individual's marriage to the miner had been terminated by a final divorce on or after the 10th anniversary of the marriage unless, if such individual was married to and divorced from the miner more than once, such individual was married to such miner in each calendar year of the period beginning 10 years immediately before the date on which any divorce became final and ending with the year in which the divorce became final.

20 C.F.R. §725.216.

⁴ In defining the conditions of entitlement in the claim of a surviving divorced spouse, 20 C.F.R. §725.212 states:

(a) An individual who is the surviving spouse or surviving divorced spouse of a miner is eligible for benefits if such individual:

(1) Is not married;

(2) Was dependent on the miner at the pertinent time; and

(3) The deceased miner either:

(i) Was receiving benefits under section 415 or part C of title IV of the Act at the time of death as a result of a claim filed prior to January 1, 1982; or

(ii) Is determined as a result of a claim filed prior to January 1, 1982, to have been totally disabled due to pneumoconiosis at the time of death or to have died due to pneumoconiosis....

20 C.F.R. §725.212(a).

applicable conditions of entitlement are limited to those conditions upon which the prior denial was based, *see* 20 C.F.R. §725.309(d)(2), these are the only applicable conditions of entitlement in this case.

By regulation, the determination of whether an individual is a surviving spouse or surviving divorced spouse of a miner is a factual determination based on the duration and nature of the individual's relationship to the miner prior to his death. 20 C.F.R. §§725.214, 725.216. Similarly, by regulation, the determination regarding a surviving divorced spouse's dependency on the miner is to be based on the factual situation in the "month before the month in which the miner died."⁵ 20 C.F.R. §725.217; *Tucker v. Director, OWCP*, 23 BLR 1-42 (2004). Because both the determination of spousal relationship and dependency are, thus, based on the factual situation prior to the miner's death, there is no opportunity for the spousal relationship or the dependency relationship to change after the miner dies. Therefore, the issues of spousal relationship and the dependency of a surviving divorced spouse are not issues that are capable of change pursuant to 20 C.F.R. §725.309. *See Coleman v. Director, OWCP*, 345 F.3d 861, 863, 23 BLR 2-1, 2-7 (11th Cir. 2003); *Tucker*, 23 BLR at 1-45. Because there is, therefore, no basis for a finding of a change in an applicable condition of entitlement in this case, we must affirm the administrative law judge's denial of benefits.

⁵ Specifically, the regulations setting forth the criteria to be used in determining whether a surviving divorced spouse was dependent on the miner provide that:

An individual who is the miner's surviving divorced spouse (see §725.216) shall be determined to have been dependent on the miner if, for the month before the month in which the miner died:

- (e) The individual was receiving at least one-half of his or her support from the miner (see § 725.233(g)); or
- (f) The individual was receiving substantial contributions from the miner pursuant to a written agreement (see §725.233 (c) and (f)); or
- (g) A court order required the miner to furnish substantial contributions to the individual's support (see §725.233(c) and (e)).

20 C.F.R. §725.217.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge