

BRB No. 98-1348 BLA

MARIE GEUSIC (Surviving Divorced)	
Spouse of MICHAEL P. GEUSIC))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Marie Geusic, Lansford, Pennsylvania, *pro se*.

Sarah M. Hurley (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 and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without assistance of counsel, appeals the Decision and Order Denying Benefits (98-BLA-0561) of Administrative Law Judge Robert D. Kaplan 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 is before the Board for the second time. In the original Decision and Order on both survivors' claims,¹ the

¹ Claimant is Marie Geusic, the surviving divorced spouse, who filed an application for benefits on October 3, 1991. Director's Exhibit 1A. The widow of Michael P. Geusic is Mary Geusic, who filed her application for survivor's benefits on October 28, 1991. Director's Exhibit 1. The administrative law judge denied Mary's claim on the basis that the

administrative law judge found that claimant had not remarried after her divorce from the miner² and that her marriage had lasted more than ten years as required by the regulations set forth in 20 C.F.R. §725.216. However, the administrative law judge determined that claimant failed to demonstrate her dependency on the miner pursuant to 20 C.F.R. §725.217(a), and, therefore, failed to qualify as a surviving divorced spouse. Accordingly, the administrative law judge denied benefits. Claimant appealed and the Board affirmed the administrative law judge's denial. *Geusic v. Director, OWCP*, BRB No. 96-0149 BLA (Oct. 30, 1996)(unpub.); Director's Exhibit 29A. Subsequently, claimant filed a timely petition for modification with supporting lay evidence pursuant to 20 C.F.R. §725.310. On modification, the administrative law judge found that claimant failed to establish a mistake in a determination of fact under 20 C.F.R. §725.310 based on claimant's failure to qualify as a surviving divorced spouse at 20 C.F.R. §725.217(a). Accordingly, the administrative law judge again denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of modification. The Director, Office of Workers' Compensation Programs (the Director) responds to this *pro se* appeal, urging affirmance.

medical evidence failed to establish that the miner's pneumoconiosis was a substantially contributing cause of his death at 20 C.F.R. §718.205(c)(2), Director's Exhibit 44, which was affirmed by the Board, *Geusic v. Director, OWCP*, BRB No. 96-0149 BLA (Oct. 30, 1996) (unpub.); Director's Exhibit 29A. The record is devoid of evidence indicating that the widow appealed the Board's decision or further pursued her claim.

² The miner filed an application for benefits on February 26, 1982. Director's Exhibit 1. The final denial on the miner's claim was by the Board's affirmance of Administrative Law Judge Thomas Schneider's Decision and Order. *Geusic v. Director, OWCP*, BRB No. 91-1004 BLA (Dec. 29, 1992)(unpub.); Director's Exhibits 31-33, 42. The miner died on September 26, 1991. Director's Exhibit 11A.

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 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 previously submitted evidence reveals a court order dated November 14, 1968 wherein the miner was ordered to pay claimant \$50 per month for spousal support. Director's Exhibit 10A. On December 3, 1981, the miner filed a Petition to Modify or Terminate Support Order on the grounds that he had a stroke and heart attack on September 26, 1981, and was, subsequently, unemployed and on welfare. Director's Exhibit 32A. On December 16, 1981, claimant agreed that the court order be vacated, provided that the miner pay arrearages that had accumulated prior to his sickness. Director's Exhibits 10A, 32A. A review of the newly submitted evidence reveals two written statements. In a letter dated November 7, 1997, Bernadette M. Geusic, claimant's sister-in-law, alleged that claimant was forced to relinquish the \$50 monthly support order because the miner "threaten[ed] to hurt her." Director's Exhibit 34A. In a letter dated October 31, 1997, Helen Brida similarly averred that because claimant "lived in fear" of the miner, who continually harassed and threatened her, claimant relinquished her right to support. Director's Exhibit 35A.

We affirm the administrative law judge's determination that claimant failed to qualify as a surviving divorced spouse pursuant to Section 725.217(a). The administrative law judge reviewed the newly submitted statements regarding the circumstances of claimant's waiver of support and, within a proper exercise of discretion, found that Section 725.217(a) contains no exception to the requirement that, to qualify as a divorced spouse, claimant "must have received support from the miner in the month preceding his death or the miner must have been required to provide her such support by a court order." See 20 C.F.R. §725.217(a)(1)-(3); Decision and Order [on Modification] at 2. In addition, the administrative law judge permissibly found that the newly submitted statements regarding the circumstances of

claimant's waiver of the court order did not constitute new evidence inasmuch as these statements were reasonably ascertainable during the pre-hearing, hearing, and post-hearing stages but were not proffered at that time, and as such, cannot serve as the basis for modification. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164-165 n.2 (1989); *Wilkes v. F & R Coal Co.*, 12 BLR 1-1 (1988); *Gill v. Alabama By-Products Corp.*, 8 BLR 1-427, 1-429 (1986); *see also* 20 C.F.R. §725.456(d); Decision and Order [on Modification] at 3. Similarly, the administrative law judge properly found that the previously submitted evidence demonstrated that the court order requiring the miner to pay spousal support to claimant was vacated on December 16, 1981, ten years prior to the miner's death. *See* 20 C.F.R. §725.217(a)(3); Decision and Order [on Modification] at 2, *citing Geusic*, BRB No. 96-0149 BLA, *slip op.* at 2; Director's Exhibit 29A at 2. Inasmuch as the record is devoid of evidence establishing that claimant received support from the miner in the month preceding his death or that the miner was required to provide her 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 Walker, supra; McCoy, supra.*³ Because claimant failed to satisfy her burden of establishing that she qualified as a surviving divorced spouse, *see Dercole, supra*, we similarly affirm the administrative law judge's finding that there is no mistake in a determination of fact in the prior denial pursuant to Section 725.310.

³ Claimant's failure to demonstrate that she is a surviving divorced spouse as defined in the regulations precludes her entitlement to survivor's benefits, and therefore, obviates the need to address the administrative law judge's findings on the merits with respect to Section 718.205(c). *See Walker, supra; McCoy, supra.*

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge