

BRB No. 10-0704 BLA

BETTY BIGNEY	)	
(Surviving Divorced Spouse of	)	
LUTHER BAISDEN)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 06/29/2011
	)	
ISLAND CREEK COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Motion for Summary Judgment of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Betty Bigney, Barboursville, West Virginia, *pro se*.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's surviving divorced spouse, appeals, without the assistance of counsel, the Decision and Order Granting Motion for Summary Judgment (10-BLA-5259) of Administrative Law Judge Richard A. Morgan on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). Claimant married the miner on April 2, 1949. Director's Exhibit 11. Claimant and the miner divorced on October 28, 1974. Director's

Exhibit 12. Claimant married her second husband on November 27, 1974. Director's Exhibit 14. While claimant was married to her second husband, her first husband, the deceased miner, died on March 9, 1987. Director's Exhibit 13. Claimant's second husband died on February 8, 2007. Director's Exhibit 15. Claimant filed a survivor's claim on January 20, 2009. Director's Exhibit 3.

On June 29, 2010, employer moved for a summary decision, asserting that there was no genuine issue of fact as to whether claimant satisfied the dependency requirement set forth at 20 C.F.R. §725.217. In a Decision and Order dated August 11, 2010, the administrative law judge found that there was no genuine issue of material fact concerning claimant's inability to satisfy the dependency requirement set forth at 20 C.F.R. §725.217. Accordingly, the administrative law judge granted employer's motion for summary judgment, and denied benefits.

On appeal, claimant generally challenges the administrative law judge's decision to grant employer's motion for summary judgment. Employer responds in support of the administrative law judge's decision to grant its motion. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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).

An individual who is the surviving divorced spouse of a miner is eligible for benefits if such individual was, *inter alia*, "dependent on the miner at the pertinent time." 20 C.F.R. §725.212(a)(2).

In regard to the dependency requirement, Section 725.217 provides that:

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

- (a) The individual was receiving at least one-half of his or her support from the miner . . .; or
- (b) The individual was receiving substantial contributions from the miner pursuant to a written agreement . . .; or

(c) A court order required the miner to furnish substantial contributions to the individual's support . . . .

20 C.F.R. §725.217.

The administrative law judge accurately determined that claimant could not satisfy subsections (b) and (c) because there was no written agreement or court order requiring the miner to provide substantial contributions to claimant. Decision and Order at 3. Consequently, the administrative law judge proceeded to determine whether there was a genuine issue of material fact regarding whether claimant was receiving at least one-half of her support from the miner in February of 1987, the month before the month in which the miner died. 20 C.F.R. §725.217(a).

In a Summary of Evidence Statement dated July 16, 2010, claimant states that following their divorce, her first husband, the deceased miner, resided in a house that she owned. Claimant's Exhibit 1 at 5. While living at the house, the miner "was responsible for the maintenance, up keep, fire insurance and taxes." *Id.* Because her total income in 1987 was only \$3,900, claimant asserts that the money that the miner paid to maintain the house "was money that [she] did not have to pay out and therefore [had] a significant impact on her monthly income." *Id.* at 6. However, the administrative law judge properly found that the money that the miner paid to maintain one of claimant's houses in which he was living does not constitute a form of "support" under the regulations. Decision and Order at 3. The regulations provide that "support" includes "food, shelter, clothing, ordinary medical expenses, and other ordinary and customary items for the maintenance of the person supported."<sup>1</sup> 20 C.F.R. §725.233(a); *Putman v. Director, OWCP*, 12 BLR 1-127, 1-129-30 (1988).

After reviewing the evidence of record, the administrative law judge accurately found that:

The important question is whether [claimant] was receiving at least one-half of her support from [the miner] in February 1987. There is no indication that she was receiving such support in the month before [the miner] died. At the time she was residing in Maine with her second husband. She was no longer receiving black lung or social security benefits from [the miner] and was not receiving any contribution to her food, shelter, clothing, medical, or other expenses from him.

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<sup>1</sup> In response to employer's interrogatories, claimant acknowledged that she has "no idea what [her] expenses were in 1987." Employer's Exhibit 1 at 14.

Decision and Order at 3 (footnote omitted).

The administrative law judge, therefore, accurately found that there is no evidence supportive of a finding that claimant was receiving at least one-half of her support from the miner in February of 1987. Because claimant cannot satisfy the dependency requirements set forth at 20 C.F.R. §725.217, the administrative law judge properly granted employer's motion for summary judgment.

The Act and regulations mandate that an administrative law judge hold a hearing on any claim whenever a party requests such a hearing, unless such hearing is waived by the parties or a party requests summary judgment pursuant to 20 C.F.R. §725.452.<sup>2</sup> *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69, 1-72 (2000). In this case, employer moved for summary judgment, arguing that there was no genuine issue of material fact concerning claimant's entitlement to benefits as a surviving divorced spouse. *See* 20 C.F.R. §725.217. Because the administrative law judge found no genuine issue of material fact concerning claimant's inability to satisfy the dependency requirement, *see* 20 C.F.R. §725.217, he was not required to hold a hearing. *See Pukas*, 22 BLR at 1-72.

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<sup>2</sup> Section 725.452(c) provides:

A full evidentiary hearing need not be conducted if a party moves for summary judgment and 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. All parties shall be entitled to respond to the motion for summary judgment prior to decision thereon.

20 C.F.R. §725.452(c).

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge