

BRB No. 07-0663 BLA

M.W.)
(Daughter of R.W.))
)
Claimant-Petitioner)
)
v.) DATE ISSUED: 03/13/2008
)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jeffrey Tureck,
Administrative Law Judge, United States Department of Labor.

M.W., Clairfield, Tennessee, *pro se*.

Jeffrey S. Goldberg (Gregory F. Jacob, Solicitor of Labor; Allen H. Feldman, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order Denying Benefits (04-BLA-6300) of Administrative Law Judge Jeffrey Tureck on a 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). In a Decision and Order dated February 21, 2007, the administrative law judge adjudicated this survivor's claim pursuant to 20 C.F.R. Part 718 and determined claimant's entitlement pursuant to

¹ Claimant is the miner's adult daughter.

20 C.F.R. §725.218. Decision and Order at 2-3. After considering the documentary and testimonial evidence of record, the administrative law judge concluded that because claimant did not establish that she suffered from a disability that began before she was twenty-two years old, and further failed to establish that the miner's death was due to pneumoconiosis, she failed to establish entitlement to survivor's benefits as the miner's dependent child pursuant to 20 C.F.R. §§725.218, 725.221. Decision and Order at 3-4. Accordingly, 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), has filed a Motion to Remand. The Director contends that the administrative law judge erred in adjudicating this claim pursuant to Part C of the Act, and requests that the denial of benefits be vacated and the case remanded to the district director for adjudication under Part B.

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

The procedural history of this case reflects that on January 9, 1970, claimant's father, the miner, filed a claim for black lung benefits. Decision and Order at 1; Director's Exhibit 4. On November 28, 1972, the Social Security Administration (SSA) found that the miner was totally disabled due to pneumoconiosis, and awarded benefits. *Id.* On May 21, 1973, SSA granted the miner augmented benefits because his wife, claimant's mother, qualified as a dependent spouse. *Id.* The miner received black lung benefits until his death on October 29, 1982, after which his widow received survivor's benefits until her death on July 31, 2003. Decision and Order at 2-3. On August 7, 2003, claimant filed a claim for survivor's benefits as the miner's surviving disabled child. Decision and Order at 2; Director's Exhibit 2.

On March 18, 2004, a claims examiner for the district director found that, because claimant had not been receiving Part B benefits with her mother when her mother died, claimant's claim, filed on August 7, 2003, should be considered under Part C of the Act. Director's Exhibit 11. The claims examiner further found that because claimant did not establish that she suffered from a disability that began before she was twenty-two years old, and further failed to establish that the miner's death was due to pneumoconiosis, she was not entitled to benefits. Director's Exhibit 11.

Claimant requested a hearing, which was held on March 31, 2006. At the hearing, the Director contested claimant's entitlement to benefits, but stated that a question remained as to whether this claim was properly considered under Part B or Part C of the Act. Hearing Tr. at 6, 18. In his Post Trial Brief, however, the Director re-asserted that, because claimant not establish that she suffered from a disability that began before she was twenty-two years old, and failed to establish that the miner's death was due to pneumoconiosis, she failed to establish entitlement as the miner's dependent child pursuant to 20 C.F.R. §§725.218, 725.221.

We first address the Director's contention that the administrative law judge erred in adjudicating this claim pursuant to Part C of the Act, rather than under Part B.² The Director asserts that, based on its 1970 filing date, the miner's claim was filed under Part B of the Act, and that the miner's widow also received benefits pursuant to Part B, because her claim was filed within six months of the miner's death. 30 U.S.C. §924(a)(1); 20 C.F.R. §410.231(b); Director's Motion to Remand (Motion) at 2. The Director further asserts that, because claimant's survivor's claim was filed within six months of the widow's death, her claim is also governed by Part B of the Act and that, therefore, the district director and the administrative law judge erred in adjudicating this claim under Part C. 30 U.S.C. §924(a)(2)(C); 20 C.F.R. §410.231(d); Director's Motion at 2.

The Director also contends that the administrative law judge's error in adjudicating this claim under Part C is not harmless. Director's Motion at 3. The Director explains that Part B claims were transferred from SSA to the Department of Labor by the Black Lung Consolidation of Administrative Responsibilities Act, enacted on November 2, 2002, 116 Stat. 1925, Pub. L. No. 107-275, which requires that all Part B claims should be treated as they had been previously treated by SSA in terms of hearing and appeal procedures. Director's Motion at 3-4. The Director asserts that unlike Part C claims, in which the Director may participate, submit evidence, and argue against entitlement, SSA black lung hearings were non-adversarial, and, therefore, it was error for the Director to have participated in the proceedings in an adversarial capacity. The Director, therefore, requests that the administrative law judge's decision be vacated, and this case be remanded to the district director for adjudication under Part B of the Act. The Director's Motion to Remand has merit.

² Regarding the distinction at issue in this case, claims such as the miner's, filed before July 1, 1973, fell under Part B of the Act, were adjudicated by the Social Security Administration, and benefits were paid by the federal government. 30 U.S.C. §§921-925. Generally, Part C claims are those filed on or after January 1, 1974, are adjudicated by the Department of Labor, and benefits are paid by a responsible operator or the Black Lung Disability Trust Fund. 30 U.S.C. §§931-945.

The Director relies on the regulations set forth at 20 C.F.R. §410.231, which provide, in pertinent part, that “A claim by or on behalf of a miner must be filed on or before December 31, 1973, and when so filed, is a claim for benefits under part B of title IV of the Act.” 20 C.F.R. §410.231(a). Thus, as the Director contends, the miner’s claim, filed on January 9, 1970, was a Part B claim. In addition, the record reflects, and the Director concedes, that the miner’s widow also received benefits under Part B of the Act. 20 C.F.R. §410.231(b); Director’s Exhibit 11. The regulations further provide that “if a widow established entitlement to benefits under this part . . . a claim by or on behalf of a surviving child of . . . such widow, must be filed within 6 months after the death of . . . such widow, or by December 31, 1973, whichever is the later.” 20 C.F.R. §410.231(d). Therefore, the Director contends that, because the widow received survivor’s benefits under Part B of the Act until her death on July 31, 2003, and because claimant filed her claim for survivor’s benefits on August 7, 2003, within six months of her mother’s death, pursuant to 20 C.F.R. §410.231(d), claimant’s claim is also governed by Part B of the Act.

The Director’s motion is granted and this case is remanded to the district director for consideration under Part B of the Black Lung Benefits Act. *See Director, OWCP v. Saulsberry*, 887 F.2d 667, 668, 13 BLR 2-80, 2-82 (6th Cir. 1989). Consequently, we vacate the administrative law judge’s findings under 20 C.F.R. §§725.218, 718.205(c), and the denial of benefits.

Accordingly, the Director's Motion to Remand is granted, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded to the district director for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge