

BRB No. 08-0175 BLA

C.M.)
(Daughter of B.M.))
)
Claimant-Petitioner)
)
v.)
)
DIRECTOR, OFFICE OF WORKERS') DATE ISSUED: 09/25/2008
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Thomas M. Burke,
United States Department of Labor.

C. M., Northglenn, Colorado, *pro se*.

Emily Goldberg-Kraft (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 the assistance of counsel, appeals the Decision and Order - Denying Benefits (07-BLA-5298) of Administrative Law Judge Thomas M. Burke rendered on a survivor's claim¹ 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). Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited the stipulations of the Director, Office Workers' Compensation Programs (the

¹ Claimant is the daughter of the miner. She filed her application for survivor's benefits on April 26, 2006. DX-3.

Director), that the miner's death was caused, as least in part, by pneumoconiosis and that claimant satisfied the relationship requirements pursuant to 20 C.F.R. §§725.208, 725.218, 725.220. Hearing Transcript at 6. The administrative law judge also found that the evidence established that claimant became disabled prior to age twenty-two, *see* 20 C.F.R. §725.221, but failed to establish her continuous dependency as she had engaged in substantial gainful activity. 42 U.S.C. §423(d)(1)(A); 20 C.F.R. §404.1572(a). Accordingly, the administrative law judge denied claimant's request for survivor's benefits as a disabled adult child of a deceased miner.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director responds, urging affirmance of the denial of benefits.²

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). 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The regulations provide that a child of a deceased miner is entitled to benefits if the requisite standards of relationship and dependency are met. 20 C.F.R. §725.218(a). An unmarried adult child satisfies the dependency requirement if the child is under a disability as defined in Section 223(d) of the Social Security Act, 42 U.S.C. §423(d), that began before the child attained age twenty-two. 30 U.S.C. §902(g); 20 C.F.R. §§725.209(a)(2)(ii), 725.221. The Social Security Act defines "disability" as "the inability to engage in substantial gainful activity by reason of any medically demonstrable physical or mental impairment." 42 U.S.C. §423(d)(1)(A); *Tackett v. Director, OWCP*, 10 BLR 1-117, 1-118 (1987).³ In order to succeed on a survivor's

² We affirm the administrative law judge's findings that the miner's death was caused, as least in part, by pneumoconiosis, that claimant satisfied the relationship requirements pursuant to 20 C.F.R. §§725.208, 725.218, 725.220, and that claimant established that she has been under a disability as defined in Section 223(d) of the Social Security Act, 42 U.S.C. §423(d), before she attained age twenty-two as these determinations are 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 2-3.

³ The law of the United States Court of Appeals for the Tenth Circuit applies because the miner was employed in coal mining in Colorado. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

claim, the child of a deceased miner must establish continuous disability from before the time he or she turned twenty-two. *Kidda v. Director, OWCP*, 769 F.2d 165, 8 BLR 2-28 (3d Cir. 1985).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's decision is rational, supported by substantial evidence, and in accordance with law. Citing *Kidda*, the administrative law judge found that the evidence failed to establish that claimant was "continuously" disabled. The administrative law judge noted that the evidence was uncontroverted that claimant worked full time as an employee for American Airlines (AA) between 1979 and 1991 and that her earnings increased from \$14,740 to in excess of \$25,000 in 1989.⁴ Thus, the administrative law judge properly concluded that, while the record was replete with evidence indicative of a life long physical ailment, the evidence failed to establish that claimant was not engaged in substantial gainful employment. In view of *Kidda*, the administrative law judge concluded that by engaging in substantial gainful employment, claimant forfeited any ability to collect survivor's benefits. Further, citing *Turkovich v. Director, OWCP*, 7 BLR 1-182 (1984), the administrative law judge found that the evidence did not reflect that she received any unusual job accommodations while she was employed with AA from 1979 to 1985. Moreover, to the extent that claimant asserts that she received special accommodations while employed for AA after 1985, the administrative law judge found that such assertion is irrelevant since the chain of continued dependency was broken by her substantial gainful employment from 1979 until 1985.⁵ *Kidda*, 769 F.2d at 167, 8 BLR at 2-33.

In conclusion, the administrative law judge found that claimant offered no evidence of an unusual accommodation provided to her during her years of employment with AA from 1979 until 1985. Further, the administrative law judge found that by engaging in full employment with AA from 1979 to 1985, she engaged in substantial gainful activity and broke the chain of continued dependency required by *Kidda*. The administrative law judge found, therefore, that claimant cannot claim dependent status under the Act.

⁴ The administrative law judge found that claimant's earnings from her employment with American Airlines (AA) exceeded the threshold necessary to establish a presumption of substantial gainful activity pursuant to 20 C.F.R. §404.1574(b)(2). Decision and Order at 3.

⁵ Even if accommodations were made after 1985, they could not establish that she was disabled since the evidence establishes substantial gainful employment from 1979 to 1985. See *Kidda v. Director, OWCP*, 769 F.2d 165, 8 BLR 2-28 (3d Cir. 1985).

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