

BRB No. 92-1380 BLA

ALMA REIGH)
(Daughter of RUSSELL PROSSER))

Claimant-Petitioner)

v.)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Respondent)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order of David W. DiNardi, Administrative Law Judge, United States Department of Labor.

Andrew C. Onwudinjo (Krasno, Krasno & Quinn), Pottsville, Pennsylvania, for claimant.

Gary K. Stearnman (Thomas S. Williamson, Jr., 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, the United States Department of Labor.

Before: SMITH and DOLDER, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant, the miner's surviving disabled adult daughter, appeals the Decision and Order (91-BLA-1299) of Administrative Law Judge David W. DiNardi denying benefits 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). The miner died on May 15, 1960. On January 17, 1973, the miner's widow, claimant's mother, filed a claim for benefits with the Social Security Administration

under Part B of the Act. See 30 U.S.C. §§921-925. This claim was approved on July 21, 1973. The

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (1988).

widow died on December 14, 1979. Claimant applied for benefits on April 10, 1989.¹ The administrative law judge determined that claimant met the survivor's eligibility requirements as a dependent child pursuant to 20 C.F.R. §§725.209, 725.220 and 725.221. The administrative law judge also found, however, that claimant was not entitled to benefits inasmuch as her claim was filed after January 1, 1982, and she had not independently established that the miner was totally disabled by his pneumoconiosis or that the pneumoconiosis contributed in any way to the miner's death. See Decision and Order at 17; 20 C.F.R. §718.205. Thus, benefits were denied. Claimant appeals, asserting that the award of survivor's benefits to the miner's widow, her mother, in 1973 is sufficient to qualify her for automatic derivative entitlement pursuant to 20 C.F.R. §725.218(a)(2). The Director, Office of Workers' Compensation Programs (the Director) responds, urging affirmance of the decision below, and asserting that the widow's entitlement is insufficient to invoke the derivative entitlement provisions under Section 725.218(a)(2).

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as 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 sole allegation in this appeal is that the award of survivor's benefits from a claim filed in January 1973 is sufficient to qualify her for automatic derivative entitlement, see 30 U.S.C. §932(l), under the regulatory provisions contained at

¹Claimant is seventy years old, and has been blind since the age of six. Hearing Transcript at 22, 24. She initially was married in 1947, and divorced her first husband seven years later. Hearing Transcript at 26-27. She subsequently remarried, and was married to her second husband thirty-three years. Claimant has been widowed since 1988. Hearing Transcript at 22-23.

Section 725.218(a)(2) of the regulations.² Claimant, citing the holding of the United States Court of Appeals for the Sixth Circuit in *Director, OWCP v. Saulsberry*, 887 F.2d 667, 13 BLR 2-80 (6th Cir. 1989), contends that the 1973 award of survivor's benefits made in the instant case is sufficient to satisfy the requirement of Section 725.218(a)(2), that there be a determination made pursuant to a claim filed prior to January 1, 1982 that the miner was totally disabled by pneumoconiosis prior to his death, or that the miner's death was due to pneumoconiosis. Thus, claimant argues

²30 U.S.C. §932(l) states:

In no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits under this subchapter at the time of his or her death be required to file a new claim for benefits, or refile or otherwise revalidate the claim of such miner, except with respect to a claim filed under this part on or after the effective date of the Black Lung Benefits Amendments of 1981.

30 U.S.C. §932(l).

The regulations at 20 C.F.R. §725.218(a) provide that:

An individual is entitled to benefits where he or she meets the required standards of relationship and dependency. . . and is the child of a deceased miner who:

(1) Was receiving benefits under section 415 or part C of title IV of the Act as a result of a claim filed prior to January 1, 1982, or
(2) 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. A surviving dependent child of a miner whose claim is filed on or after January 1, 1982, must establish that the miner's death was due to pneumoconiosis in order to establish entitlement to benefits, except where entitlement is established under §718.306 or part 718 on a claim filed prior to June 30, 1982.

20 C.F.R. §725.218(a); see also 20 C.F.R. §§410.210 and 410.212.

that she was not required to independently establish these elements in the instant claim, and that the administrative law judge erred by denying benefits on this basis. The Director responds, asserting that claimant's interpretation raises concerns regarding a potential violation of due process rights. We agree with the Director. A brief overview of the structure of the Act illustrates the validity of the concerns of the Director in this case. The Act is divided into three parts. Part A concerns primarily Congressional purpose and definitions. 30 U.S.C. §§901-904. Part B presents adjudication standards for claims filed between December 30, 1969, the date of enactment, and June 30, 1973. Part B claims are adjudicated by the Secretary of Health, Education and Welfare (now, Health and Human Services), and benefits are paid by the federal government. 30 U.S.C. §§921-925. Part C claims are processed, in the absence of an approved state program, by the Secretary of Labor and benefits are to be paid by mine operators. 30 U.S.C. §§931-945. The Black Lung Benefits Revenue Act of 1977 established the Black Lung Disability Trust Fund (Trust Fund), which is financed by an excise tax paid by coal mine operators on each ton of coal sold. 26 U.S.C. §4121. The Trust Fund assumed liability for all Part C claims in which the miner's last coal mine employment ended before January 1, 1970. 26 U.S.C. §9501(d); 20 C.F.R. §725.490. In cases involving the Trust Fund, the Director defends the claim in her fiduciary role as trustee of the Black Lung Disability Trust Fund. 26 U.S.C. §9501(a)(2); 20 C.F.R. §§701.201, 725.1(d) and (g), 725.360, 725.367.

On appeal, claimant seeks to assess liability against the Trust Fund in this Part C claim, filed on April 10, 1989, based on the previous finding of entitlement under Part B. See 30 U.S.C. §931(a). The Director defends this claim as a fiduciary of the contributors to the Trust Fund, who are entitled to due process, and were not provided with an opportunity to participate in the litigation which resulted in a finding of entitlement under Part B. 26 U.S.C. §9501(a)(2) and (d); 20 C.F.R. §§701.201, 725.360, 725.367, 725.490. The Director, acting for the interests of the participants in the Trust Fund, has not been provided with due process and the right to a full and fair hearing if the Trust Fund is assessed liability resulting from an obligation arising from a Part B claim. See *generally Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). Thus, as noted by the Director, acceptance of claimant's arguments on appeal would potentially violate the due process rights of the Director and her fiduciaries.

Additionally, the Director's interpretation of the regulations contained at 20 C.F.R. §§725.101(16) and 725.218(a)(2) supports her contention that claimant cannot receive automatic derivative entitlement in this case. Specifically, the Director contends that the word "claim" in the regulatory language at Section 725.218(a)(2) is not meant to include claims arising under Part B. The Director

argues that this distinction was not specifically expressed under Section 725.218(a)(2) because the definition of the word "claim" as used in 20 C.F.R. Part 725 is contained at Section 725.101(16).³ See Director's Brief at 7. Accordingly, in this case, we defer to the interpretation of the Director that automatic derivative entitlement is not available under Section 725.218(a)(2) where a determination has been made under Part B that the miner was totally disabled due to pneumoconiosis at the time of death or that the miner's death was due to pneumoconiosis since this interpretation is not inconsistent with the regulations and avoids a harsh result. See 30 U.S.C. §932(l); 20 C.F.R. §725.218(a)(2); *Elliott Mining Company, Inc. v. Director, OWCP*, 17 F.3d 616, 18 BLR 2-125 (3d Cir. 1994); *Director, OWCP v. Barnes and Tucker Co. [Molnar]*, 969 F.2d 1524, 16 BLR 2-99 (3d Cir. 1992); see also *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988).

Further, we note that, in *Deloe v. Director, OWCP*, 15 BLR 1-9 (1991), the Board held that a determination of total disability due to pneumoconiosis by the Social Security Administration satisfies the requirement of Section 725.218(a)(2) that the miner's disability be determined as a result of a claim filed prior to January 1, 1982, based upon the concession of the Director that the decision of the United States Court of Appeals for the Sixth Circuit in *Saulsberry, supra*, was applicable to that specific case. However, the case at bar is distinguishable from our prior holding in *Deloe*, inasmuch as the Director has not conceded the application of *Saulsberry* in the instant case. In addition, as this claim arises within the appellate jurisdiction of the United States Court of Appeals for the Third Circuit, we decline to apply the holding of *Saulsberry* to the case at bar. Thus, the automatic derivative entitlement provision pursuant to Section 725.218(a)(2) is not available to claimant in this case, since the previous finding that the miner's death was due to pneumoconiosis was made in a survivor's claim filed pursuant to Part B of the Act.⁴

³The regulations at 20 C.F.R. §725.101(16) state:

Claim means a written assertion of entitlement to benefits under section 415 or part C of title IV of the Act, submitted in a form and manner authorized by the provisions of this subchapter.

20 C.F.R. §725.101(16).

⁴Furthermore, we note that as claimant was married at the time of filing of the widow's 1973 claim, claimant has not satisfied the eligibility requirements contained at 20 C.F.R. §§725.209, 725.220 and 725.221.

Although claimant is not entitled to automatic derivative entitlement under Section 725.218(a)(2), claimant is, however, entitled to consideration under 20 C.F.R. Part 718 based upon the filing date of her claim, April 10, 1989. However, the administrative law judge's findings that claimant failed to establish that the miner was totally disabled due to pneumoconiosis

or death due to pneumoconiosis are unchallenged on appeal, and thus are affirmed.⁵

See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Consequently, claimant has failed to affirmatively establish survivor's entitlement under Part 718. See 20 C.F.R. §718.205; *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989). Therefore, the administrative law judge's denial of benefits in this case is affirmed pursuant to Section 718.205.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

⁵It is noted that the administrative law judge's finding is supported by substantial evidence. The administrative law judge permissibly found that although the autopsy report was insufficient to establish death due to pneumoconiosis, because, while it diagnosed anthracosilicosis, it failed to provide any indication that this hastened the miner's death in any way, as it listed the sole cause of death to be acute myocardial infarction due to coronary sclerosis. Decision and Order at 9; Director's Exhibit 7; *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989). Further, the administrative law judge acted within his discretion as trier-of-fact in according great weight to the opinion of Dr. Naeye, which specifically stated that the miner's coal workers' pneumoconiosis did not contribute in any way to his death, as the only medical opinion which specifically addressed the cause of death. Director's Exhibit 8; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989).

NANCY S. DOLDER
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge