

No. 09-4305

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

FANNIE HILL,

Petitioner

v.

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

Respondent

**On Petition for Review of an Order of the Benefits
Review Board, United States Department of Labor**

BRIEF FOR THE RESPONDENT

DEBORAH GREENFIELD

Acting Deputy Solicitor

RAE ELLEN FRANK JAMES

Associate Solicitor

SEAN G. BAJKOWSKI

Counsel for Appellate Litigation

RITA A. ROPPOLO

Attorney

U. S. Department of Labor

Office of the Solicitor

Suite N2117, 200 Constitution Ave. NW

Washington, D.C. 20210

(202) 693-5664

Attorneys for the Director, Office of
Workers' Compensation Programs

Table of Contents

TABLE OF AUTHORITIES	ii
STATEMENT OF APPELLATE AND SUBJECT MATTER JURISDICTION....	1
STATEMENT OF THE ISSUE	2
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS.....	3
SUMMARY OF THE ARGUMENT	6
STATEMENT OF THE STANDARD OF REVIEW	7
ARGUMENT	8
<u>The ALJ Properly Found That Mrs. Hill Was Not Dependent Upon The Miner At the Time Of His Death Because, As A Matter Of Law, The Evidence Failed To Satisfy Any Of the Statutory Or Regulatory Criteria of Dependency</u>	8
CONCLUSION	13
CERTIFICATE OF SERVICE	14
ADDENDUM.....	15

Table of Authorities

Cases

<i>Alliance v. Community Media v. F.C.C.</i> , 529 F.3d 763 (6th Cir. 2008).....	7
<i>In re Calhoun</i> , 715 F.2d 1103 (6th Cir. 1983).....	10
<i>Califano v. Boles</i> , 443 U.S. 282 (1979).....	9
<i>Comm’r of Internal Revenue v. Asphalt Products Co.</i> , 482 U.S. 117 (1987).....	11
<i>Director, OWCP v. Saulsberry</i> , 887 F.2d 667 (6th Cir. 1989).....	3
<i>Ensinger v. Director, OWCP</i> , 833 F.2d 678 (7th Cir. 1987).....	9
<i>In re Fitzgerald</i> , 9 F.3d 517 (6th Cir. 1993).....	10
<i>Hoover v. Comm’r of Internal Revenue</i> , 102 F.3d 842 (6th Cir. 1996).....	10, 11
<i>Pauley v. BethEnergy Mines, Inc.</i> , 501 U.S. 680 (1991).....	7
<i>Peabody Coal Co. v. Groves</i> , 277 F.3d 829 (6th Cir. 2002).....	7
<i>Peabody Coal Co. v. Hill</i> , 123 F.3d 412 (6th Cir. 1997).....	7
<i>Russell v. Director</i> , 829 F.2d 615 (7th Cir. 1987).....	11

Cases (con't)

Sharondale Corp. v. Ross,
42 F.3d 993 (6th Cir. 1994)..... 7

Youghiogeny & Ohio Coal Co. v. Webb,
49 F.3d 244 (6th Cir. 1995)..... 7

Statutes

Black Lung Benefits Act, 30 U.S.C. §§ 901-944

30 U.S.C. § 901(a)..... 8

30 U.S.C. § 902(a)(2)..... 8, 9

30 U.S.C. § 902(e)..... 8

30 U.S.C. §§ 921-925..... 4

30 U.S.C. §§ 931-945..... 4

30 U.S.C. § 932(a)..... 2

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950

33 U.S.C. § 921(a)..... 1

33 U.S.C. § 921(c)..... 2

Regulations

20 C.F.R. § 718.1(a)..... 3

20 C.F.R. § 725.212(a)(3)(i) 3

20 C.F.R. § 725.217 5, 8

20 C.F.R. § 725.233 5

20 C.F.R. § 725.233(e)..... 9

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 09-4305

FANNIE HILL,

Petitioner

v.

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

Respondent

BRIEF FOR THE RESPONDENT

STATEMENT OF APPELLATE AND SUBJECT
MATTER JURISDICTION

Administrative Law Judge William S. Colwell issued a decision on September 11, 2008, denying Fannie Hill's claim for survivor's benefits under the Black Lung Benefits Act ("BLBA"), 30 U.S.C. §§ 901-944. Mrs. Hill appealed this decision to the Benefits Review Board on October 8, 2008. The Board had jurisdiction over that appeal pursuant to section 21(a) of the Longshore and Harbor Workers' Compensation Act ("Longshore Act"), 33 U.S.C. § 921(a), as

incorporated by 30 U.S.C. § 932(a) (allowing an aggrieved party thirty days to appeal an ALJ's decision to the Board).

The Board affirmed the ALJ's denial on September 16, 2009, and Mrs. Hill petitioned this Court for review on October 28, 2009. This Court has jurisdiction over Mrs. Hill's petition because section 21(c) of the Longshore Act, 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final Board decision in the court of appeals in which the injury occurred. The injury, within the meaning of section 21(c), arose in Tennessee, within this Court's territorial jurisdiction.

STATEMENT OF THE ISSUE

Did the ALJ properly find that Mrs. Hill, the divorced spouse of a deceased coal miner, was not dependent upon the miner at the time of his death where the miner did not provide, and was not legally obligated to provide, financial support to her at the time of his death?

STATEMENT OF THE CASE

Mrs. Hill filed her claim for benefits as a surviving divorced spouse in December 2003.¹ A district director of the Department of Labor ("DOL") denied the claim because the evidence failed to establish that Mrs. Hill was financially

¹ At the time of this filing and throughout these proceedings, including the instant appeal, Mrs. Hill has appeared without benefit of counsel.

dependent upon the miner at the time of his death, as required by the Act and the implementing regulations.

Mrs. Hill requested an administrative hearing. In May 2006, ALJ Wood remanded the case to the district director for further development of the medical and dependency evidence.² Director's Exhibit No. ("DX") 32. Following this remand, the case was assigned to ALJ Coleville ("the ALJ"), who, after holding a hearing, issued a decision denying benefits because the evidence did not satisfy the dependency requirements of the Act and its implementing regulations. Appendix at ("App.") 8. On appeal, the Board affirmed the ALJ's decision. App.15. Mrs. Hill's petition to this Court followed. App.21.

STATEMENT OF THE FACTS

Mrs. Hill married the miner in 1965 and divorced him in 1995. DX 7, 9. She supported herself by working as a nurse until her retirement in 2002. 2007 Hearing Transcript at ("HT") 23-24. Mr. Hill worked as a miner until at least

² Judge Wood remanded the claim for further development of the medical evidence on the belief that Mrs. Hill was required to prove that the miner's death was due to pneumoconiosis in addition to proving dependency. Judge Wood was in error on this point. Because the miner was awarded benefits prior to 1982, Mrs. Hill was not required to establish that pneumoconiosis contributed to his death. *See* 20 C.F.R. § 718.1(a); 20 C.F.R. § 725.212(a)(3)(i); *Director, OWCP v. Saulsberry*, 887 F.2d 667, 668 (6th Cir. 1989). She was required to prove only that she was dependent upon the miner at the time of his death. Judge Wood's error is harmless, however, since the denial of benefits in this case was ultimately based upon Mrs. Hill's failure to prove the required dependency.

1965, DX 1; his employment thereafter, if any, is unknown. In 1972, the Social Security Administration awarded the miner BLBA benefits, DX 1, and he received these benefits until his death in April 2003.³

In 1995, a Tennessee court granted Mrs. Hill a divorce on the grounds of “Improper Marital Conduct.” DX 9, App.3. The divorce decree divided the Hills’ assets and liabilities: Mrs. Hill received real estate (composed of two adjoining tracts) and one-half of a \$2500 savings account, and was ordered to pay one-half of a joint \$44,000 debt to the People’s Bank of Byrdstown; similarly, the miner received certain other real estate and one-half of the \$2500 savings account, and was ordered to pay one-half of the joint \$44,000 debt. DX 9, App.2-4. In addition, the court ordered that cattle owned by the parties be sold and the proceeds applied to the debt. DX 9, App.2. The decree referred to the real estate awarded to Mrs. Hill and the proceeds from the sale of the cattle as “alimony,” but did not obligate the miner to make any support payments to Mrs. Hill. DX 9, App.2-4.

In statements to the district director and the ALJs, Mrs. Hill explained that the \$44,000 debt was a result of real estate purchases, and that the monthly payment on that debt was \$1010.54. DX 11; DX 26 at 9; HT 14, 20-23. She testified that, while the miner made some payments on the debt prior to the divorce (*e.g.*, he paid \$1010.54 in 1994, DX 15), he made no payments on this debt – and

³ Prior to 1973, the federal black lung program was administered by the Social Security Administration. *See* 30 U.S.C. §§ 921-925, 931-945.

gave no financial support of any kind to Mrs. Hill – after the divorce. DX 11, 32; HT 19. She also reported that, contrary to the divorce decree, she received no money from the joint bank account or the sale of the cattle. HT 14-15.

Mrs. Hill explained that she had not asked for alimony because she had been abused by the miner in the past and was living in a shelter for battered women at the time she sought the divorce. HT 14-15; *see also* DX 26. She stated that she “feared for [her] life” and . . . just wanted to get out of the situation.” HT 14. In addition, Mrs. Hill testified that the miner simply did not have enough money to pay alimony. HT 13.

Decisions Below

The ALJ considered whether Mrs. Hill satisfied the dependency requirements of a surviving divorced spouse set forth at 20 C.F.R. § 725.217. In this regard, he considered whether 1) she received “at least one-half of . . . support from the miner”; 2) she received “substantial contributions from the miner pursuant to a written agreement”; or 3) “[a] court order required the miner to furnish substantial contributions to [her] support.” ALJ decision at 3, App.10.

The ALJ concluded that the first two criteria were not satisfied because Mrs. Hill received no actual financial support from the miner and there was no written agreement to provide such support. ALJ decision at 3-5, App.10-12. The ALJ then concluded that the third criterion was also not met because 20 C.F.R. §

725.233 provides that the required court-ordered contributions must, *inter alia*, be “regular,” and the Hill’s divorce decree required no regular contributions to Mrs. Hill from the miner. ALJ decision at 4-5, App.11-12. The ALJ acknowledged that the miner’s treatment of Mrs. Hill was “abominable [] in terms of the physical abuse he exacted on her during their marriage. . . ,” but concluded that such treatment did not obviate the requirement to prove dependency. ALJ decision at 5, App.12. Accordingly, the ALJ denied benefits. *Id.*

The Board affirmed the ALJ’s denial, finding that the ALJ properly determined that none of the criteria concerning dependency had been met. Board decision at 4, App.18. The Board also observed that the miner’s treatment of Mrs. Hill was irrelevant to the issue of dependency. Board decision at 3 n.3, App.17 n.3.

SUMMARY OF THE ARGUMENT

As a surviving divorced spouse, Mrs. Hill is entitled to BLBA benefits only if she was dependent upon the miner prior to his death. Dependency can be proved in three ways: 1) receipt of at least half of her support from the miner; 2) receipt of substantial contributions from the miner pursuant to a written agreement; or 3) the existence of a court order requiring the miner to provide substantial, regular contributions for her support. The ALJ properly found that none of these methods was satisfied in this case based on two undisputed facts. First, the miner made no

actual support payments to Mrs. Hill from the time of their divorce until his death, which precludes the first two methods. Second, the divorce decree did not require the miner to make any contributions to Mrs. Hill's support. Given these facts, the ALJ's conclusion that Mrs. Hill was not dependent on the miner at the time of his death, and therefore is not entitled to BLBA benefits, must be affirmed.

STATEMENT OF THE STANDARD OF REVIEW

This Court has “a very narrow scope of review over the Board’s decisions, which must be affirmed unless the Board has committed legal error or exceeded its scope of review of the ALJ’s findings.” *Peabody Coal Co. v. Groves*, 277 F.3d 829, 833 (6th Cir. 2002). The scope of review for the Board and this Court are the same: absent an error of law, the ALJ’s findings and conclusions must be affirmed if supported by substantial evidence, *Peabody Coal Co. v. Hill*, 123 F.3d 412, 415 (6th Cir. 1997), “even if the facts permit an alternative conclusion,” *Youghioghney & Ohio Coal Co. v. Webb*, 49 F.3d 244, 246 (6th Cir. 1995). Substantial evidence means evidence that a reasonable mind might accept as adequate to support a conclusion. *Id.* The Director’s reasonable interpretation of the BLBA is entitled to substantial deference, especially where it is set forth in a regulation. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696-97 (1991); *Alliance v. Community Media v. F.C.C.*, 529 F.3d 763, 776 (6th Cir. 2008); *Sharondale Corp. v. Ross*, 42 F.3d 993, 998 (6th Cir. 1994).

ARGUMENT

The ALJ Properly Found That Mrs. Hill Was Not Dependent Upon The Miner At the Time Of His Death Because, As A Matter Of Law, The Evidence Failed To Satisfy Any Of the Statutory Or Regulatory Criteria of Dependency.

The BLBA provides benefits to a deceased miner's survivors if, *inter alia*, they were dependent upon the miner. 30 U.S.C. §§ 901(a), 902(a)(2); *see also* 20 C.F.R. § 725.212(a)(2). As the former spouse of a deceased miner, Mrs. Hill qualifies as a surviving dependent if, for the month preceding the month in which the miner died:

- 1) she “was receiving at least one-half of her support . . . from the miner”;
- 2) she “was receiving substantial contributions from the miner pursuant to a written agreement”; or
- 3) “there was in effect a court order for substantial contributions to [her] support from such miner.”

20 C.F.R. § 725.217.⁴

Mrs. Hill received no support or monetary contributions from the miner in March 2003, the month proceeding the month of his death. In fact, Mrs. Hill received absolutely nothing from the miner after their divorce in 1995. DX 11, 32; HT 19. Accordingly, the ALJ properly concluded that Mrs. Hill failed to prove dependency upon the miner pursuant to the first two criteria.

⁴ Aside from using “spouse” rather than “wife,” 20 C.F.R. § 725.217 tracks the language of 30 U.S.C. § 902(a)(2) and (e).

That leaves the third criterion: that “there was in effect a court order for substantial contributions to [her] support from such miner.” 30 U.S.C. § 902(a)(2); 20 C.F.R. § 725.217(c). “Court order for support” is defined as an order “which requires *regular contributions* that are a material factor in the cost of the individual’s support. . . .” 20 C.F.R. § 725.233(e) (emphasis added). The order must be in effect “at the applicable time” (i.e., in the month preceding the miner’s death), although no actual contributions need be made. *Id.*

Here, the divorce court made no order of regular contributions for Mrs. Hill’s support. Rather, the court simply divided up the couple’s assets and liabilities: Mrs. Hill was awarded real estate, one-half of a \$2500 savings account, and the obligation to repay one-half of a joint \$44,000 debt; and the miner similarly received real estate, one-half of a \$2500 savings account, and the obligation to repay one-half of the joint \$44,000 debt. DX 9, App.2-4. These were one-time transactions, with no requirement that the miner make regular contributions to Mrs. Hill for her support. Without such a requirement, the decree cannot, as a matter of law, establish that Mrs. Hill is a dependent divorced spouse. *See Ensinger v. Director, OWCP*, 833 F.2d 678, 680 (7th Cir. 1987) (observing that a “one-time conveyance of a home as part of a divorce settlement” is inconsistent with the requirement that the miner make “contributions”); *see also Califano v. Boles*, 443 U.S. 282, 293 n.9 (1979) (quoting Senate Report statement

that, “[i]f a woman accepted a property settlement in lieu of alimony, she could, in effect, have disqualified herself for” benefits that require proof of support).

Below, Mrs. Hill suggested that the divorce decree satisfied the third criterion’s “regular contributions” requirement because it ordered the miner to repay half the loan, and the bank allowed repayment in monthly amounts. DX 15. This argument, however, is faulty. The divorce decree did not, in fact, provide for monthly payments. Even if it did, an order of assumption of a debt in a divorce decree does not automatically mean that the purpose of the order is for support. As explained by this Court in numerous cases, the intent of the parties and the divorce court must be considered in determining whether a debt assumption is for purposes of support. *See Hoover v. Commr of Internal Revenue*, 102 F.3d 842, 845 (6th Cir. 1996) (discussing nature of assumption of loan in context of tax alimony deduction); *In re Fitzgerald*, 9 F.3d 517, 520 (6th Cir. 1993) (discussing monthly “alimony” payments in context of bankruptcy); *In re Calhoun*, 715 F.2d 1103, 1109 (6th Cir. 1983) (discussing nature of assumption of debt in context of bankruptcy).

The intent of the debt assumption here is to divide liabilities, not to provide support. Most obviously, it obligates both the miner *and* Mrs. Hill to assume one-half of the \$44,000 debt. The assumption is also missing one of the key indicia of support: that it will cease with Mrs. Hill’s death or remarriage. *See Hoover*, 102

F.3d at 847-48 (obligation to make payments under a divorce decree was not alimony for tax purposes where, *inter alia*, payments would not terminate at death of payee). Further, while the divorce decree uses the word “alimony” with reference to the division of the Hills’ real estate and proceeds from the sale of the cows, neither that word, nor the word “support,” is used in relation to the miner’s assumption of one-half of the debt. The intent of the parties and the divorce court is clear.

In her informal opening brief to this Court, Mrs. Hill asserts that the only reason she did not request alimony or support was that she feared for her life due to the miner’s abuse.⁵ She suggests that this fact removes the requirement that she prove receipt of support from the miner. This suggestion, while understandable, cannot be accepted. There is no basis to establish dependency outside of the confines of the statutory and regulatory criteria. *See Comm’r of Internal Revenue v. Asphalt Products Co.*, 482 U.S. 117, 121 (1987) (“Judicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify disregard of what Congress has plainly and intentionally provided.”); *Russell v. Director*, 829 F.2d 615, 616 (7th Cir. 1987) (widow did not establish dependency during the relevant period because the miner had been institutionalized for the prior nine years and therefore could not

⁵ Mrs. Hill also indicated that her reluctance to ask for alimony was due to the fact that the miner was financially incapable of paying it. HT 13.

provide support for the claimant; explaining that words of statute must be limited to their exact definition).

In sum, the statutory and regulatory language is clear: a surviving divorced spouse must prove dependency in deed or legal obligation to be entitled to BLBA benefits. No such dependency existed in this case: Mrs. Hill received no support from the miner after their 1995 divorce, and he was not legally required to provide such support. She therefore cannot qualify as a dependent survivor under the BLBA.

CONCLUSION

In view of the foregoing, the Director respectfully requests that the Court affirm the ALJ's denial of survivor's benefits.

Respectfully submitted,

DEBORAH GREENFIELD
Acting Deputy Solicitor

RAE ELLEN FRANK JAMES
Associate Solicitor

SEAN G. BAJKOWSKI
Counsel for Appellate Litigation

/s/ Rita A. Roppolo
RITA A. ROPPOLO
Attorney
U.S. Department of Labor
Office of the Solicitor
Suite N-2117
Frances Perkins Building
200 Constitution Ave., N.W.
Washington, D.C. 20210
Telephone: (202) 693-5664
Facsimile: (202) 693-5687
E-mail: blls-sol@dol.gov

Attorneys for the Director, Office
of Workers' Compensation Programs

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2010, two copies of the foregoing Brief for the Respondent were served by mail, postage prepaid, on the following:

Fannie Hill
304 Hillcrest Drive
Byrdstown, TN 38549

/s/ Rita A. Roppolo
RITA A. ROPPOLO
Attorney
U.S. Department of Labor

ADDENDUM

30 U.S.C. § 901(a):

(a) Congress finds and declares that there are a significant number of coal miners living today who are totally disabled due to pneumoconiosis arising out of employment in one or more of the Nation's coal mines; that there are a number of survivors of coal miners whose deaths were due to this disease; and that few States provide benefits for death or disability due to this disease to coal miners or their surviving dependents. It is, therefore, the purpose of this subchapter to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.

30 U.S.C. § 902(a)(2):

(a) The term "dependent" means—

. . . .

(2) a wife who is a member of the same household as the miner, or is receiving regular contributions from the miner for her support, or whose husband is a miner who has been ordered by a court to contribute to her support, or who meets the requirements of section 416(b)(1) or (2) of Title 42. The determination of an individual's status as the "wife" of a miner shall be made in accordance with section 416(h)(1) of Title 42 as if such miner were the "insured individual" referred to therein. The term "wife" also includes a "divorced wife" as defined in section 416(d)(1) of Title 42 who is receiving at least one-half of her support, as determined in accordance with regulations prescribed by the Secretary, from the miner, or is receiving substantial contributions from the miner (pursuant to a written agreement), or there is in effect a court order for substantial contributions to her support from such miner.

30 U.S.C. § 902(e):

(e) The term “widow” includes the wife living with or dependent for support on the miner at the time of his death, or living apart for reasonable cause or because of his desertion, or who meets the requirements of section 416(c)(1), (2), (3), (4), or (5), and section 416(k) of Title 42, who is not married. The determination of an individual’s status as the “widow” of a miner shall be made in accordance with section 416(h)(1) of Title 42 as if such miner were the “insured individual” referred to therein. Such term also includes a “surviving divorced wife” as defined in section 416(d)(2) of Title 42 who for the month preceding the month in which the miner died, was receiving at least one-half of her support, as determined in accordance with regulations prescribed by the Secretary, from the miner, or was receiving substantial contributions from the miner (pursuant to a written agreement) or there was in effect a court order for substantial contributions to her support from the miner at the time of his death.

20 C.F.R. 725.217(a)-(c):

An individual who is the miner’s surviving divorced spouse (see § 725.216) 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 (see § 725.233(g)); or

(b) The individual was receiving substantial contributions from the miner pursuant to a written agreement (see § 725.233(c) and (f)); or

(c) A court order required the miner to furnish substantial contributions to the individual’s support (see § 725.233(c) and (e)).

20 C.F.R. 725.233(e):

(e) *Court order for support* defined. References to a support order in this subpart means any court order, judgment, or decree of a court of competent jurisdiction which requires regular contributions that are a material factor in the cost of the individual’s support and which is in effect at the applicable time. If such

contributions are required by a court order, this condition is met whether or not the contributions were actually made.