



In the Matter of:

R.L.H.
(Daughter of H.N.L., deceased miner)

ARB CASE NO. 08-075

ALJ CASE NO. 2007-BLA-5279

CLAIMANT,

DATE: July 30, 2008

v.

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

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Claimant:

Rosa Lee Harmon, *pro se*, Oak Hill, West Virginia

FINAL DECISION AND ORDER

R.L.H. (claimant) filed a claim for survivor's benefits as the adult disabled daughter of the deceased miner under Part B of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C.A. § 901-944 (West 2008) (Part B). *See* 30 U.S.C.A. § 924(a)(1), (a)(2)(C) (West 2008); 20 C.F.R. § 410.231(b), (d) (2007). The district director in the Department of Labor's Office of Workers' Compensation Programs (OWCP) denied the claim, and claimant then requested a hearing. A Department of Labor (DOL) Administrative Law Judge (ALJ) found that claimant was not disabled before she turned twenty-two years old, as she must have been to qualify for survivor's benefits under Part B. Therefore, the ALJ concluded that claimant is not eligible for benefits and denied her claim. Claimant appealed.

BACKGROUND

Claimant's father, the miner, died in 1954. Claimant's mother applied for and received Part B survivor's benefits as the miner's surviving spouse. The Social Security Administration (SSA) adjudicated claimant disabled and determined that her disability began November 4, 1991. Claimant, born in 1946, was forty-five years old at the November 4, 1991 onset of her SSA-adjudicated disability. Claimant's mother died in June 23, 2006. The following month, on July 18, 2006, claimant filed a claim for survivor's benefits under Part B as a disabled, dependent child of the miner's widow.

The district director, OWCP, denied the claim because he determined that claimant could not show that she became disabled before the age of twenty-two, as she must to establish her eligibility for survivor's benefits under Part B. Claimant requested a hearing. The ALJ held a hearing on August 14, 2007, in Charleston, West Virginia. At the hearing, counsel for the Director, OWCP, entered her appearance and cross-examined claimant. On the merits of the claim, the ALJ found that claimant became disabled at the age of forty-five, well after the age of twenty-two. Therefore, the ALJ concluded that claimant is not eligible for survivor's benefits under Part B and denied the claim. Claimant appealed.

Subsequent to the filing of claimant's appeal, the Director's counsel admitted that by entering an appearance at the hearing she violated the non-adversarial nature of that hearing. Director's September 17, 2007 Statement to the ALJ, at 2. Counsel apologized for the error but asserted that because she did not make any argument or submit any new evidence, her appearance at the hearing did not prejudice claimant's case. *Id.* at 2-3.

JURISDICTION AND STANDARD OF REVIEW

The Black Lung Consolidation of Administrative Responsibility Act (BLCARA), 116 Stat. 1925, Pub. L. 107-275 (2002), transferred the authority to adjudicate Part B claims from the Commissioner of Social Security to the Secretary of Labor. Section 4(c)(44) of the Secretary's Order 1-2002, 67 Fed Reg. 64,272 (Oct. 17, 2002), provides that the Administrative Review Board (ARB) has the authority to act for the Secretary of Labor when a statute enacted after September 24, 2002, states that the Secretary of Labor is the final decision maker on an appeal of a decision issued by an ALJ. Therefore, the ARB has jurisdiction to decide claimant's appeal of the ALJ's Decision and Order denying her Part B claim. After claimant appealed, the ARB issued a Notice of Appeal and Order Establishing Briefing Schedule on May 9, 2008.

Under the BLCARA, the DOL, as administrator of the Part B claims, must follow the procedures SSA formerly used in evaluating claims. 116 Stat. 1925, Pub. L. 107-275, § 3(d)(3) ("Any proceeding before the Secretary of Labor involving the functions transferred by this Act shall be subject to the statutory requirements for notice, hearing, actions upon the record, administrative review, and judicial review that apply to similar

proceedings before the [Social Security] Commissioner conducted prior to the enactment of this Act”).

Upon review of an ALJ’s decision, the ARB may affirm, modify, or reverse the decision, or vacate it and remand the case for a rehearing and decision or for further development of the testimony and a return of the case to the ARB. 20 C.F.R. §§ 410.665, 410.666. The ARB’s decision shall be based upon the evidence and shall contain findings of fact and a statement of reasons. 20 C.F.R. § 410.665.

DISCUSSION

Legal Standard

A claim filed by a miner’s child, even if filed after July 1, 1973, will be considered to be a Part B claim if the miner and/or the miner’s widow received Part B benefits and the child’s claim is filed within six months of the death of the miner or the widow. 30 U.S.C.A. § 924(a)(1), (a)(2)(C) (West 2008); 20 C.F.R. § 410.231(b), (d). Claimant filed her survivor’s claim in July 2006, within six months of the death of her mother, the miner’s widow. Director’s Exhibits 1, 2. Further, the ALJ found that claimant’s mother was receiving Part B survivor’s benefits. D. & O. at 2. Consequently, we consider this claim to be a claim for survivor’s benefits under Part B. 20 C.F.R. § 410.231(d).

Under 20 C.F.R. § 410.370, an individual who is the child of the beneficiary, in this case claimant’s mother, will be determined to be, or to have been, dependent on the beneficiary if the child is unmarried and is under the age of eighteen, or is eighteen or older and under a disability as defined in Section 223(d) of the Social Security Act, 42 U.S.C.A. § 423(d) (West 2008), which began before the child attained age 22, or is eighteen or older and is a student. 20 C.F.R. § 410.370; *see* 20 C.F.R. §§ 725.209, 725.221 (2008). In this case, claimant was sixty years old and disabled in 2006 when her mother died and claimant filed her claim for survivor’s benefits under Part B. As claimant was older than eighteen and not a student, the issue whether she was dependent on her mother, the miner’s widow, turns on whether claimant has a qualifying disability. To be eligible for survivor’s benefits under Part B, claimant must establish that her SSA-adjudicated disability began before she was twenty-two.

Claimant is not eligible for survivor’s benefits under Part B

The SSA adjudicated claimant disabled and determined that the onset date of her disability was November 4, 1991. Director’s Exhibit 4. Claimant, born on February 28, 1946, Director’s Exhibit 3, was forty-five years old at the time of the November 4, 1991, onset of her disability. Therefore, claimant’s disability did not begin before she was twenty-two, as it must in order for her to be eligible for survivor’s benefits under Part B. Claimant has adduced no evidence establishing that her disability began before she turned twenty-two.

Claimant's arguments cannot change the outcome of the case

Claimant has filed four statements in support of her appeal, dated November 2, 2007; November 5, 2007; March 31, 2008; and May 20, 2008.¹ We consider claimant's arguments in toto. *See* 20 C.F.R. § 410.663(b). Claimant argues that she is entitled to benefits because she is her mother and father's surviving daughter; she remains disabled and unmarried; and she needs these benefits to sustain her livelihood. Claimant concedes, however, that she was not disabled before she was twenty-two but became disabled in November 1991 at age forty-five. Other circumstances asserted by claimant, such as her financial status, do not change the regulatory requirement that she prove disability before she was twenty-two.

Claimant also refers to the fact that the Director's counsel entered an appearance at the hearing. *See* Hearing Transcript at 2, 19-20. SSA hearings to determine a claimant's entitlement to benefits under the Black Lung Act were non-adversarial in nature. 20 C.F.R. §§ 410.623(a), 410.625, 410.632 (2007) (government not included as a party); *Willis v. Sullivan*, 931 F.2d 390, 399-400 (6th Cir. 1991) (SSA administrative proceedings are not adversarial), citing *Sullivan v. Hudson*, 490 U.S. 877, 891 (1989). Accordingly, to maintain the non-adversarial nature of such hearings, counsel for the Director, OWCP, may not participate at the hearing level in DOL proceedings under Part B of the Black Lung Act. Director's counsel has conceded that by entering an appearance at the hearing, she violated the non-adversarial nature of that hearing, and she has apologized for the error. Director's September 17, 2007 Statement to the ALJ, at 2-3. While claimant refers to counsel's mistake, she does not allege any resulting prejudice to her case, and we find none.

CONCLUSION

The arguments claimant raises on appeal are not persuasive and cannot affect the outcome of the case. We conclude that claimant has not met her burden to prove that her disability began before she was twenty-two, as she must under 20 C.F.R. § 410.370.

¹ Claimant's appeal, originally filed with the BRB, was transferred to the ARB on March 12, 2008, according to the provisions of the Black Lung Consolidation of Administrative Disability Act, 116 Stat. 1925, Pub. L. 107-275 (2002).

Therefore, we conclude that claimant is not eligible for benefits under Part B, and we **DENY** her claim.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge