

BRB No. 05-0518 BLA

BESSIE M. WINTERS)
(Survivor of TILDEN A. WINTERS, Jr.))
))
Claimant-Petitioner)
))
v.)
))
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
))
Respondent)

DATE ISSUED: 12/28/2005

DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Hudson Branham (Hudson Branham, P.C.), Richmond, Virginia, for claimant.

Jeffrey S. Goldberg (Howard Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order - Denying Benefits (2003-BLA-05178) of Administrative Law Judge Richard E. Huddleston (administrative law judge) rendered 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 originally filed a claim for benefits on June 8, 1973. That claim was denied by the Social Security Administration on May 3, 1974. Director's Exhibit 1. The miner filed a second claim on March 10, 1976, but died before the Department of Labor (DOL) could process his claim.

¹ Claimant is the widow of the miner, Tilden A. Winters, Jr., who died on May 31, 1976. Director's Exhibit 19.

Director's Exhibit 1. Claimant filed a claim for survivor's benefits on March 23, 1978. Director's Exhibit 1. Both the miner's claim and the survivor's claim were denied on February 13, 1987, by Administrative Law Judge Robert J. Shea, who found that the miner had eight years and eight months of coal mine employment, but that the evidence was insufficient to establish: the existence of pneumoconiosis; a totally disabling respiratory impairment; that the miner had a disabling condition due to coal mine employment; and that the miner's death was due to coal mine employment. Director's Exhibit 1. Claimant filed a second claim for survivor's benefits on July 12, 1989, which was denied as untimely by the district director on September 25, 1989, and again on May 6, 1994. Director's Exhibit 2. Claimant filed a third survivor's claim on July 6, 1994, which was denied as untimely by the district director on November 1, 1994, who also found that claimant failed to establish any requisite element of entitlement. Director's Exhibit 3. On October 25, 2001, claimant filed a fourth survivor's claim which was denied by the district director on June 11, 2002. Director's Exhibits 4, 29. On July 10, 2002, claimant filed a petition for modification which was denied by the district director on August 28, 2002 on the same ground. Director's Exhibits 31, 32. Claimant requested a formal hearing on September 26, 2002. Director's Exhibit 34.

The administrative law judge found the evidence of record was insufficient to establish that claimant took any action to preserve the miner's claim or her initial survivor's claim after both claims were denied by Judge Shea. Decision and Order at 6-8. Accordingly, the administrative law judge found that these claims had been finally denied and were not subject to further adjudication. The administrative law judge further found that benefits could not be awarded on the survivor's claims filed on July 12, 1989, July 6, 1994, and October 25, 2001, as they were filed more than one year after the denial of claimant's first survivor's claim, and claimant could not establish a change in the deceased miner's condition. Decision and Order at 8; 20 C.F.R. §725.309(c), (d). The administrative law judge also determined that if claimant had timely requested modification of Judge Shea's denial of the miner's and the survivor's earlier claims, entitlement could not have been established as the medical evidence failed to prove the existence of pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in finding that claimant failed to challenge the February 13, 1987 denial of the miner's claim and the earlier survivor's claim within the one year period available for modification pursuant to 20 C.F.R. §725.310, and erred by finding that these claims were finally denied and not subject to further adjudication. Claimant also argues that the administrative law judge erred in denying her subsequent survivor's claims. Additionally, claimant asserts that she has proved at least ten years of coal mine employment, and all the required elements necessary to establish entitlement to benefits in both claims. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the Decision and Order of the

administrative law judge as supported by substantial evidence.

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

After consideration of the administrative law judge's decision, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence and contains no reversible error. In the present case, the record indicates that the living miner's claim and claimant's first survivor's claim were denied by Judge Shea on February 13, 1987. Director's Exhibit 1. The administrative law judge found that the record does not indicate that claimant took steps to preserve these claims within the one year modification period pursuant to Section 725.310, 20 C.F.R. §725.309(c), as the birth certificate of claimant's son, Donald Winters, which claimant asserts was submitted shortly after it was obtained on May 27, 1987, was not date stamped by DOL within one year of the February 13, 1987 denial, and therefore cannot establish when claimant submitted this evidence. Decision and Order – Denying Benefits at 5-8; Claimant's Exhibit 6; Director's Exhibit 44. The record fails to reflect any other action taken by claimant within one year of the February 1987 denial of the claims, and claimant testified at the hearing that she was uncertain if she sent a letter requesting modification within the one year period provided by Section 725.310. Hearing Transcript at 41. The administrative law judge therefore, permissibly determined that claimant failed to satisfy her affirmative burden to establish that she requested modification within the specified time period, and therefore he rationally determined that the living miner's claim and the initial survivor's claim were finally denied and were not, therefore, subject to further adjudication. Decision and Order – Denying Benefits at 5-8. As these findings are supported by the record, they are affirmed as supported by substantial evidence, and preclude an award of benefits in the miner's or the survivor's claim. *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1; (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003).²

² Substantial evidence supports the administrative law judge's finding that, even if claimant timely requested modification of the miner's and the initial survivor's claims, benefits could not be awarded since none of the medical evidence establishes the existence of pneumoconiosis. Decision and Order – Denial of Benefits at 8; Director's Exhibits 1, 2, 20-22; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Trent*, 11 BLR 1-26.

Moreover, because the condition of entitlement that claimant failed to demonstrate in the initial survivor's claim related solely to the miner's physical condition at the time of his death, *i.e.*, that the miner suffered from coal workers' pneumoconiosis, the administrative law judge properly found that entitlement in the subsequent survivor's claims was precluded. Decision and Order – Denying Benefits at 8; 20 C.F.R. §725.309(d)(3). As the administrative law judge's findings pursuant to Section 725.309(d)(3) are in accordance with law, we also affirm his denial of survivor's benefits on that basis. *Tucker v. Director, OWCP*, 23 BLR 1-42 (2004); *Boden v. G.M. & W Coal Co., Inc.*, 23 BLR 1-39 (2004); *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992); *see Coleman v. Director, OWCP*, 345 F.3d 861, 23 BLR 2-1 (11th Cir. 2003); *Tonelli v. Director, OWCP*, 878 F.2d 1083, 12 BLR 2-319 (8th Cir. 1989); *Adkins v. Director, OWCP*, 878 F.2d 151, 12 BLR 2-313 (4th Cir. 1989); *Clark v. Director, OWCP*, 838 F.2d 197, 11 BLR 2-46 (6th Cir. 1988).

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