

BRB No. 04-0619 BLA

BRENDA CASTLE )  
(Widow of RALPH CASTLE) )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 B & B COAL COMPANY ) DATE ISSUED: 01/31/2005  
 )  
 and )  
 )  
 OLD REPUBLIC INSURANCE COMPANY )  
 )  
 Employer/Carrier- )  
 Respondent )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order Dismissing Claim and Cancelling Hearing of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Brenda Castle, West Van Lear, Kentucky, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,<sup>1</sup> without the assistance of counsel, appeals the Decision and Order Dismissing Claim and Cancelling Hearing (03-BLA-6330) of Administrative Law Judge Alice M. Craft rendered on a subsequent survivor's 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).<sup>2</sup> Claimant filed a subsequent claim for survivor's benefits on July 31, 2001.<sup>3</sup> Director's Exhibit 3. The district director issued a Proposed Decision and Order denying benefits, finding that claimant failed to submit evidence to demonstrate that one of the applicable conditions of entitlement had changed since the prior denial of her claim. 20 C.F.R. §725.309(d); Director's Exhibit 18. At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 20. On February 25, 2004, the administrative law judge issued an Order to Claimant to Show Cause why this case should not be dismissed

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<sup>1</sup> Claimant, Brenda Castle, is the widow of the miner Ralph Castle, who died on April 18, 1995, due to an acute myocardial infarction. Director's Exhibit 11.

<sup>2</sup> The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

<sup>3</sup> The miner filed four claims for benefits during his lifetime. Director's Exhibit 1. The miner's most recent claim, filed on April 26, 1993, was denied by the district director on December 8, 1994, on the grounds that, *inter alia*, the miner had not established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Director's Exhibit 1. The miner requested a hearing before an administrative law judge, but before the hearing was held, the miner died. Claimant filed her initial claim for survivor's benefits on May 11, 1995. Director's Exhibit 1. Following the district director's denial of the survivor's claim, claimant filed a timely request for a hearing which was held on May 18, 2000 before Administrative Law Judge Daniel J. Roketenetz. Judge Roketenetz initially found that the widow's claim constituted both a request for modification of the denial of benefits on the most recent miner's claim, and a separate claim for survivor's benefits. Judge Roketenetz further found that as the evidence failed to establish the existence of pneumoconiosis, entitlement was precluded on both the miner's and survivor's claims. Accordingly, both the miner's and survivor's claims were denied. Director's Exhibit 1. Claimant appealed, and in a decision dated April 16, 1998, the Board affirmed the administrative law judge's finding that the evidence of record is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and that, therefore, claimant is precluded from establishing entitlement to benefits. Director's Exhibit 1; *Castle v. B & B Coal Co.*, BRB No. 97-1190 BLA (Apr. 16, 1998)(unpub.).

pursuant to 20 C.F.R. §725.309(d). The Order stated that failure to respond would result in summary dismissal of the claim. Claimant did not respond, and on March 22, 2004, the administrative law judge cancelled the scheduled hearing and dismissed the claim for benefits.<sup>4</sup>

On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits on her survivor's claim. Employer responds, urging affirmance of the dismissal of this claim. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board 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 into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order Dismissing Claim and Cancelling Hearing, the issues on appeal, and the evidence of record, we conclude that substantial evidence supports the administrative law judge's determination with regard to the subsequent survivor's claim filed on July 31, 2001. Section 725.309(d) provides in pertinent part:

If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (*see* 20 §725.502(a)(2)), the later claim shall be considered a subsequent claim for benefits. A subsequent claim shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part, except that the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (*see* §§725.202(d) (miner), 725.212 (spouse), 725.218 (child), and 725.222 (parent, brother, or sister) has changed since the prior claim became final.

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<sup>4</sup> 20 C.F.R. §725.452(d) provides that if an administrative law judge believes that an oral hearing is not necessary, the judge shall notify the parties by written order and allow the parties time for response. The administrative law judge shall hold the oral hearing if any party makes a timely request in response to the order.

20 C.F.R. §725.309(d). The “applicable conditions of entitlement” are “those conditions upon which the prior denial was based.” 20 C.F.R. §725.309(d)(2). The regulation further provides that if the applicable condition of entitlement relates to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement. A subsequent claim filed by a surviving spouse shall be denied unless the applicable conditions of entitlement in such claim include at least one condition unrelated to the miner's physical condition at the time of his death. 20 C.F.R. §725.309(d)(3).

In this case, claimant filed a subsequent survivor's claim on July 31, 2001, which was more than one year after the denial of her previous survivor's claim on April 16, 1998. In considering the present claim under 20 C.F.R. §725.309(d), having determined that the prior survivor's claim was fully adjudicated on the merits, and was denied solely based on the failure to prove that the miner suffered from pneumoconiosis, and not based on any condition of entitlement unrelated to the miner's physical condition at the time of his death, the administrative law judge ordered claimant to show cause why her claim should not be dismissed. Administrative Law Judge's Order to Claimant to Show Cause, February 5, 2004. Claimant did not respond, and, therefore, the administrative law judge cancelled the scheduled hearing and dismissed her claim. Decision and Order at 2; 20 C.F.R. §725.309(d). Because claimant was unable to satisfy the requirements of 20 C.F.R. §725.309(d), and because claimant failed to respond to the administrative law judge's Order to show cause, we find that the administrative law judge permissibly exercised her discretion in cancelling the scheduled hearing and dismissing the claim. 20 C.F.R. §§725.309(d), 725.452(d). Consequently, we affirm the administrative law judge's denial of benefits.

Accordingly, the Decision and Order Dismissing Claim and Cancelling Hearing of the administrative law judge is hereby affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge