

BRB No. 07-0868 BLA

M.H.)
(Widow of G.H.))
)
Claimant-Petitioner)
)
v.) DATE ISSUED: 07/16/2008
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

M.H., Salyersville, Kentucky, *pro se*.

Barry H. Joyner (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2006-BLA-05599) of Administrative Law Judge Thomas F. Phalen, Jr., 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).¹ The administrative law judge denied this subsequent survivor's claim in

¹ Claimant, M.H., is the widow of the miner, G.H. The miner's claim, filed on August 17, 1988, was ultimately denied because the evidence failed to establish he was totally disabled due to pneumoconiosis. Director's Exhibit 1-123. The miner died on

accordance with 20 C.F.R. §725.309(d)(3), as he found that claimant failed to establish a change in an applicable condition of entitlement.

On appeal, claimant generally contends that she is entitled to benefits. The Director, Office of Workers' Compensation Programs, has responded in a letter brief, urging the Board to affirm the administrative law judge's denial of benefits pursuant to 20 C.F.R. §725.309(d)(3).

In an appeal filed by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law.² 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).

A subsequent survivor's claim, filed more than one year after the effective date of a final order denying survivor's benefits, must be denied unless the applicable conditions of entitlement in such a 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); *see generally Boden v. G.M. & W. Coal Co., Inc.*, 23 BLR 1-39 (2004); *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992).

In this case, the administrative law judge found that claimant filed her initial claim for survivor's benefits on February 16, 1995. Director's Exhibit 1-738. On April 30, 1997, Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge) issued a Decision and Order denying benefits, finding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205. Director's Exhibit 1-621. The Board affirmed the denial of benefits. [*M.H.*] *v. Director, OWCP*, BRB No. 97-1153 BLA (May 12, 1998) (unpub.). On November 10, 1998, the district director acknowledged receipt of claimant's request for modification. Director's Exhibit 1-593. Administrative Law Judge Daniel Roketenetz issued a Decision and

January 22, 1995. Director's Exhibit 11. Claimant filed her initial claim for survivor's benefits on February 16, 1995. Director's Exhibit 1-738.

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because the miner's coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

Order on February 8, 2001, denying benefits. *Id.* at 1-60. The Board affirmed the denial of benefits and subsequently denied claimant's request for reconsideration. [*M.H.*] v. *Director, OWCP*, BRB No. 01-0545 BLA (Jan. 30, 2002), *aff'd on recon.*, BRB No. 01-0545 BLA (Mar. 27, 2002)(unpub.). The United States Court of Appeals for the Sixth Circuit affirmed the denial of benefits. *Helton v. Director, OWCP*, 61 Fed. Appx. 127, No. 02-3548 (6th Cir. Mar. 7, 2003). Claimant took no further action until she filed this subsequent claim on April 28, 2005. Director's Exhibit 3. The administrative law judge held a hearing on February 22, 2007 and issued a Decision and Order Denying Benefits on July 3, 2007. Because the conditions of entitlement that claimant failed to demonstrate in her initial claim related solely to the miner's physical condition at the time of his death, *i.e.*, whether his death was due to pneumoconiosis at 20 C.F.R. §718.205(c), the administrative law judge properly found that entitlement was precluded. 20 C.F.R. §725.309(d)(3); *see Watts*, 17 BLR at 1-70; *Mack v. Matoaka Kitchekan Fuel*, 12 BLR 1-197 (1989). Decision and Order at 4. Consequently, we affirm the administrative law judge's denial of survivor's benefits pursuant to Section 725.309(d)(3).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge