

BRB No. 97-1834 BLA

ANNA COLEMAN)		
(Widow of JOHNNY COLEMAN))		
)		
Claimant-Petitioner)		
)		
v.)		
)		
MOUNT CALVARY COAL COMPANY)		
)		
and)	DATE	ISSUED:
)		
OLD REPUBLIC INSURANCE COMPANY)		
)		
Employer/Carrier-)		
Respondents)		
)		
DIRECTOR, OFFICE OF WORKERS')		
COMPENSATION PROGRAMS, UNITED)		
STATES DEPARTMENT OF LABOR)		
)		
Party-in-Interest)	DECISION and ORDER	

Appeal of the Order of Dismissal of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Anna Coleman, Huddy, Kentucky, *pro se*.

Laura Metcoff Klaus and Gregory S. Feder (Arter & Hadden), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Order of Dismissal

¹Claimant is the widow of the deceased miner, Johnny Coleman, who died on January 31, 1989. Director's Exhibits 1, 8, 21, 22.

(97-BLA-0603) of Administrative Law Judge Donald W. Mosser (the administrative law judge) dismissing a 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). The administrative law judge dismissed claimant's duplicate survivor's claim in accordance with 20 C.F.R. §725.309(d). On appeal, claimant generally challenges the administrative law judge's dismissal of her survivor's claim. Employer/carrier responds, urging affirmance of the administrative law judge's Order of Dismissal. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Order below is supported by substantial evidence. See *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The pertinent procedural history of this case is as follows: Claimant filed her initial survivor's claim for benefits on July 19, 1990. Director's Exhibit 22. This survivor's claim was denied by the Department of Labor (DOL) on December 17, 1990. *Id.* On October 9, 1991, Administrative Law Judge Charles W. Campbell issued a Decision and Order denying benefits on the survivor's claim, *id.*, which the Board affirmed, *Coleman v. Mount Calvary Coal Co., Inc.*, BRB No. 92-0426 BLA (Sept. 28, 1992)(unpub.). Inasmuch as claimant did not pursue this survivor's claim any further, the denial became final. Claimant filed her most recent survivor's claim for benefits on September 8, 1995. Director's Exhibit 1. The DOL denied this survivor's claim on February 12, 1996, September 18, 1996 and January 22, 1997. Director's Exhibits 10, 11, 23.² On March 11, 1997, while the case was pending before the Office of Administrative Law Judges, the Director filed a Motion to Dismiss the survivor's claim in accordance with 20 C.F.R. §725.309. On April 22, 1997, the administrative law judge issued an Order to Show Cause why the survivor's claim should not be dismissed. Claimant responded by letter dated May 1, 1997, disagreeing with the Director's Motion to Dismiss and requesting a hearing. On May 2, 1997, employer indicated that it wanted to join with the Director in the Director's Motion to Dismiss.

²The Department of Labor's September 18, 1996 denial was based on the fact that claimant's most recent application for survivor's benefits is a duplicate survivor's claim. Director's Exhibit 11.

The administrative law judge correctly stated that “the claimant in this case did not file her second application for benefits within one year of the denial of her previous claim by the Benefits Review Board so that the claim could be considered a timely request for modification under Section 725.310.” Order of Dismissal at 4. Pursuant to 20 C.F.R. §725.309(c) and (d), if an earlier survivor's claim is finally denied, a subsequent survivor's claim must also be denied based on the prior denial unless claimant's subsequent survivor's claim is considered a petition for modification, thereby satisfying the requirements of 20 C.F.R. §725.310. See *Mack v. Matoaka Kitchekan Fuel*, 12 BLR 1-197 (1989). Thus, since claimant's 1995 duplicate survivor's claim, which the Director previously challenged, was filed more than one year after the final denial of claimant's initial 1990 survivor's claim, thereby not meeting the requirements of 20 C.F.R. §725.310, the administrative law judge properly denied benefits. See *Jordan v. Director, OWCP*, 892 F.2d 482, 13 BLR 2-184 (6th Cir. 1989); *Clark v. Director, OWCP*, 838 F.2d 197, 11 BLR 2-46 (6th Cir. 1988), *rev'g on other grounds*, 9 BLR 1-205 (1986); *Mack, supra*.

Accordingly, the administrative law judge's Order of Dismissal is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge