

BRB No. 08-0509 BLA

D.D.)
(Widow of J.D.))
)
Claimant-Petitioner)
)
v.) DATE ISSUED: 03/16/2009
)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Order Dismissing the Claim of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

D.D., Scranton, Pennsylvania, *pro se*.

Sarah M. Hurley (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals, without the assistance of counsel, the Order Dismissing the Claim (08-BLA-5154) of Administrative Law Judge Robert D. Kaplan (the administrative law judge), 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). The administrative law judge dismissed claimant's subsequent survivor's claim in accordance with 20 C.F.R. §725.309(d)(3), as

¹ Claimant is the miner's widow. The miner died on December 18, 1993. Director's Exhibit 3.

he found that claimant failed to establish a change in an applicable condition of entitlement.

On appeal, claimant generally challenges the administrative law judge's dismissal of her claim. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to affirm the administrative law judge's dismissal of this claim.

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. *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); *Boden v. G.M. & W. Coal Co.*, 23 BLR 1-39, 1-40 (2004); *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992).

The record reflects that claimant filed her initial claim for survivor's benefits on January 8, 1994. Director's Exhibit 1. In a Decision and Order dated November 9, 1995, the administrative law judge credited the miner with 2.7 years of coal mine employment, as stipulated by the parties, and found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further found, however, that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Director's Exhibit 1. Accordingly, the administrative law judge denied benefits.

Claimant filed the current claim, her second, on May 30, 2007. Director's Exhibit 2. The district director denied the claim on August 14, 2007 on the grounds that claimant failed to establish that an applicable condition of entitlement, unrelated to the miner's

² The record indicates that the miner's coal mine employment was in Pennsylvania. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

physical condition at the time of his death, had changed since the date upon which the order denying her prior survivor's claim became final. 20 C.F.R. §725.309; Director's Exhibit 8. At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. However, on November 23, 2007, the Director moved to dismiss the claim, contending that the claim was a subsequent survivor's claim and, therefore, had to be dismissed based upon the denial of the earlier claim.

In an Order to Show Cause dated January 31, 2008, the administrative law judge found that 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). Therefore, the administrative law judge ordered claimant to show cause within fifteen days why her 2007 survivor's claim should not be denied pursuant to 20 C.F.R. §725.309(d)(3). In a response dated February 14, 2008, claimant reiterated her contention that the medical evidence established that pneumoconiosis contributed to the miner's death.

In an Order Dismissing the Claim dated February 22, 2008, the administrative law judge found that claimant's response did not address the pertinent issue of whether there had been a change in an applicable condition of entitlement unrelated to the miner's physical condition at the time of his death, as required by 20 C.F.R. §725.309(d)(3). Therefore, the administrative law judge dismissed the claim.

In this case, the administrative law judge properly found that 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 further found, correctly, that claimant's response to the January 31, 2008 Order to Show Cause did not address any elements of entitlement unrelated to the miner's physical condition, but instead repeated her earlier contention that the miner's death was due to pneumoconiosis. Therefore, the administrative law judge properly found that claimant was precluded from entitlement to survivor's benefits, and properly dismissed her 2007 claim. 20 C.F.R. §725.309(d)(3); *see Boden*, 23 BLR at 1-41; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

Accordingly, the administrative law judge's Order Dismissing the Claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge