

BRB No. 01-0137 BLA

KATTIE E. WHITED)
(Widow of WILBURN L. WHITED))
)
 Claimant-Petitioner)

v.)

DATE ISSUED: _____

)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
 Respondent)

DECISION and ORDER

Appeal of the Decision and Order of Daniel L. Solomon, Administrative Law Judge, United States Department of Labor.

Kattie E. Whited, Pennington Gap, Virginia, *pro se*.

Helen H. Cox (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

¹Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested on behalf of claimant that the Board review the decision of Administrative Law Judge Daniel L. Solomon. In a letter dated October 18, 2000, the Board stated that claimant would be considered to be representing herself on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant, without the assistance of counsel, appeals the Decision and Order (00-BLA-0633) of Administrative Law Judge Daniel L. Solomon (the administrative law judge) denying benefits on 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). Because claimant's 1998 duplicate survivor's claim was not filed within a year of the denial of claimant's prior 1990 survivor's claim, the administrative law judge denied benefits in accordance with 20 C.F.R. §725.309 (2000). On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, responds by letter, urging the Board to affirm the administrative law judge's Decision and Order.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and 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 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*,

²Claimant is the divorced widow of the miner, Wilburn L. Whited, who died on July 30, 1987. Director's Exhibits 1, 9, 24.

³The 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001).

⁴The revisions to the regulations at 20 C.F.R. §§725.309 and 725.310 apply only to claims filed after January 19, 2001.

Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

The pertinent procedural history of this case is as follows: Although claimant initially filed a claim with the Social Security Administration on June 29, 1987, this claim was finally disallowed by the Social Security Administration on May 25, 1990. Director's Exhibit 23. Claimant filed a survivor's claim with the Department of Labor on June 27, 1990. Director's Exhibit 24. On July 14, 1992, Administrative Law Judge Frank J. Marcellino issued a Decision and Order denying survivor's benefits, Director's Exhibit 24, which the Board affirmed, *Whited v. Director, OWCP*, BRB No. 92-2223 BLA (May 16, 1994)(unpub.). Following claimant's appeal, the United States Court of Appeals for the Fourth Circuit affirmed the Board's decision. *Whited v. Director, OWCP*, No. 94-1774 (4th Cir. Dec. 19, 1994)(unpub.). Inasmuch as claimant did not pursue this survivor's claim any further, the denial became final. Claimant's most recent survivor's claim was filed with the Department of Labor on November 13, 1998. Director's Exhibit 1.

As previously noted, claimant's prior survivor's claim was filed in 1990. The administrative law judge accurately determined that "[t]he last activity in the 1990 claim was in December, 1994." Decision and Order at 2. The administrative law judge also accurately determined that "claimant did not request modification within one year of that date." *Id.* The administrative law judge therefore concluded that "since the 1990 claim was denied, the subsequent claim must also be denied based on the prior denial, unless claimant's subsequent claim is considered a motion for modification satisfying the requirements of Section 725.310." *Id.* Pursuant to 20 C.F.R. §725.309(c) and (d) (2000), 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 (2000). See *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992); *Mack v. Matoaka Kitchikan Fuel*, 12 BLR 1-197 (1989). Since claimant's 1998 survivor's claim was filed more than one year after the final denial of claimant's prior 1990 survivor's claim, and therefore did not meet the requirements of 20 C.F.R. §725.310 (2000), we hold that this survivor's claim was properly denied as a duplicate survivor's claim. See 20 C.F.R. §725.310 (2000); *Watts, supra*; *Mack, supra*.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

⁵The administrative law judge stated that "[a]lthough a purported 'modification' was filed (Dx 19), that action is based on the 1998 application." Decision and Order at 2.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge