

BRB No. 14-0228 BLA

WANDA MARLOWE)
(Widow of WADE MARLOWE))
)
 Claimant-Petitioner)
)
 v.)
)
 PREMIER ELKHORN COAL COMPANY)
) DATE ISSUED: 07/30/2014
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Order Denying Subsequent Survivor's Claim of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Wanda Marlowe, Duff, Tennessee, *pro se*.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals,¹ without the assistance of counsel, the Order Denying Subsequent Survivor's Claim (2013-BLA-5728) of Administrative Law Judge William S. Colwell rendered on a survivor's subsequent claim² filed pursuant to the provisions of the

¹ Claimant is the widow of the miner, who died on January 18, 1997. Director's Exhibit 7.

² This is claimant's second claim for survivor's benefits. Her first claim, filed on January 24, 1998, was finally denied by the district director on October 5, 1998, for

Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge denied claimant's subsequent claim in accordance with 20 C.F.R. §725.309(c)(4),³ because he found that claimant did not establish a change in an applicable condition of entitlement since the denial of her first survivor's claim.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging the Board to affirm the denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

The regulations provide that a survivor's claim, filed more than one year after the effective date of a final order denying a previous survivor's claim, "must 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(c)(4); see *Moser v. Director, OWCP*, 25 BLR 1-97, 1-99 (2013); *Boden v. G.M. & W. Coal Co.*, 23 BLR 1-39, 1-40 (2004).

The administrative law judge correctly found that the conditions of entitlement that claimant failed to establish in her initial survivor's claim related solely to the miner's physical condition at the time of his death. Director's Exhibit 1. Therefore, the administrative law judge properly determined that claimant's subsequent claim must be

failure to establish that the miner suffered from pneumoconiosis and that his death was due to pneumoconiosis. Director's Exhibit 1. Claimant filed her current claim on November 1, 2012. Director's Exhibit 2.

³ After the administrative law judge issued his Order, the Department of Labor revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The provision that was applied by the administrative law judge at 20 C.F.R. §725.309(d)(3) is now set forth at 20 C.F.R. §725.309(c)(4) (2014).

denied.⁴ *See* 20 C.F.R. §725.309(c)(4); *Moser*, 25 BLR at 1-101; *Boden*, 23 BLR at 1-41; Order at 2.

Accordingly, the administrative law judge's Order Denying Subsequent Survivor's Claim is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

⁴ Under amendments to the Act applicable to claims filed after January 1, 2005 and pending on or after March 23, 2010, a survivor is automatically entitled to receive benefits if the miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(l) (2012). However, claimant cannot benefit from this provision, as there is no evidence in the record that the miner filed a claim for federal black lung benefits during his lifetime. Further, claimant cannot benefit from the rebuttable presumption of death due to pneumoconiosis at amended Section 411(c)(4), 30 U.S.C. 921(c)(4). To invoke that presumption, claimant would need to prove that the miner had a totally disabling respiratory or pulmonary impairment. This is a condition of entitlement related solely to the miner's physical condition at the time of his death. *See* 20 C.F.R. §725.309(c)(4); *Moser v. Director, OWCP*, 25 BLR 1-97, 1-101 & n.4 (2013). As previously noted, in order to succeed in a subsequent claim, a surviving spouse must establish at least one condition of entitlement unrelated to the miner's physical condition. In this case, there is no evidence of such an additional change. 20 C.F.R. §725.309(c).