

BRB No. 12-0293 BLA

BERNICE MOSER)	
(Widow of CARL ROBERT MOSER))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED: 02/26/2013
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Bernice R. Moser, Port Carbon, Pennsylvania, *pro se*.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2011-BLA-5048) of Administrative Law Judge Adele Higgins Odegard (the administrative law judge) rendered on a subsequent survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The administrative law judge denied claimant's subsequent claim in accordance with 20 C.F.R. §725.309(d)(3) because she found that claimant had

¹ Claimant is the surviving spouse of the miner, who died on March 30, 1994. Director's Exhibit 4.

not established a change in an applicable condition of entitlement since the final denial of her first survivor's claim.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's denial of benefits.

In an appeal 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'Keefe v. Smith, Hichman & 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 claimant demonstrates that 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 Boden v. G.M. & W. Coal Co.*, 23 BLR 1-39 (2004); *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992).

The record reflects that the miner filed his claim for benefits on February 10, 1993; that the claim was pending at the time of his death on March 30, 1994; and that claimant's survivor's claim, filed on June 22, 1994, was consolidated with the miner's claim. Director's Exhibits 1, 23, 28, 40. On April 17, 1996, Administrative Law Judge Frank D. Marden denied benefits in the miner's claim because he found the evidence insufficient to establish total respiratory disability, and denied benefits in the survivor's claim because he found the evidence insufficient to establish that the miner's death was due to pneumoconiosis. Director's Exhibit 50. The Board affirmed the denial of benefits in both claims on April 25, 1997.³ Director's Exhibit 56; *Moser v. Director, OWCP*,

² The Board will apply the law of the United States Court of Appeals for the Third Circuit, as the miner was last employed in the coal mining industry in Pennsylvania. Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

³ Claimant was represented by counsel at the hearing before Administrative Law Judge Frank D. Marden and in her appeal to the Board. Director's Exhibits 50, 56, 65.

BRB No. 96-1084 BLA (Apr. 25, 1997)(unpub.). Claimant filed another survivor's claim on December 19, 1997, which was construed as a request for modification because it was filed within one year of the last denial of benefits. *See* 20 C.F.R. §725.310; Director's Exhibits 57, 58. In a Decision and Order dated September 22, 1999, Administrative Law Judge Daniel F. Sutton found that claimant failed to establish a mistake in a determination of fact and denied modification. Director's Exhibit 73. Upon claimant's appeal, the Board affirmed the denial of modification and the denial of benefits on October 6, 2000. *Moser v. Director, OWCP*, BRB No. 00-0124 BLA (Oct. 6, 2000) (unpub.), *recon. denied*, (Dec. 21, 2000)(Order)(unpub.); Director's Exhibits 79, 82. On August 13, 2001, claimant again requested modification, which was denied by Administrative Law Judge Janice K. Bullard on May 20, 2003, Director's Exhibit 84, and the Board affirmed the denial of modification. *Moser v. Director, OWCP*, BRB No. 03-0593 BLA (Feb. 27, 2004)(unpub.), *recon. denied*, (June 22, 2004)(Order)(unpub.). Claimant's appeal to the United States Court of Appeals for the Third Circuit was dismissed ("procedurally terminated without judicial action" . . . "default"). Director's Exhibit 1.

Claimant filed the current survivor's claim on June 3, 2010. Director's Exhibit 2. The district director denied benefits on July 6, 2010, on the ground that claimant failed to establish that an applicable condition of entitlement 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 5. At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a hearing. Director's Exhibits 6, 7.

Prior to the hearing, the administrative law judge informed the parties that amendments to the Act were enacted on March 23, 2010, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010). Relevant to a survivor's claim, the amendments revive Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), which provides that the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*). The amendments also reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a survivor establishes that the miner had at least fifteen years of underground coal mine employment or comparable surface mine employment, and had a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §921(c)(4)).

The administrative law judge performed a *de novo* review of the evidence relevant to the length of the miner's coal mine employment, and credited the miner with a total of

13.96 years of qualifying coal mine employment. The administrative law judge properly determined that application of the automatic entitlement provision at amended Section 932(l) to a subsequent survivor's claim was not prohibited where the miner was awarded benefits in his lifetime claim, but that this provision was not applicable to claimant because the miner's claim was denied. Decision and Order at 4; *see Richards v. Union Carbide Corp.*, 25 BLR 1-31 (2012)(en banc)(McGranery, J., concurring and dissenting) (Boggs, J., dissenting), *appeal docketed*, No. 12-1294 (4th Cir. Mar. 8, 2012). Further, the administrative law judge properly found that claimant could not establish invocation of the rebuttable presumption of death due to pneumoconiosis under amended Section 411(c)(4), as the presumption is applicable only if the miner had at least fifteen years of coal mine employment and was totally disabled at the time of his death.⁴ Decision and Order at 5; *see* 30 U.S.C. §921(c)(4). The administrative law judge also correctly determined that the conditions of entitlement that claimant failed to demonstrate in her initial survivor's claim related solely to the miner's physical condition at the time of his death. Director's Exhibit 1. Thus, the administrative law judge properly found that claimant's subsequent claim was barred pursuant to 20 C.F.R. §725.309(d)(3). Decision and Order at 4-5; *see Boden*, 23 BLR at 1-41. As substantial evidence supports the administrative law judge's findings, we affirm her denial of benefits.

⁴ Because total respiratory disability was not established in the earlier consolidated claims, and as total respiratory disability is a condition of entitlement related to the miner's physical condition at the time of his death, we decline to review the administrative law judge's findings regarding the length of the miner's coal mine employment, since a finding of more than fifteen years of coal mine employment, as asserted by claimant, would not change the outcome of this case. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge