

BRB No. 01-0675 BLA

HAZEL MAE SWINFORD)
(Widow of BILLY SWINFORD))

Claimant-Petitioner)

v.)

DATE ISSUED:

ARCH OF ILLINOIS,)
INCORPORATED)

Employer-Respondent)

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

Party-in-Interest)

DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Hazel Mae Swinford, Cumberland, Kentucky, *pro se*.

Denise M. Davidson (Barret, Haynes, May, Carter & Roark, P.S.C.), Hazard, Kentucky.

Mary Forrest-Doyle (Eugene Scalia, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals, without the assistance of counsel,² the Decision and Order - Denying Benefits (00-BLA-0253) of Administrative Law Judge Donald W. Mosser (the administrative law judge) on a duplicate 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).³ The administrative law judge denied the instant duplicate survivor's

¹Claimant is the widow of the miner, Billy Swinford. The miner's death certificate indicates that he died on January 22, 1996 due to acute morphine toxicity by ingestion. The death certificate lists laryngeal carcinoma with tracheotomy as a significant condition which contributed to death but did not result in the underlying cause of death. Director's Exhibit 11.

²Ron Carson, a benefits counselor with Stone Mountain Health Services in Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's Decision and Order. In a letter dated May 17, 2001, 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).

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 47 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). In the instant case, the Board attached a memorandum to the parties to its May 17, 2001 acknowledgment of claimant's appeal. Therein, the Board stated that the parties' pleadings should address whether the amended regulatory provisions enumerated in the court's order will affect the outcome of the case. The Board further indicated that failure to address this issue will be construed as a position that the challenged regulations will not affect the outcome of the case.

By letter dated June 19, 2001, the Director, Office of Workers' Compensation Programs (the Director), submits that application of the amended regulations will not affect the outcome of the case. In its response brief dated July 6, 2001, employer contends that the

claim under 20 C.F.R. §725.309 (2000).⁴ The administrative law judge also determined that claimant failed to establish her entitlement to survivor's benefits on the merits of the claim. Accordingly, benefits were denied.

In response to claimant's appeal, employer urges the Board to affirm the administrative law judge's denial of the instant claim pursuant to 20 C.F.R. §725.309 (2000). Employer also contends that the administrative law judge properly found that claimant failed to establish her entitlement to survivor's benefits on the merits of the claim. In his letter

amended regulations will not affect the outcome of this case. On August 9, 2001, the United States District Court for the District of Columbia issued its decision, *inter alia*, upholding the validity of the challenged regulations. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

⁴ The regulation at 20 C.F.R. §725.309(d) (2000) provides in pertinent part:

If an earlier survivor's claim filed under this part has been finally denied, the new claim filed under this part shall also be denied unless the [district director] determines that the later claim is a request for modification and the requirements of [20 C.F.R.] §725.310 [(2000)] are met.

20 C.F.R. §725.309(d) (2000). The amendments to the regulation at 20 C.F.R. §725.309 (2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2.

dated June 19, 2001, the Director, Office of Workers' Compensation Programs (the Director), declined to address the issues raised by claimant's *pro se* appeal of the decision below.

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. *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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hichman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The pertinent procedural history is as follows: Claimant filed a claim for benefits on March 20, 1997. *See* Director's Exhibit 24-236; *see also* Director's Exhibit 24-231 containing a claim filed March 28, 1997.³ The district director denied the claim on July 23, 1997. Director's Exhibit 24-15. Claimant took no further action on this claim. Claimant filed the instant claim on April 27, 1999. Director's Exhibit 2. On August 17, 1999, the district director denied the claim as a duplicate survivor's claim under 20 C.F.R. §725.309(d) (2000). Director's Exhibits 17, 26. Pursuant to claimant's request, the district director transferred the case to the Office of Administrative Law Judges for a hearing. Director's Exhibits 18, 25. A hearing was held on October 19, 2000 before the administrative law judge, who issued his Decision and Order on April 17, 2001. Therein, the administrative law judge denied the instant claim under 20 C.F.R. §725.309 (2000) as he found that it is a duplicate survivor's claim which does not meet the requirements for modification under 20

³Claimant filed her March 20, 1997 claim using a "Miner's Claim for Benefits under the Black Lung Benefits Act" form. Director's Exhibit 24-236. Claimant filed her March 28, 1997 claim using a "Survivor's Claim for Benefits under the Black Lung Benefits Act" form. Director's Exhibit 24-231.

C.F.R. §725.310 (2000). For purposes of appeal, the administrative law judge then considered the case on its merits and found that claimant failed to establish her entitlement to survivor's benefits under 20 C.F.R. Part 718. Specifically, the administrative law judge found that claimant failed to establish that the miner had pneumoconiosis or that he died due to the disease. 20 C.F.R. §§718.202, 718.205(c). The administrative law judge further found that the amended regulations do not affect the outcome of this case. The administrative law judge thus denied the claim.

We affirm the administrative law judge's denial of the instant claim as it is rational, supported by substantial evidence and in accordance with law. Under 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 claim is considered to be a motion for modification which satisfies the requirements of 20 C.F.R. §725.310 (2000). *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992); *Mack v. Matoaka Kitchikan Fuel*, 12 BLR 1-197 (1989); *see Clark v. Director, OWCP*, 9 BLR 1-205 (1986), *rev'd on other grounds*, *Clark v. Director, OWCP*, 838 F.2d 197, 11 BLR 2-46 (6th Cir. 1988). The administrative law judge properly determined that the instant claim must be denied as a duplicate survivor's claim as it does not meet the requirements for modification. Specifically, claimant filed the instant survivor's claim on April 27, 1999, more than one year after the district director's July 23, 1997 denial of the prior survivor's claim. Director's Exhibits 2, 24-15. Moreover, the record shows that the Director has consistently relied on the duplicate survivor's claim regulations in the adjudication of the instant claim. Director's Exhibits 17, 26; *cf. Jordan v. Director, OWCP*, 892 F.2d 482, 13 BLR 2-184 (6th Cir. 1989). We, therefore, affirm the administrative law judge's denial of the instant duplicate claim for survivor's benefits under 20 C.F.R. §725.309(d) (2000).

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

PETER A. GABAUER, Jr.
Administrative Appeals Judge