

BRB Nos. 13-0310 BLA
and 88-1100 BLA

MARGARET NELUMS)	
(Widow of GORDON NELUMS))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED: 04/17/2014
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Margaret Nelums, El Paso, Texas, *pro se*.

Barry H. Joyner (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals, without the assistance of counsel, the Decision and Order (2012-BLA-5185) of Administrative Law Judge Patrick M. Rosenow (the administrative law judge) denying benefits on a survivor's claim, filed on October 6, 2007, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). The administrative law judge determined that this claim was a

¹ Claimant is the widow of the miner, who died on March 18, 1978. Director's Exhibit 1-8.

subsequent survivor's claim that was barred pursuant to 20 C.F.R. §725.309(d),² as he found that claimant had not established a change in an applicable condition of entitlement since the denial of her first survivor's claim, filed on May 9, 1985.³ Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting that claimant's first claim is still pending.

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

After consideration of the administrative law judge's Decision and Order, the Director's brief, and the procedural history of the case, we are compelled to vacate the

² The regulations provide that a survivor's claim, filed by a miner's widow more than one year after the effective date of a final order denying her previous survivor's claim, must be denied unless she demonstrates a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.212. Further, the applicable conditions of entitlement must 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 generally Boden v. G.M. & W. Coal Co.*, 23 BLR 1-39 (2004); *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992).

³ Claimant's first claim was submitted without a signature page and was received by the Department of Labor (DOL) on May 9, 1985. Director's Exhibit 1. DOL notified claimant that it construed her incomplete application as an intent to file, and advised claimant that if she submitted the signature page within six months, "it [would] protect [her] entitlement to benefits back to the date it was received." Director's Exhibit 2. Claimant completed her application on July 22, 1985, and complied with DOL's instructions.

⁴ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner's last coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3.

administrative law judge's Decision and Order. The record reflects that claimant's original 1985 claim was denied by Administrative Law Judge Thomas Schneider on February 19, 1988, because claimant failed to prove that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).⁵ Upon claimant's *pro se* appeal, the Board affirmed the denial of benefits, as substantial evidence supported Judge Schneider's finding that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis. *Nelums v. Director, OWCP*, BRB No. 88-1100 BLA (Feb. 28, 1990)(unpub.). By motion dated March 25, 1990, claimant requested an extension of time to retain new counsel and to file a motion for reconsideration of the Board's decision. By Order dated July 16, 1990, the Board held that it would construe claimant's motion as a timely-filed request for reconsideration of the Board's decision, and granted claimant thirty days from receipt of the Order to file a brief in support of reconsideration. The record does not reflect that any further action was taken by claimant until the filing of her second application for survivor's benefits on September 12, 2011.

As noted by the Director, the Board never issued an order either granting or denying claimant's motion for reconsideration of the Board's Decision and Order affirming Judge Schneider's denial of her 1985 claim in BRB No. 88-1100 BLA. As claimant's original claim was never finally denied, claimant's second application for benefits, filed on September 12, 2011, does not constitute a subsequent survivor's claim. Based on the facts of this case, we agree with the Director that because claimant's March 25, 1990 request for reconsideration of the Board's Decision and Order was still pending when claimant filed her September 12, 2011 application for benefits, the merger provision of 20 C.F.R. §725.309(b) (1999) is applicable. *See* 20 C.F.R. §725.2(c) (2013). The regulation at 20 C.F.R. §725.309(b) (1999) states, in pertinent part, that "[i]f a claimant files a claim under this part while another claim filed by the claimant is pending, the later claim shall be merged with the earlier claim for all purposes." 20 C.F.R. §725.309(b) (1999). Insofar as there is no evidence that claimant ever withdrew her request for reconsideration, the March 25, 1990 reconsideration request is still pending, with the 1985 claim being the operative claim. *See Tackett v. Howell & Bailey Coal Co.*, 9 BLR 1-181 (1986).

Having previously performed a substantial evidence review of Judge Schneider's findings with regard to claimant's 1985 claim, and upon review of our disposition of the case, we deny claimant's motion for reconsideration in BRB No. 88-1100 BLA.⁶ As the

⁵ Claimant was represented by counsel before Judge Schneider.

⁶ The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the present claim, as it was filed before January 1, 2005. We note that, if claimant's second application for benefits had, in fact, been a

administrative law judge lacked jurisdiction to adjudicate claimant's 2011 application as a subsequent claim, we vacate his Decision and Order denying benefits in BRB No. 13-0310 BLA, *see* 33 U.S.C. §921(b)(5); 20 C.F.R. §§801.301, 802.407(a), 802.409, and remand this case to the district director for further appropriate action on the merged claims.

Accordingly, claimant's motion for reconsideration in BRB No. 88-1100 BLA is denied. The administrative law judge's Decision and Order denying benefits in BRB No. 13-0310 BLA is vacated, and this case is remanded to the district director for further consideration consistent with this decision.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

subsequent survivor's claim, claimant would not be entitled to derivative benefits under the recent amendments, as the miner's lifetime claims for benefits were finally denied. Director's Exhibit 1. Additionally, the miner did not have fifteen years of coal mine employment, thus the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act is not applicable. 30 U.S.C. §§921(c)(4), 932(l), *amended by* Pub. L. No. 1121-148, §1556(b), 124 Stat. 119, 260 (2010).