

BRB No. 00-1103 BLA

MARY HARRISON)	
(Surviving Remarried Spouse of)	
JAMES GRAVELY))	
)	
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 - Denying Benefits of David W. DiNardi, Administrative Law Judge, United States Department of Labor.

Mary Harrison, Hartford, Connecticut, *pro se*.

Dorothy L. Page (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 and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, the miner's surviving remarried spouse,¹ appeals, without the assistance of counsel, the Decision and Order - Denying Benefits (00-BLA-0150) of Administrative Law

¹Claimant was married to James Gravelly, the miner, from 1928 until his death in 1953. Director's Exhibits 3, 4. Claimant was married to Claude McCray from 1965 until his death in 1982. Director's Exhibits 10, 11. Claimant was married to John Harrison from 1984 until his death in 1989. Director's Exhibits 12, 13.

Judge David W. DiNardi (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).² The administrative law judge initially

²The 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). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9,

noted claimant's failure to respond to his February 25, 2000 Show Cause Order, requiring claimant to show cause as to why the instant survivor's claim should not be dismissed as a duplicate survivor's claim. The administrative law judge denied the claim under 20 C.F.R. §725.309(d) (2000) as he found that it was a duplicate survivor's claim which does not meet the requirements for modification under 20 C.F.R. §725.310 (2000). Claimant generally appeals from the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), responds, and seeks affirmance of the decision below. The Director also argues that even if the Board were to reach the merits of the instant claim, the claim must fail as there is no evidence to show that the deceased miner had pneumoconiosis which arose out of his coal mine employment or that the miner's death was due to pneumoconiosis.³

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: In 1989, the district director denied claimant's first claim, filed on February 3, 1989, and administratively closed the case on January 8, 1990. Director's Exhibit 17-14. Claimant took no further action on this claim.

2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (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.

³The only medical evidence relating to the miner is his death certificate, which indicates that the miner died due to chronic cor pulmonale due to undetermined causes. Director's Exhibit 4.

Claimant filed a second claim on February 8, 1991, which the district director denied on May 6, 1991. Director's Exhibit 17-15. Claimant took no further action on this claim. In 1993, the district director denied claimant's third claim, filed on January 4, 1993. Director's Exhibit 17 at 1, 12. Claimant requested a hearing, but subsequently requested, by counsel, that the case be dismissed. Director's Exhibit 17-22. By Order of Dismissal dated May 26, 1994, Administrative Law Judge Joan Huddy Rosenzweig granted claimant's request and dismissed the case. Director's Exhibit 17-23.

Claimant filed the instant claim on May 17, 1999. Director's Exhibit 1. On May 25, 1999, the district director denied the claim as a duplicate survivor's claim under 20 C.F.R. §725.309(d) (2000), and indicated that the evidence did not show that the miner had pneumoconiosis which arose out of his coal mine employment and did not show that pneumoconiosis caused the miner's death. Director's Exhibit 5. By letter dated June 9, 1999, the district director stated that its previous denial remained unchanged by claimant's submission of further information and evidence. Director's Exhibit 14. Claimant requested a hearing by letter filed on October 27, 1999. Director's Exhibit 15.

In the Order to Show Cause and Order Postponing Hearing dated February 25, 2000, the administrative law judge indicated that during his review of the case in preparation for the hearing, which was set for April 14, 2000, it came to his attention that the instant duplicate claim may be barred by 20 C.F.R. §725.309(d) (2000). 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 failed 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).⁴ The administrative law judge indicated that since the instant claim was filed more than one year after Administrative Law Judge Rosenzweig's 1994

⁴The 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, 65 Fed. Reg. 80,057.

Order of Dismissal, claimant “might not have had the right to file her current claim.” Order to Show Cause and Order Postponing the Hearing at 2. The administrative law judge thus ordered claimant to show cause as to why the instant survivor’s claim should not be dismissed. Claimant did not respond to the Show Cause Order.

In his Decision and Order - Denying Benefits, which is the subject of the instant appeal, the administrative law judge initially reviewed the procedural history of the case. He then discussed claimant’s failure to respond to the Show Cause Order, requiring claimant to show cause as to why the instant claim should not be dismissed as a duplicate survivor’s claim under 20 C.F.R. §725.309(d) (2000). The administrative law judge thus found that claimant failed to show good cause as to why this claim should not be dismissed, in light of the fact that it was filed more than one year after Administrative Law Judge Rosenzweig’s 1994 Order of Dismissal. Accordingly, the administrative law judge dismissed the claim and denied claimant’s application for benefits. Decision and Order - Denying Benefits at 2.

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. Survivors are barred from filing duplicate claims beyond the one year period provided for modification. Specifically, 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 May 17, 1999, more than one year after the Order of Dismissal of Administrative Law Judge Rosenzweig which dismissed claimant’s earlier claim. Director’s Exhibits 1, 17-23.⁵ Moreover, we hold that the administrative law judge acted within his discretion in dismissing the instant claim in light of claimant’s failure to respond to his Show Cause Order. 20 C.F.R. §725.465(a)(2), (c) (2000).⁶ We, therefore, affirm the administrative law judge's denial of

⁵We note that the Director, Office of Workers’ Compensation Programs, has relied on the duplicate survivor's claims regulations at each stage of the adjudication of the instant claim. Director’s Exhibits 5, 14, 18; *cf. Jordan v. Director, OWCP*, 892 F.2d 482, 13 BLR 2-184 (6th Cir. 1989).

⁶The revised regulation at 20 C.F.R. §725.465 does not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2, 65 Fed. Reg. 80,057. The specific regulations at subsections 725.465(a)(2) and (c) have not been revised.

the instant 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.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge