

BRB No. 02-0348 BLA

IRENE ROGOWSKI)		
(Widow of CARL ROGOWSKI))		
)		
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 Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Harry T. Coleman (Abrahamsen, Moran & Conaboy), Scranton, Pennsylvania, for claimant.

Rita Roppolo (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits (01-BLA-0489) of Administrative Law Judge Robert D. Kaplan 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

¹Claimant is the surviving spouse of Carl Rogowski, who died on August 12, 1997. Director's Exhibit 8.

amended, 30 U.S.C. §901 *et seq.* (the Act).² The administrative law judge denied the instant claim pursuant to 20 C.F.R. §725.309(d) (2000)³ because it was filed on September 13, 2000, more than one year after the January 9, 1998, final denial of claimant's previously filed, October 3, 1997 survivor's claim. The administrative law judge also denied the instant claim on alternate grounds, finding the evidence of record insufficient to establish that claimant's husband, Carl Rogowski, was a "miner" under the Act, and finding the evidence of record insufficient to establish that Mr. Rogowski's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). On appeal, claimant contends that the administrative law judge's denial of the instant claim on procedural grounds was unfair and contrary to the remedial purpose of the Act to provide benefits to coal miners who die due to pneumoconiosis, and to their dependents. Claimant urges the Board to remand the case to the administrative law judge for a new hearing and an opportunity to submit further evidence in support of her claim. The Director, Office of Workers' Compensation Programs (the Director) responds, arguing that the administrative law judge properly denied the instant claim as a duplicate survivor's claim under Section 725.309(d) (2000), and thus the Director urges the Board to affirm the administrative law judge's decision denying benefits.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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 claimant's contentions on appeal, the administrative law

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 20 C.F.R. Parts 718, 722, 725 and 726. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³The amendments to the regulation at 20 C.F.R. §725.309 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.

judge's Decision and Order, and the evidence of record, we conclude that the administrative law judge properly denied benefits in this case. Section 725.309(d) (2000) provides that a duplicate survivor's claim must be denied on the grounds of the prior denial unless 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); *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992); *Mack v. Matoaka Kitchekan Fuel*, 12 BLR 1-197 (1989). Claimant's first survivor's claim, filed on October 3, 1997, was finally denied by the district director on January 9, 1998. Director's Exhibit 8. Claimant took no further action with respect to this claim, but rather filed a second claim on September 13, 2000, more than one year after the denial of her initial claim. Director's Exhibit 1. Thus, the later claim did not satisfy the timeliness requirement for modification set forth at Section 725.310(a) (2000) and, according to the terms of Section 725.309(d) (2000), was properly denied as a duplicate survivor's claim. 20 C.F.R. §725.310(a) (2000); *see Watts, supra; Mack, supra.*

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

