

BRB No. 03-0845 BLA

MYRTIE L. FRASURE)
(o/b/o ASHLEY DAWN ANDERSON))
)
 Claimant-Petitioner)
)
 v.)
)
 KJW MINING CONSTRUCTION,) DATE ISSUED: 08/24/2004
 INCORPORATED, aka VAN HOOSER)
 MINING & CONSTRUCTION,)
 INCORPORATED)
)
 and)
)
 AMERICAN BUSINESS & MERCANTILE)
 INSURANCE MUTUAL, INCORPORATED)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Myrtie L. Frasure, Harold, Kentucky, *pro se*.

Mark E. Solomons and Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order (03-BLA-5930) of Administrative Law Judge Robert L. Hillyard denying benefits on a subsequent 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 denied this subsequent survivor's claim in accordance with 20 C.F.R. §725.309(d)(3). On appeal, claimant generally challenges the administrative law judge's denial of survivor's benefits. Employer responds to claimant's appeal, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 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 rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The pertinent procedural history of this case is as follows: Claimant filed the initial survivor's claim on September 27, 1996. Director's Exhibit 3. This survivor's claim was denied by the Department of Labor on April 4, 1997 and March 12, 1998 because claimant failed to establish the existence of pneumoconiosis and death due to

¹Claimant is pursuing this claim on behalf of her daughter, Ashley Dawn Anderson, as a dependent minor of the deceased miner, Kirby Anderson. The miner filed his first claim on November 2, 1988. Director's Exhibit 1. This claim was denied by the Department of Labor on April 12, 1989. *Id.* Because the miner did not pursue this claim any further, the denial became final. The miner filed his second claim on October 10, 1995. Director's Exhibit 2. This claim was denied by the Department of Labor on January 29, 1996. *Id.* The denial became final because the miner did not pursue this claim any further. The miner died on September 25, 1996. Director's Exhibits 3, 4, 7, 14.

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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

pneumoconiosis. *Id.* Because claimant did not pursue this survivor's claim any further, the denial became final. More than one year later, on August 20, 1999, claimant filed another survivor's claim, which constituted a duplicate claim pursuant to 20 C.F.R. §725.309 (2000), rather than a request for modification pursuant to 20 C.F.R. §725.310 (2000). Director's Exhibit 4. On December 13, 1999, this duplicate survivor's claim was denied by the Department of Labor because claimant failed to establish the existence of pneumoconiosis, death due to pneumoconiosis, that she was an eligible survivor of the miner and that she was dependent on the miner at the time of his death. *Id.* Since claimant did not pursue this survivor's claim any further, the denial became final. On July 27, 2001, more than a year later, claimant filed the most recent survivor's claim, which constituted a subsequent claim pursuant to 20 C.F.R. §725.309, rather than a request for modification pursuant to 20 C.F.R. §725.310.³ Director's Exhibit 7. On February 27, 2002, employer filed a request that the administrative law judge dismiss the 2001 survivor's claim pursuant to 20 C.F.R. §725.309.⁴ On September 5, 2003, the district director issued an Order to Show Cause why the 2001 survivor's claim should not be denied based on claimant's failure to establish a change in an applicable condition of entitlement in accordance with 20 C.F.R. §725.309.⁵ Director's Exhibit 28. In the Show Cause Order, claimant was given thirty days to submit evidence that demonstrated that one of the applicable conditions of entitlement had changed since the denial of the prior claim or to submit a written statement indicating her intent to continue the claim and indicating when evidence would be submitted. *Id.* On February 25, 2003, the district director denied claimant's 2001 survivor's claim because claimant failed to demonstrate a change in any condition of entitlement. Director's Exhibit 31. Claimant requested a

³On July 27, 2001, claimant filed a request for a survivor's claim form, which the Department of Labor construed as an intent to file a claim. Director's Exhibit 5. Claimant filed the survivor's claim form on September 14, 2001. Director's Exhibit 7.

⁴20 C.F.R. §725.465(a) provides that a claim may be dismissed for the failure of claimant, or claimant's counsel, to appear at a scheduled hearing, to comply with an order issued by an administrative law judge, or to submit new evidence where there has been a prior final adjudication of the claim or defense to the claim. 20 C.F.R. §725.465(a)(1)-(3).

⁵Section 725.465(c) provides that "[i]n any case where a dismissal of a claim, defense, or party is sought, the administrative law judge shall issue an order to show cause why the dismissal should not be granted and afford all parties a reasonable time to respond to such order." 20 C.F.R. §725.465(c). An order to show cause allows the claimant an opportunity to explain her actions and to take the steps necessary to avoid dismissal of the claim.

hearing on March 3, 2003 and March 5, 2003.⁶ Director's Exhibits 32, 35. Although the administrative law judge notified the parties that a hearing was scheduled for October 15, 2003, employer filed a request for summary judgment on August 6, 2003. On August 8, 2003, the administrative law judge issued an Order to Show Cause. Therein, the administrative law judge ordered claimant to show cause, in writing, on or before August 25, 2003, why the 2001 survivor's claim should not be dismissed for the reasons stated in employer's request for summary judgment. The record does not indicate that claimant responded to the administrative law judge's order. However, the administrative law judge did not issue an order of summary judgment. Rather, on August 28, 2003, the administrative law judge canceled the hearing scheduled for October 15, 2003 and issued a Decision and Order denying benefits on the merits.

We first address the administrative law judge's denial of survivor's benefits pursuant to 20 C.F.R. §725.309(d)(3). As previously noted, the most recent survivor's claim was filed more than one year after the denial of claimant's 1999 survivor's claim. Director's Exhibits 4, 7. Consequently, the administrative law judge correctly stated that "[t]he present claim does not satisfy the requirements of a motion for modification."⁷ Decision and Order at 2. In considering claimant's 2001 survivor's claim, the administrative law judge concluded that "[b]ecause the prior denial was based upon the [m]iner's physical condition at the time of his death and the only conditions of entitlement at issue in this claim are necessarily related to the [m]iner's physical condition at the time of his death, the present claim must, therefore, be denied pursuant to 20 C.F.R. §725.309(d)(3)." *Id.* at 3. The pertinent regulation provides that a subsequent claim filed by a surviving spouse, child, parent, brother, or sister shall be denied unless the applicable conditions of entitlement in such claim include at least one condition unrelated to the miner's physical condition at the time of his death. *See* 20 C.F.R. §725.309(d)(3). Since the only conditions of entitlement in claimant's 2001 survivor's claim relate to the miner's physical condition at the time of his death, we hold that the 2001 survivor's claim was properly denied in accordance with 20 C.F.R. §725.309(d)(3). *See generally* *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992).

⁶Claimant's attorney filed the March 3, 2003 request for a hearing on her behalf. Director's Exhibit 32. Claimant filed the March 5, 2003 request for a hearing in a handwritten letter. Director's Exhibit 35.

⁷The pertinent regulation provides that "[u]pon his or her own initiative, or upon the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the district director may, at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits. *See* 20 C.F.R. §725.310(a).

Next, we address the administrative law judge's failure to conduct a hearing. Although a hearing was requested by claimant and scheduled for October 15, 2003, the administrative law judge canceled it and issued a Decision and Order denying benefits. The Act and regulations mandate that an administrative law judge hold a hearing on any claim (including a request for modification filed with the district director) whenever a party requests such a hearing, unless such hearing is waived by the parties or a party requests summary judgment. *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69 (2000). In support of its request for summary judgment, employer argued that claimant's 2001 survivor's claim must be denied pursuant to 20 C.F.R. §725.309(d)(3). Although the administrative law judge did not issue an order of summary judgment in response to employer's request that he do so, the administrative law judge's Decision and Order denying benefits had the same effect in that a denial of claimant's 2001 survivor's claim was required as a matter of law in either method of disposition. Therefore, we hold that any error by the administrative law judge in failing to conduct a hearing before issuing a Decision and Order in this case is harmless. *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