

BRB No. 98-1494 BLA

CLARICE E. HENSLEY)
(Widow of WILLIAM H. HENSLEY, JR.))
)
 Claimant-Petitioner)
)
 v.)
)
 KNOX CREEK COAL CORPORATION) DATE ISSUED:
)
)
 and)
)
 UNITED AFFILIATES CORPORATION)
)
)
 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 On Remand of James Guill, Administrative Law Judge, United States Department of Labor.

Clarice E. Hensley, Hurley, Virginia, *pro se*.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRAWERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, without the aid of counsel, the Decision and Order On Remand (94-BLA-1158) of Administrative Law Judge James Guill denying benefits on a 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).¹ This case is before the Board for the second time. Originally, in an Order Granting Motion for Summary Judgment and Dismissing Claim issued on April 21, 1995, the administrative law judge found that claimant was properly notified of the denial of her first survivor's claim pursuant to 20 C.F.R. §725.478 and therefore denied claimant's second survivor's claim as a duplicate survivor's claim on the basis of the denial of her original claim pursuant to 20 C.F.R. §725.309(d). On appeal, the Board held that the administrative law judge erred in applying Section 725.309(d) to this claim, holding that claimant's original survivor's claim was still viable in light of a letter dated September 14, 1988, submitted by claimant's attorney at that time to the Department of Labor. *Hensley v. Knox Creek Coal Corp.*, BRB No. 95-1479 BLA (Jun. 19, 1996)(unpub.). On reconsideration *en banc*, inasmuch as it was unclear what documents were in the record, the Board remanded the case to the administrative law judge to determine whether the letter dated September 14, 1988, as well as another letter dated March 26, 1990, from claimant's attorney at that time to the Department of Labor and a Department of Labor Report of Telephone or Office Calls dated October 28, 1988, are part of the official record pursuant to 20 C.F.R. §§725.404, 725.421, 725.455(b) and 725.456. *Hensley v. Knox Creek Coal Corp.*, BRB No. 95-1479 BLA (Nov. 4, 1997)(on recon. *en banc*)(unpub.). In addition, the Board remanded the case for the administrative law judge to determine, if necessary, whether the September 14, 1988, letter constitutes a valid request for modification pursuant to 20 C.F.R. §725.310.

¹ Claimant is the surviving widow of the miner, William H. Hensley, Jr., who died on October 4, 1986, Director's Exhibits 1, 10-11, 22. The miner originally filed a claim on July 27, 1973, which was denied on May 14, 1981, Director's Exhibit 21. No further action was taken on the miner's claim and it is not at issue herein.

Subsequent to the miner's death, claimant filed a survivor's claim on March 5, 1987, which was ultimately denied on August 22, 1988, Director's Exhibit 22. Claimant filed a second survivor's claim, at issue herein, on December 9, 1993, Director's Exhibit 1.

In response to an order issued by the administrative law judge on remand to clarify whether the letter dated September 14, 1988, as well as the letter dated March 26, 1990, from claimant's attorney at that time to the Department of Labor and a Department of Labor Report of Telephone or Office Calls dated October 28, 1988, were part of the official record, the Department of Labor informed the administrative law judge that the documents in question were not part of the record forwarded to the Office of Administrative Law Judges. Decision and Order On Remand at 2. The administrative law judge found the Department of Labor's conclusion supported by employer's assertion that it had never received copies of the documents in question and by the fact that no evidence has been submitted by claimant or employer outside of the official record. Thus, the administrative law judge held that the documents in question were not part of the official record. Nevertheless, the administrative law judge further held that the September 14, 1988, letter from claimant's attorney at that time to the Department of Labor did not constitute a request for modification pursuant to Section 725.310. Accordingly, the administrative law judge again denied claimant's second survivor's claim as a duplicate survivor's claim on the basis of the denial of her original claim pursuant to Section 725.309(d).² Claimant's appeal, herein, followed. Employer responds, urging that the administrative law judge's Decision and Order On Remand denying benefits be affirmed. The Director, Office of Workers' Compensation Programs [the Director], as a party-in-interest, has not responded to this appeal.

In an appeal filed by a claimant without the aid of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence, *see Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1985). If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

² The record now before the Board on appeal does not contain the letters dated September 14, 1988, and March 26, 1990, from claimant's attorney at that time to the Department of Labor and the Department of Labor Report of Telephone or Office Calls dated October 28, 1988.

Section 725.309(d) provides that a duplicate survivor's claim must be denied unless the later claim is a request for modification and the requirements of 20 C.F.R. §725.310 are met, *i.e.*, that it is filed within one year after the denial of the initial claim. 20 C.F.R. §725.309(d); *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992); *Mack v. Matoaka Kitchikan Fuel*, 12 BLR 1-197 (1989); *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). Initially, we affirm the administrative law judge's determination that the letters dated September 14, 1988, and March 26, 1990, from claimant's attorney at that time to the Department of Labor and a Department of Labor Report of Telephone or Office Calls dated October 28, 1988, are not part of the official record, as this finding is supported by substantial evidence, *see* 20 C.F.R. §§725.404, 725.421, 725.455(b) and 725.456.³ Consequently, there is no evidence in the record indicating that claimant filed her second claim in accordance with the provisions of Section 725.310. Claimant's first survivor's claim, filed on March 5, 1987, was finally denied by the district director on August 22, 1988, Director's Exhibit 22. Based on the evidence of record, claimant took no further action with respect to this claim, but rather filed a second survivor's claim on December 9, 1993, more than one year after the denial of her initial survivor's claim. Director's Exhibit 1. Moreover, both employer and the Director raised Section 725.309(d) as an issue to be considered by the administrative law judge, Director's Exhibit 23, *see Watts, supra; see also Jordan v. Director, OWCP*, 892 F.2d 482, 13 BLR 2-184 (6th Cir. 1989); *Clark, supra*. Thus, the later claim did not satisfy the timeliness requirement set forth in Section 725.310(a) and, according to the terms of Section 725.309(d), was properly denied by the administrative law judge as a duplicate survivor's claim. 20 C.F.R. §725.310(a), *see Watts, supra; Mack, supra; Clark, supra*.

³ Inasmuch as we affirm the administrative law judge's determination that the letters dated September 14, 1988, and March 26, 1990, from claimant's attorney at that time to the Department of Labor and a Department of Labor Report of Telephone or Office Calls dated October 28, 1988, are not part of the official record, we need not address the administrative law judge's finding that the September 14, 1988, letter from claimant's attorney at that time to the Department of Labor did not constitute a request for modification pursuant to Section 725.310 as moot, *see Andrews v. Petroleum Helicopters, Inc.*, 15 BRBS 166 (1982).

Accordingly, the Decision and Order On Remand of the administrative law judge's denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge