

BRB No. 02-0418 BLA

NANCY F. POTTER)
(Widow of RICHARD POTTER))
)
 Claimant-Petitioner)
)
 v.)
)
 R. L. POTTER TRUCKING,) DATE ISSUED:
)
 INCORPORATED)
)
 Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Nancy F. Potter, Pikeville, Kentucky, *pro se*.

J. Logan Griffith (Porter, Schmitt, Jones & Banks), Paintsville, Kentucky, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,¹ the Decision and Order

¹ Susie Davis, President of the Kentucky Black Lung Association, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms.

- Denying Benefits (01-BLA-0540) of Administrative Law Judge Rudolf L. Jansen 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 found twenty-one years of coal mine employment established and based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718. Reviewing the history of this case, the administrative law judge noted that the miner had filed applications for black lung benefits on April 12, 1995 and September 25, 1996, which were denied and are now closed. Director's Exhibits 16, 17, 20. The miner's September 25, 1996 claim was denied by the district director on January 22, 1997. Subsequent to the miner's death on January 21, 1997, Director's Exhibit 1, claimant filed an application for survivor's benefits on March 25, 1997, also appealing the denial of the miner's claim. Director's Exhibit 18. The district director, pursuant to an informal conference, found the existence of pneumoconiosis established in both claims, but found that the evidence failed to establish total disability or causation in the miner's claim and failed to establish that pneumoconiosis contributed to the miner's death in the

Davis is not representing claimant on appeal. *See Shelton v. Claude Keen Trucking Co.*, 19 BLR 1-88 (1995)(order).

² The 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.

survivor's claim. Accordingly, benefits were denied on both the miner's and the survivor's claims in a Proposed Decision and Order issued on February 2, 1998. Director's Exhibit 18-20; see Decision and Order at 4. The claims were again denied by the district director on March 24, 1998, after reconsideration of additional evidence. The district director noted that claimant submitted evidence establishing the relationship and dependency of her adopted daughter, Mercedes, but that the only other additional evidence submitted consisted of x-ray reports from Drs. Broudy, Fino and Jarboe and that since the presence of coal workers' pneumoconiosis had already been established by means of autopsy evidence, the x-ray evidence was not probative for purposes of modification and the finding of coal workers' pneumoconiosis remained unchanged. Director's Exhibit 18 at 19. On March 9, 1999, claimant's lay representative requested modification of the district director's March 24, 1998 decision. Director's Exhibit 18 at 13. After reviewing additional medical evidence submitted by claimant, which consisted of an x-ray report from Dr. Patel and a copy of the miner's autopsy report, the district director issued a Proposed Decision and Order denying claimant's modification request on April 26, 1999, because the evidence submitted did not establish that a change in conditions or a mistake in a determination of fact had been made in the previous denials, *i.e.*, the previous denials were based on the district director's findings that total disability and causation were not established on the miner's claim and that death due to pneumoconiosis was not established on the survivor's claim; the existence of

pneumoconiosis had already been established on both claims. Claimant was advised that she could request a formal hearing of the district director's decision within thirty days, otherwise the proposed order denying modification would become final. Director's Exhibit 18 at 3. Claimant, apparently, did not respond to or appeal this proposed Decision and Order until June 27, 2000, when her lay representative requested a hearing on both claims. Director's Exhibit 18 at 2. The district director acknowledged receipt of her request for a hearing as her appeal, but explained that because she had failed to file a timely appeal of the April 26, 1999 decision denying modification, her claims were closed and that her only option was to file a new application for benefits. Director's Exhibit 18 at 1. Claimant filed the current claim on August 3, 2000. The administrative law judge found that because claimant failed to respond within one year to the previous denial of both claims issued on April 26, 1999, her second application for benefits was not a request for modification, "but a 'subsequent' new claim under the regulations, and must be adjudicated pursuant to Section 725.309." Decision and Order at 5. The administrative law judge found that "where a claimant files more than one claim and the prior claim has been finally denied, the later claims must be denied on the grounds of the prior denial unless the evidence demonstrates 'a material change in condition.' 20 C.F.R. §725.309(d)." Decision and Order at 5. The administrative law judge further found that when an earlier survivor's claim has been denied, then any subsequent survivor's claim shall also be denied unless the later claim is a request for modification, *citing Watts v.*

Peabody Coal Co., 17 BLR 1-68 (1992) and *Mack v. Matoaka Kitchehan Fuel*, 12 BLR 1-197 (1989). Thus, the administrative law judge further found that since the denial of claimant's prior survivor's claim was based on the fact that the miner's pneumoconiosis did not contribute to his death, her current claim must also be denied pursuant to Section 725.309 (2000). Likewise, while not specifically referring to the miner's claim, the administrative law judge appears to have also found that it must be denied because claimant could not meet the burden of establishing a material change in a deceased miner's condition, *i.e.*, total disability pursuant to 20 C.F.R. §725.309(d)(2000). Decision and Order at 4-5.

On appeal, claimant contends that she filed a timely request for modification of the district director's denial of benefits in both the miner's and survivor's claims in March of 1999, and that the administrative law judge should have granted her request for modification pursuant to 20 C.F.R. §725.310 (2000). Claimant also contends that the administrative law judge should have accorded greatest weight to the treating physician's opinion and the autopsy report to find that the miner's death was due to pneumoconiosis. Claimant, therefore, contends that she should be awarded benefits under both the miner's and the survivor's claims. Employer responds, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the Decision and Order and the evidence of record, we conclude that the administrative law judge's denial of benefits in the miner's and the survivor's claims is supported by substantial evidence and contains no reversible error. Under the terms of Section 725.309(d)(2000), if an earlier survivor's claim has been finally denied, the new claim must also be denied unless the later claim is a request for modification and the requirements of Section 725.310 (2000) are met. 20 C.F.R. §725.309(d)(2000). See *Watts, supra*; see also *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); compare *Jordan v. Director, OWCP*, 892 F.2d 482, 13 BLR 2-184 (6th Cir. 1989). Likewise, if an earlier miner's claim has been finally denied, the new claim shall also be denied, unless the district director determines that there has been a material change in conditions or the later claim is a request for modification and the requirements of Section 725.310 (2000) have been met. 20 C.F.R. §725.309(d)(2000); see *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10

(6th Cir. 1994).

It is apparent from the record that the miner's and the survivor's claims were denied because total disability and causation were not established on the miner's claim and death due to pneumoconiosis was not established on the survivor's claim.

Claimant's subsequent requests for modification were denied because claimant failed to establish those elements and claimant's submission of evidence establishing the existence of pneumoconiosis was not found to be probative on modification since the existence of pneumoconiosis on both claims had already been established. Because claimant did not respond to or appeal the April 26, 1999 denial of both claims until June 27, 2000, when she requested a hearing on both claims, the administrative law judge concluded that the district director properly found that the earlier claims were closed and that claimant's only recourse was to file a new application for benefits. See 20 C.F.R. §725.309(d). Considering the new claim, the administrative law judge properly found that entitlement was not established on either the miner's or the survivor's claims because it was not possible for claimant to show a material change in the deceased miner's condition, *i.e.*, that he was now totally disabled pursuant to Section 725.309(d)(2000). Decision and Order at 6; see *Ross, supra*; *Eccher v. Director, OWCP*, 10 BLR 1-1 (1987).

Accordingly, the administrative law judge's Decision and Order - Denying Benefits on both the miner's and the survivor's claims is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge