

BRB No. 99-0479 BLA

DOROTHY M. STUBBLEFIELD )  
(Widow of JAMES W. STUBBLEFIELD) )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 DIRECTOR, OFFICE OF WORKERS' ) DATE ISSUED:  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

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

Thomas E. Johnson and Anne Megan Davis (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Sarah M. Hurley (Henry L. Solano, 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: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order- Rejection of Claim (97-BLA-1697) of Administrative Law Judge Rudolf L. Jansen denying benefits on a claim filed pursuant to the

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<sup>1</sup> Claimant, Dorothy Stubblefield, is the divorced widow of the miner, James Stubblefield. The record demonstrates that the miner and claimant were divorced in 1972, Director's Exhibit 9, and that the miner died of an acute myocardial infarction due to arteriosclerotic heart disease in 1977, Director's Exhibit 2. The record demonstrates that, at the time of his death, the miner was receiving Part B benefits. Director's Exhibit 9.

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). The administrative law judge concluded that claimant failed to file her claim within six months of the miner's death and thus failed to establish derivative entitlement to benefits.<sup>2</sup> Decision and Order at 3-4, 7. The administrative law judge further concluded that, even if claimant had filed a claim within the six month period, claimant failed to establish dependency upon the miner at the time of his death. Decision and Order at 7-8. The administrative law judge thus denied the instant claim as a duplicate survivor's claim pursuant to 20 C.F.R. §725.309(d).

On appeal, claimant contends that the administrative law judge erred in concluding that she did not file a survivor's claim in 1977 inasmuch as claimant's actions during that time period constituted a constructive filing of a claim. Claimant also asserts that the administrative law judge erred in concluding that claimant's "constructively filed" 1977 claim merged into her later 1980 claim, or that she had elected review of that claim by the Department of Labor and not appealed the denial. Finally, claimant asserts that the hearing testimony clearly establishes claimant's dependency on the miner at the time of his death and that the administrative law judge erred in failing to make this determination. The Director responds and urges affirmance of the denial of benefits. The Director contends that claimant failed to establish derivative entitlement inasmuch as claimant failed to file a claim in a timely manner and even if claimant were deemed to have filed such a claim, the record fails to establish claimant's dependency on the miner.

The Board's scope of review is defined by statute. If the administrative law judge's

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<sup>2</sup> An eligible survivor is derivatively entitled to survivor's benefits if the deceased miner, as a result of a claim filed prior to January 1, 1982, was receiving benefits at the time of his death under a finally adjudicated award of benefits for total disability due to pneumoconiosis. 20 C.F.R. §§725.212, 725.218, 725.222. Where the miner's claim was ultimately denied or there is no eligible survivor, a survivor's award cannot be derived from the miner's award. 30 U.S.C. §901(a); 20 C.F.R. §725.212; *see Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 1328, 12 BLR 2-60, 2-79 (3d Cir. 1988); *Smith v. Camco Mining, Inc.*, 13 BLR 1-17 (1989).

findings of fact and conclusions of law 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).

Claimant contends that, within six months of the miner’s death, she attempted to file claims at Social Security Administration offices in both Charleston, West Virginia and Chicago, Illinois. Claimant asserts that these offices failed to properly assist her in the actual filing of her claims, but that her inquiries and requests for information constituted a “constructive” filing for benefits within the six month period subsequent to the miner’s death. Claimant’s Brief at 5-8. Claimant asserts that she is therefore entitled to derivative entitlement to benefits based on the award of benefits in the miner’s Part B claim.

The administrative law judge found that claimant did not file a claim within six months of the miner’s death and failed to demonstrate any intent to file a claim. Decision and Order at 7. Accordingly, the administrative law judge concluded that claimant was not derivatively entitled to benefits pursuant to the miner’s previous Part B award. We reject claimant’s assertions in this regard and affirm the determination of the administrative law judge.

In order to be eligible for derivative benefits pursuant to an award on a miner’s Part B claim, a surviving divorced spouse must file a claim within six months of the miner’s death and demonstrate that she was dependent on the miner at the time of his death. 20 C.F.R. §410.231(b). The Act does not provide for any type of constructive filing of a claim. A claim is defined as a “writing asserting a right to benefits,” 20 C.F.R. §410.220, through a prescribed form, 20 C.F.R. §410.221. While the Act does acknowledge claimant’s right to submit a declaration of intent to file a claim as tantamount to the actual filing of a claim, such an intent must also be manifested in a written instrument. 20 C.F.R. §410.429(a), (c). In the instant case, the record is devoid of a claim filed within six months of the miner’s death or any written instrument manifesting an intent by claimant to file a survivor’s claim. Accordingly, contrary to claimant’s assertion, the record does not support a finding that claimant filed a claim within six months of the miner’s death.

Under the Act, a divorced spouse may establish dependency on the miner by showing that in the month before the miner died, the divorced spouse was receiving at least one-half of her support from the miner or the divorced spouse was receiving substantial contributions from the miner pursuant to a written agreement or a court order requiring the miner to pay the divorced spouse substantial contributions. 20 C.F.R. §725-217(a)(1)-(3). In the instant case, the administrative law judge properly concluded that the record is devoid of any written agreement or court order requiring the miner to make contributions to the claimant. Accordingly, the administrative law judge properly concluded that claimant was charged with demonstrating that she received at least one-half of her support from the miner. *See*

Section 725.217(a). The administrative law judge concluded that the only evidence of the miner's contribution was elicited in hearing testimony and concluded that the income and expense evidence was not sufficiently reliable to establish the miner's contribution to claimant of at least fifty percent. Decision and Order at 8. The administrative law judge concluded that claimant's testimony conflicted with her daughter's testimony and changed several times throughout the hearing. The administrative law judge, as trier-of-fact, is charged with determining the credibility of testimony. *See Wenanski v. Director, OWCP*, 8 BLR 1-487 (1986); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Contrary to claimant's assertions that the administrative law judge erred in reading portions of testimony "too literally" and "ignor[ed] the sense" of the testimony, the hearing transcript is replete with inconsistent testimony and unexplained statements, *i.e.*, the amount of money received monthly from the miner, *see* Hearing Transcript at 52-74. Thus, the administrative law judge did not abuse his discretion in concluding that claimant failed to carry her burden of demonstrating dependency at Section 725.217(a)(1). Accordingly, we affirm the administrative law judge's determination that claimant is precluded from demonstrating derivative entitlement to survivor's benefits pursuant to the miner's Part B award.<sup>3</sup> *See* 20 C.F.R. §410.231.

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<sup>3</sup> In view of our conclusion that claimant failed to establish that the claim was filed in 1977, we need not address the assertion that the administrative law judge erred in concluding that such a claim merged with the claim filed in 1980. *See generally Coen v. Director, OWCP*, 7 BLR 1-30 (1984).

Inasmuch as claimant is precluded from establishing derivative entitlement, claimant must independently establish entitlement to benefits. *See generally* 20 C.F.R. §725.1. The instant 1997 claim constitutes a duplicate survivor's claim. Claimant's initial survivor's claim, filed in 1980, was denied on the basis of claimant having failed to establish dependency on the miner at the time of his death. Director's Exhibit 9. The Board has held that a duplicate survivor's claim is properly denied where the later survivor's claim is filed more than one year after the final denial of the previous survivor's claim, as it would not meet the requirements of Section 725.310, and pursuant to Section 725.309, duplicate survivor's claims are subject to denial on the basis of the previously denied survivor's claim.<sup>4</sup> *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*, 838 F.2d 197, 11 BLR 2-46 (6th Cir. 1988); *see Jordan v. Director, OWCP*, 892 F.2d 482, 13 BLR 2-184 (6th Cir. 1989). Inasmuch as the instant survivor's claim was filed on January 24, 1997, Director's Exhibit 1, more than one year after the previous final denial of September 9, 1980, Director's Exhibit 9, claimant has not satisfied the modification requirements of Section 725.310, and thus can not satisfy the requirement for a duplicate survivor's claim at Section 725.309. Thus, the administrative law judge's denial of benefits on this claim is proper.<sup>5</sup>

Accordingly the administrative law judge's Decision and Order-Rejection of Claim is affirmed.

SO ORDERED.

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<sup>4</sup> Section 725.309(d) specifically states, in relevant part:

"If an earlier survivor's claim...has been finally denied, the new claim filed 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 are met."

20 C.F.R. §725.309(d).

<sup>5</sup> Inasmuch as the record is devoid of any evidence supporting a finding that the miner's death was due to or hastened by pneumoconiosis pursuant to 20 C.F.R. §718.205, claimant is precluded from establishing entitlement to survivor's benefits as a matter of law. *See Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); *see also Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 20 BLR 2-335 (10th Cir. 1996); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge