

BRB No. 99-0601 BLA

ELSIE CHURCH)
(Widow of SYLVESTER CHURCH))
)
 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 of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Elsie Church, Pulaski, Virginia, *pro se*.

Jennifer U. Toth (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, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order (98-BLA-0466) of Administrative Law Judge Mollie W. Neal (the administrative law judge) denying benefits in 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.

¹Claimant is the divorced widow of the miner, Sylvester Church, who died on July 9, 1966. Director's Exhibits 1, 10, 11, 12.

§901 *et seq.* (the Act). Because claimant's 1994 duplicate survivor's claim² was not

²The pertinent procedural history of this case is as follows: Claimant filed her first survivor's claim with the Social Security Administration (SSA) on February 7, 1973. Director's Exhibit 12. After several administrative denials by the SSA, this survivor's claim was forwarded to the Department of Labor (DOL), which denied benefits on May 4, 1981. *Id.* Further, on November 23, 1983, Administrative Law Judge Nicodemo Degregorio issued a Decision and Order denying benefits. *Id.* On November 28, 1983, claimant appealed Judge Degregorio's denial of benefits. *Id.* However, the Board subsequently dismissed claimant's appeal as abandoned. *Church v. Director, OWCP*, BRB No. 83-2738 BLA (Order)(Sept. 25, 1985)(unpub.). Inasmuch as claimant did not pursue this survivor's claim any further, the denial became final. Claimant filed her second survivor's claim with the DOL on August 30, 1994. Director's Exhibit 11. After this survivor's claim was denied by the DOL on October 3, 1994, claimant filed a request for a hearing on November 29, 1994. *Id.* However, on August 18, 1995, the district director issued a Final Memorandum of Informal Conference, denying this survivor's claim in accordance with 20 C.F.R.

filed within a year of the denial of claimant's prior 1973 survivor's claim, the administrative law judge denied benefits in accordance with 20 C.F.R. §725.309. On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, responds by letter, urging the Board to affirm the administrative law judge's Decision and Order.

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. See *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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

With regard to 20 C.F.R. §725.309, the administrative law judge found that "Claimant's refiled survivor's claim must be denied based on the denial of her prior claim." Decision and Order at 5. Pursuant to 20 C.F.R. §725.309(c) and (d), if an earlier survivor's claim is finally denied, a subsequent survivor's claim must also be denied based on the prior denial unless claimant's subsequent survivor's claim is considered a petition for modification, thereby satisfying the requirement of 20

§725.309(d) because it was a duplicate survivor's claim. *Id.* Claimant filed her most recent survivor's claim with the DOL on September 16, 1997. Director's Exhibit 1. However, in her decision, Administrative Law Judge Mollie W. Neal (the administrative law judge), citing *Plesh v. Director, OWCP*, 71 F.3d 103, 20 BLR 2-30 (3d Cir. 1995), stated that because "Claimant's November 29, 1994 request for formal hearing on the claim filed on August 30, 1994 was not acted upon by [the DOL],...[it] is still pending." Decision and Order at 4 n.2. Consequently, the administrative law judge found that "Claimant's third claim merged with the claim filed in August of 1994." *Id.*

C.F.R. §725.310. See *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992); *Mack v. Matoaka Kitchehan Fuel*, 12 BLR 1-197 (1989). In the instant case, claimant's first survivor's claim, filed on February 7, 1973, was denied by Administrative Law Judge Nicodemo Degregorio on November 23, 1983. Director's Exhibit 12. On September 25, 1985, the Board dismissed claimant's appeal of Judge Degregorio's denial of benefits as abandoned. *Church v. Director, OWCP*, BRB No. 83-2738 BLA (Order)(Sept. 25, 1985)(unpub.). As the administrative law judge correctly stated, "Claimant took no further action with regard to the [survivor's] claim...[but instead] filed a second claim on August 30, 1994, more than one year after the denial of her initial claim." Decision and Order at 5. Thus, the later claim did not satisfy the timeliness requirement set forth in 20 C.F.R. §725.310(a) and, according to the terms of 20 C.F.R. §725.309(d), was properly denied as a duplicate survivor's claim. 20 C.F.R. §725.310; see *Watts, supra*; *Mack, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge