

BRB No. 12-0298 BLA

PEGGY LUE COLEMAN)	
(Widow of EVERETT DEAN COLEMAN))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CEDAR COAL COMPANY)	DATE ISSUED: 02/27/2013
)	
Employer-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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Peggy Lue Coleman, Cedar Grove, West Virginia, *pro se*.

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

PER CURIAM:

Claimant¹ appeals, without the assistance of counsel, the Decision and Order - Denying Benefits (2011-BLA-5363) of Administrative Law Judge Michael P. Lesniak,

¹ Claimant is the widow of the deceased miner, who died on April 22, 1985. Director's Exhibit 11. The record indicates that the miner filed a claim for benefits on February 24, 1984, which was finally denied on September 28, 1990, because the evidence did not establish total respiratory disability. *See* Living Miner's Closed Claim.

rendered on a subsequent survivor's claim² filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The administrative law judge denied claimant's subsequent claim because, under 20 C.F.R. §725.309(d)(3), claimant could not establish a change in an applicable condition of entitlement since the denial of the prior claim.

On appeal, claimant generally challenges the administrative law judge's denial of her claim. Neither employer, nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, rational, and in accordance with applicable law.³ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

A survivor's claim filed more than one year after the effective date of a final order denying a previous survivor's claim "shall be denied unless the applicable conditions of entitlement in such a claim include at least one condition unrelated to the miner's physical condition at the time of his death." 20 C.F.R. §725.309(d)(3); *see Boden v. G.M. & W. Coal Co.*, 23 BLR 1-39, 1-40 (2004). In this case, the administrative law judge properly found that the conditions of entitlement that claimant failed to

² Claimant filed her initial claim for survivor's benefits on July 24, 1985. Director's Exhibit 1. This claim was consolidated with the miner's claim for the purpose of decision only and was finally denied on September 28, 1990, as claimant did not prove that the miner's death was due to pneumoconiosis. *Id.* Claimant filed a second survivor's claim on May 8, 1997. Director's Exhibit 2. The claim was denied by the district director on September 22, 1997, because claimant failed to establish that pneumoconiosis caused the miner's death. *Id.* On October 28, 1997, claimant requested an informal conference and a formal hearing. *Id.* In a memorandum of informal conference issued on February 23, 1998, the district director stated that claimant was informed that she could not prevail unless there was a change in the Black Lung Benefits Act or regulations. *Id.* At claimant's request, the claim was closed. *Id.* Claimant filed the present subsequent survivor's claim on August 27, 2010. Director's Exhibit 4.

³ The case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

demonstrate in her prior survivor's claim related solely to the miner's physical condition at the time of his death, e.g., whether the miner's death was due to pneumoconiosis. Decision and Order at 4-5; Director's Exhibits 1, 2. The administrative law judge further determined correctly that the evidence submitted in connection with claimant's subsequent claim did not address a condition of entitlement unrelated to the miner's physical condition. Decision and Order at 5; Claimant's Exhibits 1, 2. Thus, we affirm the administrative law judge's finding that entitlement is precluded in this subsequent survivor's claim pursuant to 20 C.F.R. §725.309(d)(3). See *Boden*, 23 BLR at 1-41; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

The administrative law judge also considered whether claimant could establish entitlement pursuant to amended Sections 921(c)(4) and 932(l) of the Act, 30 U.S.C. §§921(c)(4), 932(l).⁴ Decision and Order at 4. Amended Section 921(c)(4) provides that if claimant establishes that the miner had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and that the miner had a totally disabling respiratory impairment, there is a rebuttable presumption that the miner's death was due to pneumoconiosis. The administrative law judge found that amended Section 921(c)(4) "does not apply" in this case, as the miner failed to establish total disability in his claim. *Id.* n.6. Although the administrative law judge did not consider that claimant could have invoked the presumption by presenting evidence in conjunction with her subsequent claim that supported a finding of total disability, this omission does not constitute error requiring remand. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Because total respiratory disability is a condition of entitlement related to the miner's physical condition at the time of his death, establishing total disability cannot form the basis for a finding of a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d)(3). See *Moser v. Director, OWCP*, BLR , BRB No. 12-0293 BLA, slip op. at 4 n.4 (Feb. 26, 2013); *Boden*, 23 BLR at 1-41. We affirm, therefore, the administrative law judge's finding that claimant cannot establish entitlement by invoking the presumption at amended Section 921(c)(4).

Section 932(l) provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l). We affirm the administrative law judge's determination that amended Section 932(l) is not available to claimant in this case,

⁴ Congress enacted these amendments on March 23, 2010 and they apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. See Section 1556 of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §§921(c)(4) and 932(l)).

because the miner “was not finally awarded benefits.” Decision and Order at 4; *see* 30 U.S.C. §932(l); Director’s Exhibits 1, 2.

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

JUDITH S. BOGGS
Administrative Appeals Judge