

BRB No. 12-0248 BLA

LELA E. ROTENBERRY)
(Widow of ROBERT J. ROTENBERRY))
)
 Claimant-Petitioner)
)
 v.)
)
 CAHABA RESOURCES INCORPORATED) DATE ISSUED: 01/30/2013
)
 and)
)
 AMERICAN RESOURCES INSURANCE)
 COMPANY)
)
 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 Denying Benefits of Adele H. Odegard,
Administrative Law Judge, United States Department of Labor.

Lela E. Rotenberry, Woodstock, Alabama, *pro se*.

Ward Ballerstedt (Ferreri & Fogle, PLLC), Louisville, Kentucky, for
employer.

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 (2010-BLA-05688) of Administrative Law Judge Adele H. Odegard, rendered on a subsequent survivor's claim filed on March 8, 2010, 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, in accordance with 20 C.F.R. §725.309(d)(3), because she found that claimant could not establish a change in an applicable condition of entitlement since the denial of her first claim.

On appeal, claimant generally challenges the administrative law judge's denial of her claim. Employer responds, urging the Board to affirm the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board² 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, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The record reflects that claimant filed her initial claim for survivor's benefits on May 25, 1994. Director's Exhibit 1. On May 31, 1995, the district director denied benefits, finding that the evidence was insufficient to establish that the miner suffered from pneumoconiosis and that his death was due to pneumoconiosis. *Id.* Claimant filed this survivor's claim, her second, on March 8, 2010. Director's Exhibit 2. On April 19, 2010, the district director issued a Proposed Decision and Order denying benefits pursuant to 20 C.F.R. §725.309. Director's Exhibit 11. At claimant's request, a hearing was held before the administrative law judge on February 2, 2011. Director's Exhibits 12, 14.

¹ Claimant is the widow of the deceased miner, who died on March 4, 1994. Director's Exhibit 7.

² The case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, as the miner's coal mine employment was in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

In considering claimant's subsequent claim, the administrative law judge found that the conditions of entitlement claimant failed to demonstrate in her first survivor's claim related solely to the miner's physical condition at the time of his death. Decision and Order at 5. The administrative law judge further determined that "[t]he basis of [claimant's] current claim is her contention that her husband, the Miner had 'black lung,' and that, prior to his death, he had difficulty breathing." *Id.*, citing Hearing Transcript at 14-16; Claimant's Exhibit 1. The administrative law judge stated:

Even if I were to determine that the evidence the Claimant now submits overcomes the District Director's determination about whether the Miner has pneumoconiosis (which I do not), the governing regulation does not permit an award to the Claimant. This is because the "change in condition" that she has asserted – that the Miner indeed had pneumoconiosis ("black lung"), contrary to the District Director's determination – relates to the Miner's physical condition, and under the regulation a survivor's subsequent claim can be awarded only if the "change in condition" relates to a matter other than the Miner's physical condition at the time of his death.

Id. at 5. Therefore, the administrative law judge denied benefits pursuant to 20 C.F.R. §725.309(d)(3). *Id.*

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); *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992).

In this case, the administrative law judge properly found that the conditions of entitlement that claimant failed to demonstrate in her first survivor's claim related solely to the miner's physical condition at the time of his death. Decision and Order at 5; Director's Exhibit 1. The administrative law judge further found, correctly, that the evidence submitted in connection with claimant's subsequent claim did not address any condition of entitlement unrelated to the miner's physical condition. Decision and Order at 1; Claimant's Exhibit 1. Additionally, the administrative law judge properly found that claimant is not eligible for benefits pursuant to amended Section 932(*l*), as the miner was never awarded benefits on a lifetime claim, filed prior to his death. 30 U.S.C. §932(*l*); *see* Decision and Order at 4. 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).³ 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).

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

³ On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, were enacted. The amendments, in pertinent part, revive Section 932(l) of the Act, which 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 survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. Pub. L. No. 111-148, §1556(b),(c), 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §932(l)).