

BRB No. 93-2477 BLA

FLORENCE P. RILEY)
(Widow of JOHN W. RILEY)
)
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 Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

William Z. Cullen (Cooper, Mitch, Crawford, Kuykendall & Whatley), Birmingham, Alabama, for claimant.

Gary K. Stearman (Thomas S. Williamson, Jr., 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: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order (92-BLA-1328) of Administrative Law Judge Lee J. Romero, Jr. denying benefits on a 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). This case involves duplicate survivor's claims. The miner filed a claim for benefits on December 26, 1972, which was finally denied on August 24, 1981. The miner died on December 19, 1986.

Claimant filed a survivor's claim on January 9, 1987, which was finally denied on July 8, 1987. Claimant filed a second survivor's claim on April 22, 1991. After determining that claimant established that the miner had nine and three-quarter years of coal mine employment, the administrative law judge determined that the claim must be denied as a duplicate claim pursuant to 20 C.F.R. §725.309(d). The administrative law judge

then determined that even if the claim were considered a request for modification pursuant to 20 C.F.R. §725.310, the evidence does not support an award of benefits. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in finding that a material change in conditions had not occurred pursuant to 20 C.F.R. §725.309, that the miner did not suffer from coal workers' pneumoconiosis, that the miner's respiratory dysfunction was not caused by his coal mine employment, and that the miner's death was not due to pneumoconiosis. Claimant also contends that the administrative law judge's Decision and Order does not comport with the Administrative Procedure Act, 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's Decision and Order denying benefits.

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with 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).

Where the record contains two survivors' claims filed by the same claimant, and the previous claim has been denied, the subsequent claim must be denied on the basis of the earlier claim unless the subsequent claim is a request for modification and the requirements of 20 C.F.R. §725.310 are met. See 20 C.F.R. §725.309(d); *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992). The present survivor's claim, which was filed in 1991, is claimant's second. Claimant's prior survivor's claim was finally denied in 1987 and the present claim was filed more than one year after the prior denial and, thus, is not a request for modification pursuant to 20 C.F.R. §725.310. See *Mack v. Matoaka Kitchekan Fuel*, 12 BLR 1-197 (1989). Thus, the "material change in conditions" language of 20 C.F.R. §725.309 is not applicable to the present claim and the administrative law judge properly denied the present claim as a duplicate claim. See Decision and Order at 3; *Watts, supra*; *Mack, supra*. As a result, the administrative law judge's denial of the claim as duplicate claim is affirmed as it is supported by substantial evidence.

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

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge