



Claimant,<sup>1</sup> without the assistance of counsel, appeals the Order Granting Employer's Motion of Summary Judgment and Canceling Hearing (02-BLA-5505) of Administrative Law Judge Gerald M. Tierney on a duplicate 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. §901 *et seq.* (the Act).<sup>2</sup> Claimant filed a duplicate claim for survivor's benefits on January 14, 2002.<sup>3</sup> Director's Exhibit 3. The district director issued a Proposed Decision and Order denying benefits, finding that claimant failed to submit evidence to demonstrate that one of the applicable conditions of entitlement had changed since the prior denial of her claim. 20 C.F.R §725.309(d); Director's Exhibit 15. At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing.<sup>4</sup> Director's Exhibit 18. Employer subsequently filed a

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<sup>1</sup> Helen Hulseley is the surviving spouse of R.D. Hulseley, the miner, who died on January 28, 1999. Director's Exhibit 9.

<sup>2</sup> The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

<sup>3</sup> The miner filed a claim for benefits on April 27, 1995, which was denied by Administrative Law Judge Gerald M. Tierney in a Decision and Order dated January 14, 1998. Judge Tierney determined that the miner failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Director's Exhibit 1. The miner subsequently appealed the denial to the Board, but his appeal was dismissed. The miner then filed a request for modification on December 17, 1998. The district director denied the claim and the miner requested a hearing. Before the matter was referred to the Office of Administrative Law Judges, the miner died. Claimant filed her claim for survivor's benefits on February 26, 1999. Director's Exhibit 1. Following the district director's denial of the survivor's claim, claimant filed a timely request for a hearing. Both cases were then referred for a hearing, which was held on May 18, 2000 before Administrative Law Judge Mollie W. Neal. Judge Neal found that, while the evidence established the existence of pneumoconiosis, claimant failed to establish that the miner was totally disabled due to pneumoconiosis prior to his death. Accordingly, the miner's claim was denied pursuant to 20 C.F.R. §718.204(b). With respect to the survivor's claim, Judge Neal denied benefits, finding that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Director's Exhibit 1.

<sup>4</sup> The administrative law judge originally scheduled a hearing for March 28, 2003. Employer filed a motion for continuance and the hearing was rescheduled for October 21, 2003.

Motion for Summary Judgment, requesting that the administrative law judge deny benefits because claimant failed to submit any evidence to establish a change in a condition of entitlement as required by 20 C.F.R. §725.309(d). By Order dated September 25, 2003, Judge Tierney granted employer's motion, canceled the scheduled hearing, and denied benefits.<sup>5</sup>

On appeal, claimant argues that the administrative law judge erred in granting the employer's motion for summary judgment, and that he erred in denying benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). The Board 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Order Granting Employer's Motion for Summary Judgment, the issues on appeal, and the evidence of record, we conclude that substantial evidence supports the administrative law judge's denial of benefits with regard to the duplicate survivor's claim filed on January 14, 2002. Section 725.309(d) provides in pertinent part:

If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see 20 §725.502(a)(2)), the later claim shall be considered a subsequent claim for benefits. A subsequent claim shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part, except that the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (*see*

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<sup>5</sup> The regulation at 20 C.F.R. §725.452(c) provides:

A full evidentiary hearing need not be conducted if a party moves for summary judgment and the administrative law judge determines that there is no genuine issue as to any material fact and that the moving party is entitled to the relief requested as a matter of law. All parties shall be entitled to respond to the motion for summary judgment prior to decision thereon. 20 C.F.R. §725.452(c).

§§725.202(d) (miner), 725.212 (spouse), 725.218 (child), and 725.222 (parent, brother, or sister) has changed since the prior claim became final.

20 C.F.R. §725.309(d).<sup>6</sup>

In this case, claimant filed a duplicate survivor's claim on January 14, 2002, which was more than one year after the denial of her previous survivor's claim filed on July 31, 2000. In considering the present claim under Section 725.309(d), the administrative law judge properly found that claimant failed to demonstrate that one of the applicable conditions of entitlement had changed since the prior denial of benefits on July 31, 2000. Order Granting Summary Judgment at 2; 20 C.F.R. §725.309(d); *see Watts v. Peabody Coal Co.*, 17 BLR 1-68, 1-70-71 (1992); *Mack v. Matoaka Kitchekan Fuel*, 12 BLR 1-197, 1-199 (1989); *Clark v. Director, OWCP*, 9 BLR 1-205 (1986), *rev'd on other grnds, Clark v. Director, OWCP*, 838 F.2d 197, 11 BLR 2-46 (6th Cir. 1988). Because claimant was unable to satisfy the requirements of Section 725.309(d), we find that the administrative law judge permissibly exercised his discretion in granting the employer's Motion for Summary Judgment and in canceling the scheduled hearing. 20 C.F.R. §725.452(c). Consequently, we affirm the administrative law judge's denial of benefits.

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<sup>6</sup> Section 725.309(d)(3) further provides: "A subsequent claim filed by a surviving spouse, child, parent, brother, or sister shall be denied unless the applicable conditions of entitlement in such 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).

Accordingly, the administrative law judge's Decision and Order Granting Employer's Motion for Summary Judgment and denying benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge