

BRB No. 04-0224 BLA

ALTA RITCHIE MADDEN)	
(Widow of CHESTER RITCHIE))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED: 07/21/2004
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of Order of Dismissal of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Alta Ritchie Madden, Lexington, Kentucky, pro se.

Michael J. Rutledge and Richard A. Seid (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Order of Dismissal (03-BLA-5560) of Administrative Law Judge Rudolf L. Jansen issued on her request for modification of the denial of her duplicate survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

¹ Claimant, Alta Ritchie Madden, is the remarried widow of the miner Chester Ritchie, who died on April 30, 1957, due to a traumatic injury to the head.

amended, 30 U.S.C. §901 *et seq.* (the Act).² This case is before the Board for a second time. The procedural history of the case was discussed in the Board's prior decision dated July 26, 2001 and is incorporated by reference herein.³ Director's Exhibit 8. The Board previously affirmed the denial of claimant's duplicate claim pursuant to 20 C.F.R. §725.309(d). *Id.* Following the Board's decision, the district director received a letter from claimant dated May 29, 2002, which was construed as a request for modification. Director's Exhibit 10. On November 13, 2002, the district director issued a Proposed Decision and Order Denying Request for Modification. Director's Exhibit 11. At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 12. The Director, Office of Workers' Compensation Programs, (the Director) subsequently filed a motion to dismiss, arguing that the modification proceeding involved a duplicate survivor's claim that had been properly denied under the requirements of 20 C.F.R. §725.309(d)(2000). The administrative law judge granted the motion and issued an Order of Dismissal on November 6, 2003.⁴

Claimant appeals, generally arguing that the administrative law judge erred in denying her duplicate survivor's claim and by not awarding benefits. The Director responds, urging affirmance of the Order of Dismissal.

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

² 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.

³ *Madden v. Director, OWCP*, BRB No. 00-1094 BLA (July 26, 2001) (unpub.).

⁴ The administrative law judge first cited the requirement imposed by 20 C.F.R. §725.309(d)(2000) that a duplicate survivor's claim must be denied automatically on the grounds of the denial of the original survivors' claim. The administrative law judge also found that the death certificate, constituting the only medical evidence of record, considered together with claimant's statements regarding the miner's respiratory problems, failed to establish that the miners' death was due to pneumoconiosis as required by 20 C.F.R. §718.205(c).

incorporated into the Act by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant seeks modification of the automatic denial of her duplicate survivor’s claim. The administrative law judge’s Order of Dismissal is supported by substantial evidence and is in accordance with law, however. Consistent with the requirements of Section 725.309(d)(2000), the Board has held that if an earlier survivor’s claim is denied, a subsequent survivor’s claim must also be denied based on the prior denial unless the district director determines that the subsequent claim is a request for modification under Section 725.310 (2000).⁵ 20 C.F.R. §725.309(d) (2000); *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 grounds*, *Clark v. Director, OWCP*, 838 F.2d 197, 11 BLR 2-46 (6th Cir. 1988).⁶

Claimant’s first survivor’s claim, filed on August 24, 1990, was finally denied on February 28, 1994. Director’s Exhibit 1. Claimant took no further action with respect to that denial, but rather filed a second claim on July 15, 1998. Director’s Exhibits 1, 15. Because the later claim was not filed within one year of the denial of the initial claim, claimant did not satisfy the timeliness requirement set forth in Section 725.310 (2000) and her duplicate claim of July 15, 1998 may not be considered a request for modification. Accordingly, under the terms of Section 725.309(d)(2000), the duplicate claim must be automatically denied. 20 C.F.R. §725.309(d) (2000); *Watts*, 17 BLR 1-68; *Mack*, 12 BLR 1-197.

Pursuant to Section 22 of the Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented

⁵ The amendments to the regulation at 20 C.F.R. §725.309 (2002) and 725.310 (2002), do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2, 65 Fed. Reg. 80,057. Section 725.309(d)(2000) provides in relevant part: “If an earlier survivor’s claim filed under this part has been finally denied, the new claim filed under this part shall also be denied unless the [district director] determines that the later claim is a request for modification and the requirements of §725.310 are met.” 20 C.F.R. §725.309(d)(2000). Section 725.310 (2000) provides that a request for modification may be filed within one year of the denial of a claim. 20 C.F.R. §725.310 (2000).

⁶ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant’s last coal mine employment occurred in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director’s Exhibit 2.

by 20 C.F.R. §725.310 (2000), *see* 20 C.F.R. §725.2(c), a party may request modification of a denial on the grounds of a change in conditions or because of a mistake in a determination of fact. However, the sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made, since there cannot be a change in the deceased miner's condition. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989).

In this case, the only relevant issue before the administrative law judge on modification was whether claimant's duplicate claim was properly denied under Section 725.309(d)(2000).⁷ As previously discussed, we hold that claimant's duplicate claim must be denied under Section 725.309(d)(2000) as a matter of law; therefore, she is unable to establish a mistake in fact. Consequently, the Board affirms the administrative law judge's Order of Dismissal and his denial of benefits.

⁷ The administrative law judge discussed a November 20, 2002 letter, wherein claimant noted breathing problems experienced by the miner prior to his death. The administrative law judge found that claimant's statements were insufficient to establish that the miner's death was due to pneumoconiosis and therefore did not prove a mistake in fact with respect to the denial of her original survivor's claim. The modification letter of May 29, 2002 is not a timely request for modification of the February 28, 1994 denial of the initial survivor's claim. The modification request only pertained to the denial of the duplicate survivor's claim; therefore, the only issue properly before the administrative law judge was whether there was a mistake in fact with regard to the denial of the duplicate survivor's claim under 20 C.F.R. §725.309(d) (2000).

Accordingly, the Order of Dismissal of the administrative law judge is hereby affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge