

BRB No. 08-0793 BLA

P.C.)
(Widow of R.C.))
)
Claimant-Petitioner)
v.)
)
ISLAND CREEK COAL COMPANY)
)
Employer-Respondent) DATE ISSUED: 07/20/2009
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Order Granting Summary Decision of Daniel F. Solomon,
Administrative Law Judge, United States Department of Labor.

P.C., Madisonville, Kentucky, *pro se*.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for
employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Order Granting Summary Decision (2007-BLA-05940) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) denying benefits on a 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).¹ Claimant filed this application for benefits on October 31, 2005. Director's Exhibit 3. Adjudicating this survivor's claim pursuant

¹ Claimant, P.C., is the widow of the miner. Director's Exhibit 1 at 274-275.

to 20 C.F.R. Part 718, the administrative law judge denied the claim as a subsequent survivor's claim in accordance with 20 C.F.R. §725.309(d)(3).

On appeal, claimant generally challenges the administrative law judge's denial of survivor's benefits. Employer and the Director, Office of Workers' Compensation Programs (the Director), both respond, urging affirmance of the administrative law judge's denial of benefits.

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 administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence and in accordance with applicable law.² 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The regulations provide that a subsequent claim, filed more than one year after the effective date of a final order denying a claim, must be denied unless the claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309. A subsequent claim filed by a surviving spouse must be denied unless the applicable conditions of entitlement pursuant to 20 C.F.R. §725.212 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); *Clark v. Director, OWCP*, 838 F.2d 197, 11 BLR 2-46 (6th Cir. 1988); *Boden v. G. M. & W. Coal Co., Inc.*, 23 BLR 1-38, 1-40 (2004); *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).

The procedural history of this case is as follows: On May 20, 1980, claimant filed a claim for survivor's benefits. Director's Exhibit 1 at 277-280. The district director made an initial finding that claimant was entitled to benefits. Employer contested the award and requested a hearing before the Office of Administrative Law Judges (OALJ). Director's Exhibit 1 at 193. A hearing was held before Administrative Law Judge Michael P. Lesniak on June 19, 1984. Director's Exhibit 1 at 2. By Decision and Order dated April 26, 1985, Judge Lesniak denied benefits, finding that the evidence failed to

² The record indicates that the miner's last coal mine employment was in Kentucky. Director's Exhibit 1. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

establish that the miner's death was due to pneumoconiosis. Director's Exhibit 1 at 2-16. Accordingly, benefits were denied. *Id.* Claimant did not appeal or take any action within one year of the denial.

On October 31, 2005, claimant filed a second survivor's claim. Director's Exhibit 3. The district director denied this claim on May 11, 2006 because claimant failed to establish a change in any condition of entitlement. Director's Exhibit 24. Claimant filed a request for modification on January 23, 2007, which the district director denied on May 7, 2007. Director's Exhibit 31. Claimant requested a hearing on May 24, 2007. Director's Exhibit 32. While the case was pending before the OALJ, employer filed a motion for summary judgment on September 10, 2007 and argued that claimant could not establish a change in an applicable condition of entitlement unrelated to the miner's physical condition at the time of his death, as required under 20 C.F.R. §725.309(d)(3). *See* Employer's Motion for Summary Judgment.

On May 29, 2008, the administrative law judge issued a Notice to Show Cause, directing claimant to explain how one of the applicable conditions of entitlement had changed since the denial of the prior claim. *See* Notice to Show Cause at 2. Claimant responded, stating that she was awarded federal black lung benefits in 1980, but was required to defer the federal black lung benefits because she was also awarded state workers' compensation benefits. *See* June 6, 2008 Correspondence of Claimant. Claimant further argued that at no point was her claim for federal black lung benefits denied, and that she had only recently re-filed because the state workers' compensation benefits ceased in 2005. *Id.* Claimant also submitted documentation related to the miner's death. *Id.*

On August 5, 2008, the administrative law judge issued an Order Granting Summary Decision because he found that the current claim was a subsequent claim for survivor's benefits under 20 C.F.R. §725.309(d), as it was filed more than one year after the effective date of the final decision denying the prior survivor's claim, filed in 1980.³ The administrative law judge concluded that the prior claim was denied because the evidence did not establish that the miner's death was due to pneumoconiosis. Therefore, the administrative law judge concluded that since "the denial was based solely on medical evidence that is not subject to change," claimant cannot meet the criteria established under 20 C.F.R. §725.309(d) and show a change in an applicable condition of entitlement, thereby requiring automatic dismissal. Order Granting Summary Decision at

³ The administrative law judge stated incorrectly that claimant filed the current claim on May 11, 2006, as the current claim was actually filed on October 31, 2005. Order Granting Summary Decision at 1; Director's Exhibit 3. This error is harmless because the same regulations apply regardless of whether the claim was filed in 2005 or 2006. 20 C.F.R. §§718.2, 725.2; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

2. Thus, the administrative law judge dismissed the claim under 20 C.F.R. §725.309(d). *Id.* at 3.

We affirm the administrative law judge's denial of the current claim as it is rational, supported by substantial evidence and in accordance with the law. A review of the record supports the administrative law judge's findings that claimant's 1980 claim was denied because the evidence did not establish that the miner's death was due to pneumoconiosis and that claimant did not appeal the 1980 denial of benefits or take any further action on the prior claim. Director's Exhibit 1 at 2-16. Contrary to claimant's argument, her initial claim, filed on May 20, 1980, was fully litigated and was denied by Judge Lesniak on April 26, 1985. *Id.* We agree with the Director that there is no basis in the record to relieve claimant of the effect of the applicable regulations. In considering the subsequent survivor's claim, therefore, the administrative law judge properly determined that it was subject to automatic denial under 20 C.F.R. §725.309(d)(3) because there was no change in an applicable condition of entitlement unrelated to the miner's physical condition at the time of his death. Because claimant is unable to satisfy the requirements of 20 C.F.R. §725.309(d)(3), which include proving such a change, we affirm the administrative law judge's dismissal of the current claim. 20 C.F.R. §725.309(d)(3); *see Watts*, 17 BLR at 1-70; *Mack*, 12 BLR at 1-199.

Accordingly, the Order Granting Summary Decision of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge