

BRB No. 08-0797 BLA

G.C.	)	
(Widow of E.C.)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CUMBERLAND RIVER COAL	)	
CORPORATION	)	DATE ISSUED: 07/20/2009
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Dismissing Duplicate Claim of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

G.C., English, Kentucky, *pro se*.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals, without the assistance of counsel, the Decision and Order Dismissing Duplicate Claim (2007-BLA-05843) of Administrative Law Judge Janice K. Bullard (the administrative law judge) with respect to a subsequent survivor's claim filed on November 16, 2006, 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). Director's Exhibit 3. The administrative law judge found that claimant failed to establish a change in condition with respect to a non-medical element of entitlement pursuant to 20 C.F.R.

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<sup>1</sup> Claimant is the widow of the deceased miner, who died on January 9, 1997. Director's Exhibit 10.

§725.309(d). Accordingly, the administrative law judge denied benefits and dismissed the survivor's claim.

Claimant generally appeals the administrative law judge's decision dismissing her claim. Employer and the Director, Office of Workers' Compensation Programs, have not filed response briefs in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board 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 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.<sup>2</sup> 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 procedural history of this case is as follows: Claimant's initial survivor's claim was filed on February 13, 1997, and it was denied by the district director on October 28, 1997. Director's Exhibits 1-394, 1-107. Claimant requested a hearing before the Office of Administrative Law Judges. Administrative Law Judge Joseph E. Kane denied the claim on December 31, 1998, based on a finding that claimant failed to prove that the miner suffered from pneumoconiosis or that the miner's death was due to, or hastened by, pneumoconiosis. Director's Exhibit 1 at 1-73. The Board affirmed Judge Kane's Decision and Order. *[G.C.] v. Cumberland River Coal Co.*, BRB No. 99-0430 BLA (December 20, 1999)(unpub.). The Board also denied claimant's motion for reconsideration. *[G.C.] v. Cumberland River Coal Co.*, BRB No. 99-0430 BLA (April 13, 2000)(unpub. Order); Director's Exhibits 1-42, 1-40. On March 9, 2001, claimant sent a letter to the Office of Workers' Compensation Programs requesting reconsideration of the Board's decision for the second time, and the district director construed this as a request for modification. Director's Exhibits 1-39, 1-38. Administrative Law Judge Thomas F. Phalen, Jr. issued a decision on November 26, 2002, denying benefits based on claimant's failure "to establish a change in condition or a mistake in a determination of fact." Director's Exhibit, 1-6. Claimant did not appeal or take any other action within one year of the denial.

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

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<sup>2</sup> The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

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); *Boden v. G. M. & W. Coal Co., Inc.*, 23 BLR 1-38 (2004); *see generally 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); *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992); *Mack v. Matoaka Kitchekan Fuel*, 12 BLR 1-197 (1989).

In her Decision and Order, the administrative law judge found that the instant claim, filed on November 16, 2006, was a subsequent survivor's claim 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, which was issued on November 26, 2002. *See* Decision and Order at 3. The administrative law judge found that the evidence claimant provided to the district director "suggests that this claim raised questions regarding the miner's physical condition, and not conditions unrelated to his physical condition." Decision and Order at 2. As a result, the administrative law judge concluded that claimant failed to establish a change in condition with respect to a non-medical element of entitlement, as required by 20 C.F.R. §725.309(d)(3). Therefore, the administrative law judge dismissed the claim. *Id.*

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. In considering claimant's subsequent survivor's claim, 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), which include proving such a change, we affirm the administrative law judge's dismissal of the instant claim. 20 C.F.R. §725.309(d)(3); *see Watts*, 17 BLR at 1-70; *Mack*, 12 BLR at 1-199.

Accordingly, the administrative law judge's Decision and Order Dismissing Duplicate Claim is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge