

BRB No. 00-0912 BLA

EVELYN POWELL)
(Widow of BEN POWELL))
)
Claimant-Petitioner)
)
v.)
)
LANGLEY & MORGAN CORPORATION) DATE ISSUED:
)
Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Denying Duplicate Survivor's Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Evelyn Powell, Cumberland Gap, Tennessee, *pro se*.

Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, widow of the miner, appeals, without the assistance of counsel, the Decision and Order Denying Duplicate Survivor's Claim (00-BLA-336) of Administrative Law Judge Edward Terhune Miller 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).¹

¹ The Department of Labor has amended the regulations implementing the Federal

The miner died of lung cancer on January 9, 1995. Director's Exhibit 14-6. Claimant filed an application for survivor's benefits on December 2, 1996, which was denied by the district director on February 26, 1997, because the evidence submitted failed to establish that the miner suffered from pneumoconiosis, that it arose out of coal mine employment and that it contributed to the miner's death. Director's Exhibits 14-16. Claimant was informed that she had sixty days from the date of the denial to submit evidence in support of her claim or request a hearing. Claimant was further advised that if she did not take any action within sixty days, her claim would be considered abandoned and the denial would become final. Finally, claimant was advised that she had one year from the date the denial became final to request reconsideration of her claim, but only if her condition had changed or a mistake was made in the denial of her claim. There is no indication in the record that claimant took any action on this claim subsequent to the denial. Director's Exhibits 14-1, 14-16. Claimant filed a second survivor's claim on February 18, 1999, which was again denied by the district director on April 14, 1999, because claimant failed to establish any of the elements of entitlement. Claimant was again advised that she had sixty days to respond to the denial or it would become final. Director's Exhibits 4, 14-21. Claimant again failed to respond to the denial within the required sixty days. The Department of Labor (DOL) received a letter dated July 6, 1999 from claimant's newly retained counsel, with an attached attorney authorization form, requesting a copy of claimant's file and stating that his letter was an appeal of any prior denials. DOL treated this letter as a motion for modification. Director's Exhibit 5; Employer's Exhibit 3. A November 15, 1999 letter to the file regarding a telephone conversation between a senior claims examiner and claimant, however, indicated that claimant was no longer represented by an attorney. Director's Exhibit 12. Employer responded, asserting that the doctrine of res judicata precluded consideration of claimant's duplicate survivor's claim and that she was therefore precluded from pursuing the purported request for modification which was the subject of the district director's prior notice. Employer also argued that it was an abuse of the administrative process for DOL to allow this matter to continue. Director's Exhibit 10-6. DOL issued a proposed Decision and Order denying modification on October 14, 1999 and advising claimant that she had thirty days from the date of the proposed order to request a hearing. Director's Exhibit 11. Claimant requested a formal hearing, which was scheduled for May 17, 2000. Director's Exhibit 12. Employer filed a motion for summary judgement on March 24, 2000, asserting that because claimant did not respond to the February 26, 1997 denial of her first claim in a timely manner, the doctrine of res judicata requires denial of the instant duplicate widow's claim.

Coal Mine Health and Safety Act of 1969 as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80, 107 (2000)(to be codified at 20 C.F.R. parts 718, 722,725 and 726). For the convenience of the parties, all citations to the regulations herein refer to the previous regulations, as the disposition of this case is not affected by the amendments.

On April 5, 2000, the administrative law judge issued an Order to Show Cause why employer's motion for summary judgement should not be granted. Claimant did not respond to that Order. Since the claim was filed more than one year after the prior denial, the administrative law judge denied the duplicate survivor's claim on the grounds of the previous denial as a matter of law pursuant to 20 C.F.R. §725.309(d). Further, the administrative law judge concluded that modification of the district director's denial of the duplicate claim "need not be considered because there is no suggestion of a pertinent mistake in a determination of fact other than disagreement with the previous denial of the claim." Decision and Order at 1. Accordingly, the hearing was canceled and benefits were denied. Employer responds, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he would not participate in this appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 16, 2001, to which employer and the Director have responded.² Claimant has not responded.³ Based on the responses of the parties and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed to adjudicate the merits of this appeal.

² Employer and the Director agree that the revised regulations will not affect the outcome of this case as the revised regulations at 20 C.F.R. §§725.309 and 725.310, the pertinent regulations in this case, applies only to claims filed after January 19, 2001.

³ Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 16, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

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 by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the Decision and Order and the evidence of record, we conclude that the administrative law judge's denial of benefits is supported by substantial evidence and contains no reversible error. We affirm the administrative law judge's Decision and Order Denying Duplicate Survivor's Claim as it is rational and supported by substantial evidence. Under the terms of Section 725.309(d), if an earlier survivor's claim filed under this part has been finally denied, the new claim filed under this part must also be denied unless the later claim is a request for modification and the requirements of Section 725.310 are met. 20 C.F.R. §725.309(d). *See Mack v. Matoaka Kitchikan Fuel*, 12 BLR1-197 (1989); *see also 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); *compare Jordan v. Director, OWCP*, 892 F.2d 482, 13 BLR 2-184 (6th Cir. 1989).

It is apparent from the record in the present case that claimant's initial application for survivor's benefits was finally denied on February 26, 1997 and that the second claim for benefits was not filed until February 18, 1999. Director's Exhibits 14-16, 14-1. The district director relied on Section 725.309(d) to deny claimant's second application for survivor's benefits. Director's Exhibit 4. Thus, the administrative law judge properly determined that under Section 725.309(d), he was required to deny claimant's second claim for survivor's benefits, on the grounds of the prior denial, as it was filed more than one year after the initial claim was finally denied. The administrative law judge further found that the request for modification of the district director's denial of the duplicate claim need not be considered because there was no suggestion of a pertinent mistake in a determination of fact other than disagreement with the previous denial of the claim. Decision and Order at 1.

In light of our affirmance of the administrative law judge's denial of the duplicate survivor's claim pursuant to Section 725.309(d), we hold that the administrative law judge's cancellation of the hearing does not constitute error requiring remand. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Cf. Cunningham v. Island Creek Coal Co.*, 144 F.3d 388, 21 BLR 2-384 (6th Cir. 1998). The only issue before the administrative law judge was whether claimant's second application for benefits was filed more than one year after the final denial of the initial claim. Conducting a hearing would have served no meaningful purpose, therefore, as resolution of this issue was accomplished solely by examination of the record. In addition, we need not address the

administrative law judge's findings under Section 725.310, inasmuch as the administrative law judge was not required to consider separately claimant's request for modification of the district director's denial of the duplicate claim. *See Motichak v. Bethenergy Mines, Inc.*, 17 BLR 1-14 (1992); *Kott v. Director, OWCP*, 17 BLR 1-9 (1992).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge