

BRB No. 04-0960 BLA

JOHNIE MAE HATFIELD)	
(Widow of LUTHER HATFIELD))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
EASTERN COAL CORPORATION)	
)	
Employer-Respondent)	DATE ISSUED: 06/13/2005
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Order – Dismissal of Claim of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Johnie Mae Hatfield, Pinson Fork, Kentucky, *pro se*.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Order – Dismissal of Claim (04-BLA-0036) of Administrative Law Judge Robert L. Hillyard on a request for modification of a duplicate survivor's claim¹ filed pursuant to the provisions of Title IV of

¹ Claimant, Johnie Mae Hatfield, is the widow of the miner, Luther Hatfield, who died on January 13, 1993. Director's Exhibit 38. The miner filed applications for benefits with the Social Security Administration on June 21, 1973 and with the Department of Labor on March 21, 1985, but did not pursue these claims after they were denied. Director's Exhibit 23. Subsequent to the miner's death, claimant filed her first survivor's claim for benefits on July 5, 1994, which was denied by Administrative Law Judge Ainsworth H. Brown in a

the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case is on appeal before the Board for the second time. In the initial adjudication of claimant's duplicate survivor's claim filed on September 15, 1999, Administrative Law Judge Daniel J. Roketenetz found that because the duplicate claim was filed more than one year after the denial of claimant's first claim, it could not be construed as a request for modification pursuant to 20 C.F.R. §725.310 (2000), hence, he denied the duplicate claim pursuant to 20 C.F.R. §725.309(d) (2000). Accordingly, Judge Roketenetz granted employer's Motion for Summary Judgment, denied claimant's duplicate claim, and cancelled the scheduled formal hearing.

Upon review of claimant's appeal and the evidence of record, the Board held that Judge Roketenetz properly granted summary judgment because claimant's second claim constituted a duplicate survivor's claim subject to denial under Section 725.309(d) (2000). Accordingly, the Board affirmed the grant of summary judgment to employer. *Hatfield v. Eastern Coal Co.*, 01-0479 BLA (Feb. 13, 2002) (unpub.); Director's Exhibit 36.

Subsequently, claimant filed a third survivor's claim for benefits on October 22, 2002. Director's Exhibit 37. By letter dated October 25, 2002, the district director inquired of claimant whether she wished to pursue a new claim with the October 22, 2002 application or, whether she intended the new application to represent a modification request of the previous denial because it was filed less than one year since the issuance of the previous decision on February 13, 2002. Claimant responded in a letter dated February 4, 2003, stating that she wished to pursue the denial of the pending claim. Accordingly, the district director construed claimant's February 4, 2003 letter as a request for modification and consequently, claimant submitted additional evidence. After reviewing the additional evidence to determine whether a mistake in a determination of fact was demonstrated in the prior denial, the district director found that the prior denial was proper and denied claimant's request for modification on July 14, 2003. Director's Exhibit 46. Thereafter, claimant requested a formal hearing and the case was transferred to the Office of the Administrative Law Judges and assigned to Administrative Law Judge Robert L. Hillyard (administrative law judge).

In the ensuing order dismissing the claim, the administrative law judge discussed the procedural history of claimant's first and second claims filed in 1994 and 1999 respectively, and her February 4, 2003 letter requesting modification of the previous denial. Relying on

Decision and Order dated August 27, 1996; his denial was affirmed by the Board on May 27, 1997. *Hatfield v. Eastern Coal Corp.*, BRB No. 96-1767 BLA (May 27, 1997) (unpub.); Director's Exhibit 24. Thereafter, claimant filed a duplicate survivor's claim on September 15, 1999, which is the subject of the instant appeal. Director's Exhibit 4.

Section 725.309(d) (2000), which mandates that a subsequent survivor's claim shall be denied unless the later claim is a request for modification based on an allegation of a mistake in a determination of fact and satisfies the one-year requirement of Section 725.310 (2000), the administrative law judge found that claimant's second claim was filed more than one year after the denial of her first claim, and thus, Judge Roketenetz properly dismissed the second claim as a matter of law. The administrative law judge similarly determined that claimant's request for modification contained in her February 2003 letter must also be dismissed as a matter of law. Accordingly, the claim was dismissed and the scheduled formal hearing was cancelled.

On appeal, claimant generally challenges the administrative law judge's Order dismissing the claim. Employer responds, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating his intention not 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 Co.*, 12 BLR 1-176 (1989). 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. 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).

Consistent with the requirements of Section 725.309(c), (d) (2000), the Board has held that if an earlier survivor's claim is finally denied, a subsequent survivor's claim must also be denied based on the prior denial, unless claimant's subsequent claim is considered a request for modification thereby satisfying the requirements of Section 725.310 (2000).² 20 C.F.R. §725.309(c), (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); see *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). Further, the sole ground available for modification in a survivor's claim is that a mistake in a determination of fact was made in the administrative law judge's initial decision. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989); see *Mills v. Director, OWCP*, 348 F.3d 133, 136, 23 BLR 2-12, 2-16 (6th Cir. 2003).

² Pursuant to Section 725.310 (2000), upon his or her own initiative or upon the request of any party, the district director may, at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of the claim, reconsider the terms of an award or denial of benefits. 20 C.F.R. §725.310 (2000).

After reviewing the evidentiary record, we hold that the administrative law judge properly denied claimant's request for modification. A review of the record indicates that claimant's second survivor's claim, filed on September 15, 1999, was filed more than one year after May 27, 1997, the date of the final denial on her first survivor's claim. Director's Exhibits 3, 4. Hence, the administrative law judge properly found that there was no mistake in Judge Roketenetz's prior determination that, because claimant's second claim failed to satisfy the requirements of Section 725.310 (2000), it constituted a duplicate survivor's claim subject to automatic denial under Section 725.309(d) (2000). *See* 20 C.F.R. §725.309(d) (2000); *Watts*, 17 BLR at 1-70; *Mack*, 12 BLR at 1-199; *Clark*, 9 BLR at 1-209-210; Order – Dismissal of Claim at 2.³

Consequently, because claimant's duplicate claim failed to satisfy the requirements of Section 725.310 (2000), we affirm the administrative law judge's findings that there was no mistake in the prior determination to deny the duplicate survivor's claim as a matter of law and, likewise, to deny claimant's request for modification. *See Mills*, 348 F.3d at 136, 23 BLR at 2-16; *Wojtowicz*, 12 BLR at 1-164.

³ Application of the duplicate survivor's claim provisions has been rejected in cases where the party opposing entitlement has either waived reliance on it or has failed to raise it at any stage in the proceedings. *See Jordan v. Director, OWCP*, 892 F.2d 482, 13 BLR 2-184 (6th Cir. 1989); *Clark v. Director, OWCP*, 838 F.2d 197, 11 BLR 2-46 (6th Cir. 1988), *rev'd on other grounds*, 9 BLR 1-205 (1986); *Watts*, 17 BLR at 1-71. A review of the record in this case, however, reveals that when the case was referred to the Office of Administrative Law Judges for a formal hearing, employer filed a Motion for Summary Judgment that raised the issue that the claim should be denied pursuant to Section 725.309(d) (2000). Director's Exhibit 27. Accordingly, because employer contested this claim on the basis that it was a duplicate survivor's claim and was subject to automatic denial pursuant to Section 725.309 (2000), employer neither waived reliance on Section 725.309(d) (2000) nor failed to raise it during the proceedings on this claim.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge