

BRB No. 07-0912 BLA

Y.C.P. )  
(Widow of R.F.P.) )  
 )  
Claimant-Petitioner )  
 )  
v. )  
 )  
NEWBERRY TRUCKING, )  
INCORPORATED )  
 )  
and )  
 )  
AMERICAN INTERNATIONAL (AIG), c/o ) DATE ISSUED: 06/20/2008  
AIG CLAIMS SERVICES, )  
INCORPORATED )  
 )  
Employer/Carrier- )  
Respondents )  
 )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order – Denial of Subsequent Claim of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Y.C.P., Clinchco, Virginia, *pro se*.

Sarah Y. M. Kirby (Sands Anderson Marks & Miller), Blacksburg, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order – Denial of Subsequent Claim (2006-BLA-5636) of Administrative Law Judge Richard T. Stansell-Gamm denying benefits on a subsequent survivor’s claim<sup>1</sup> 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).<sup>2</sup> The administrative law judge denied this subsequent survivor’s claim in accordance with 20 C.F.R. §725.309(d), as he found that claimant failed to establish a change in an applicable condition of entitlement.

On appeal, claimant generally contends that she is entitled to survivor’s benefits. Employer responds, urging affirmance of the administrative law judge’s Decision and Order denying benefits. The Director, Office of Workers’ Compensation Programs, has declined to file a brief in this case.

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *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 supported by substantial evidence, are rational, and are consistent with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hichman & 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 survivor’s 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(d). A subsequent claim filed by a surviving spouse shall be denied unless the applicable conditions of entitlement at 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.

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<sup>1</sup> Claimant is the surviving spouse of the miner who died on September 26, 1996. Director’s Exhibit 16.

<sup>2</sup> 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.

§725.309(d)(3); *see Tucker v. Director, OWCP*, 23 BLR 1-42 (2004); *Boden v. G.M. & W. Coal Company, Inc.*, 23 BLR 1-38 (2004).

In the present case, the record indicates that claimant's first claim for survivor's benefits, filed on January 22, 1999, was finally denied by the district director on April 15, 1999, because claimant failed to establish any of the conditions for entitlement. Director's Exhibit 1. Claimant took no further action with respect to this claim. Claimant filed her second survivor's claim on June 9, 2000. Director's Exhibit 2. Because claimant's 2000 claim was filed more than one year after the denial of her initial claim, it could not be considered a request for modification pursuant to 20 C.F.R. §725.310 (2000) and, therefore, was automatically denied by the district director pursuant to 20 C.F.R. §725.309(d) (2000).<sup>3</sup> *Id.* A third survivor's claim was filed by claimant on June 15, 2005, Director's Exhibit 4, and was denied by the district director as a subsequent survivor's claim on January 9, 2006, because claimant failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), Director's Exhibit 27. At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing, Director's Exhibits 29-33, and a hearing was held on September 12, 2006.

In his Decision and Order – Denial of Subsequent Claim issued on July 9, 2007, the administrative law judge concluded that the claim must be denied pursuant to Section 725.309(d) because there was not a change in an applicable condition of entitlement that was unrelated to the miner's physical condition at the time of his death. Decision and Order at 3-4. As the administrative law judge correctly observed, claimant's eligibility as a dependent surviving spouse under the Act is the sole condition of entitlement that claimant failed to demonstrate in her prior claims that was unrelated to the miner's physical condition at the time of his death. *Id.* at 3.<sup>4</sup> In this regard, the administrative law judge properly determined that this claimant's eligibility as a surviving widow is based on the factual situation in existence at the time of the miner's death and, thus, is not capable of change thereafter pursuant to Section 725.309(d)(3). *Id.* at 3-4; *see* 20 C.F.R. §§725.212-725.215; *Tucker*, 23 BLR 1-42. Therefore, because the record is devoid of any evidence of a change in an applicable condition of entitlement that was unrelated to the miner's physical condition at the time of his death, claimant is unable to satisfy the requirements of 20 C.F.R. §725.309(d). Consequently, we affirm the administrative law

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<sup>3</sup> Section 725.309(d) (2000) provided that a duplicate survivor's claim must be denied unless the later claim is a request for modification and the requirements of 20 C.F.R. §725.310 (2000) are met. 20 C.F.R. §725.309(d) (2000).

<sup>4</sup> Claimant did not provide evidence of her marriage on November 4, 1967, to the miner until the hearing before the administrative law judge. Director's Exhibit 14.

judge's denial of benefits. *See Boden*, 23 BLR 1-38; *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992)(applying previous regulation governing duplicate survivors' claims).

Accordingly, the administrative law judge's Decision and Order—Denial of Subsequent Claim is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge