

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601



BRB No. 16-0574 BLA

NAOMI McCOWN)
(Widow of CARL McCOWN))
)
 Claimant-Petitioner)
)
 v.)
)
 NARROWS BRANCH COAL COMPANY,)
 INCORPORATED)
)
 and)
) DATE ISSUED: 06/29/2017
 KENTUCKY EMPLOYERS MUTUAL)
 INSURANCE)
)
 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 Denying Benefits in a Subsequent Survivor's Claim of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Dennis James Keenan (Hinkle & Keenan P.S.C.), South Williamson, Kentucky, for claimant.

Paul Jones (Jones & Walters, PLLC), Pikeville, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE,
Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits in a Subsequent Survivor's Claim (2013-BLA-05920) of Administrative Law Judge Joseph E. Kane rendered on a claim² filed on December 27, 2012, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found that claimant was unable to prove that an applicable condition of entitlement unrelated to the miner's physical condition at the time of death had changed since the denial of her prior claim, as required under 20 C.F.R. §725.309(c)(4). He also observed that Section 411(c)(4), 30 U.S.C. §921(c)(4), and Section 422(l), 30 U.S.C. §932(l), do not assist claimant in establishing her entitlement to benefits.³ Thus, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in failing to find that claimant established a change in an applicable condition of entitlement based upon new medical evidence. Employer responds, urging the Board to affirm the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response to this appeal.

¹ Claimant is the widow of the miner, Carl McCown, who died on August 23, 2006. Director's Exhibit 9-1.

² Claimant filed an initial survivor's claim on October 19, 2007, which was denied by Administrative Law Judge Daniel F. Solomon on April 6, 2010 for failure to establish that the miner had pneumoconiosis. Director's Exhibit 1-2. Claimant took no further action until filing her current subsequent claim. Director's Exhibit 3-1.

³ Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where a claimant establishes that the miner had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. Section 422(l) of the Act, 30 U.S.C. §932(l), provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l) (2012).

The Board's scope of review is defined by statute. 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.⁴ 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 regulations provide that a survivor's claim filed more than one year after the effective date of a final order denying a previous survivor's claim, "must be denied unless the applicable conditions of entitlement in such claim include at least one condition unrelated to the miner's physical condition at the time of his death." 20 C.F.R. §725.309(c)(4); see *Moser v. Director, OWCP*, 25 BLR 1-97, 1-99 (2013); *Boden v. G.M. & W. Coal Co.*, 23 BLR 1-38, 1-40 (2004). The administrative law judge determined correctly that the condition of entitlement that claimant failed to demonstrate in her initial survivor's claim, that the miner had pneumoconiosis, related solely to the miner's physical condition at the time of his death. Decision and Order at 3; Director's Exhibit 1-2. Thus, the administrative law judge properly found that an award of benefits in claimant's subsequent survivor's claim was precluded under 20 C.F.R. §725.309(c)(4).⁵ See *Moser*, 25 BLR at 1-99; *Boden*, 23 BLR at 1-41; Decision and Order at 3.

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Miner's Claim Director's Exhibit 1-209-10.

⁵ The administrative law judge also determined correctly that the rebuttable presumption of death due to pneumoconiosis, set forth in Section 411(c)(4), does not assist claimant as the presumption is not available in a survivor's subsequent claim, like the present one, where the conditions of entitlement that claimant failed to establish in the initial claim relate solely to the miner's physical condition at the time of his death. See *Moser v. Director, OWCP*, 25 BLR 1-97, 1-101 n.4 (2013); 20 C.F.R. §725.309(c)(4); Decision and Order at 3. In addition, the administrative law judge correctly found that Section 422(l) is not applicable in this case because the miner's claim for benefits was finally denied. See *Union Carbide Corp. v. Richards*, 721 F.3d 307, 314, 25 BLR 2-321, 2-331-32 (4th Cir. 2013); Decision and Order at 3; Miner's Claim Director's Exhibit 1-7.

Accordingly, the administrative law judge's Decision and Order Denying Benefits in a Subsequent Survivor's Claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge