

BRB No. 03-0557 BLA

ELEANOR ZBEGNER)	
(Widow of EDWARD ZBEGNER))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED: 03/31/2004
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order Denying Survivor's Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Eleanor Zbegner, Wilkes-Barre, Pennsylvania, *pro se*.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, the widow of the miner, appeals, without the assistance of counsel, the Decision and Order Denying Survivor's Benefits (2003-BLA-5562) of Administrative Law Judge Robert D. Kaplan 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 Claimant filed her first claim for survivor's benefits on January 11, 1988.²

¹ 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.

That claim was finally denied by Administrative Law Judge Ainsworth H. Brown on January 30, 1989. Judge Brown found that the miner's pneumoconiosis did not play a role in his death, which was the only issue before him. Director's Exhibit 1. Claimant did not file a second claim for survivor's benefits until March 14, 2002, more than thirteen years later. Director's Exhibit 2. On March 22, 2002, the district director issued an Order to Show Cause why that claim should not be summarily denied as a duplicate survivor's claim. Director's Exhibit 8. Claimant did not respond to the Show Cause Order. On April 30, 2002, the district director issued a Proposed Decision and Order Denying Benefits. Director's Exhibit 10. In that decision, claimant was informed that she had thirty 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 thirty days, her claim would be considered closed and the denial would become final. Finally, claimant was advised that she had one year from the date on which the denial became final to request modification. On November 14, 2002, claimant wrote to the district director disagreeing with the denial of her claim. Director's Exhibit 11. The district director construed claimant's letter to be a request for modification. Director's Exhibit 12. On December 19, 2002, claimant responded that a mistake in the determination of fact had been made in Judge Brown's 1989 denial of survivor's benefits. She requested a review of that decision. Director's Exhibit 13. On December 30, 2002, the district director reviewed the claim and found no basis for modification. Director's Exhibit 14. Claimant disagreed with that determination and requested a hearing. Director's Exhibit 15. The case was referred to the Office of Administrative Law Judge.

On March 28, 2003, Administrative Law Judge Robert D. Kaplan (the administrative law judge) issued an Order to Show Cause. The administrative law judge ordered claimant to show cause why her subsequent survivor's claim should not be summarily denied because she failed to show, pursuant to Section 725.309(d)(3), that at least one condition unrelated to the miner's physical condition at the time of his death had changed, *e.g.*, marital status. The administrative law judge also ordered the Director to state whether he had waived the issue of the viability of the duplicate survivor's claim under Section 725.309(d)(3) and if he had pleaded that defense or if he wished to do so whether such controversy was or would be timely.

Claimant did not respond to the Order. On April 9, 2003, the Director responded, stating that he had not waived the issue of the viability of the subsequent survivor's claim. Director's Exhibit 17. The administrative law judge agreed with the Director and found that the Director had not waived the issue of the viability of the survivor's claim. Accordingly, the administrative law judge summarily denied the duplicate survivor's claim because claimant never alleged a change in a condition of entitlement unrelated to the miner's physical condition at the time of death pursuant to Section 725.309(d)(3).

² The miner died on December 2, 1987. Director's Exhibit 3.

On appeal, claimant contends generally that the administrative law judge erred in denying modification and survivor's benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of modification and denial of benefits. The Director concedes that the district director erred in informing claimant that she could submit evidence to show that the miner's death was due to pneumoconiosis, Director's Exhibit 12, but contends that this error was harmless since the district director has consistently maintained that the claim must be denied as a duplicate survivor's claim.

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 modification and denial of benefits is supported by substantial evidence and contains no reversible error. The administrative law judge found that although claimant made numerous arguments regarding the physical condition of the miner in her December 19, 2002 letter to the district director, Director's Exhibit 13, she made no allegations regarding a change in any condition of entitlement unrelated to the miner's physical condition as required by Section 725.309(d)(3). Further, the administrative law judge found, as the Director contended, that Form CM-1025 controverted a finding that there had been a change in conditions since the district director's denial of April 21, 2002 or that a mistake in a finding of fact was made in that decision. Director's Exhibit 17. Additionally, the administrative law judge properly found that the Director had not waived the question of the viability of the current claim, but affirmatively raised it. 20 C.F.R. §725.309(d); Director's Exhibits 16, 14, 8. The administrative law judge, therefore, properly denied claimant's request for modification. *See* 20 C.F.R. §725.309(d)(3).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge