



BRB No. 15-0269 BLA

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| DIXIE A. LESLIE |) | |
| (Widow of BILLY LESLIE) |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| RATLIFF COAL SALES, INCORPORATED |) | DATE ISSUED: 03/28/2016 |
| |) | |
| and |) | |
| |) | |
| 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 – Denial of Benefits in a Second Modification of a Survivor’s Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Paul E. Jones and Denise Hall Scarberry (Jones, Walters, Turner & Shelton, PLLC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant¹ appeals the Decision and Order – Denial of Benefits in a Second Modification of a Survivor’s Claim (2011-BLA-05230) of Administrative Law Judge Larry S. Merck, rendered pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Claimant filed her survivor’s claim on March 4, 2002, and it was denied by Administrative Law Judge Thomas F. Phalen, Jr. on November 7, 2005, because she failed to establish that the miner’s death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Director’s Exhibits 3, 49. Claimant filed a timely request for modification on November 25, 2005,² which was denied by Administrative Law Judge Kenneth A. Krantz on March 3, 2009, because claimant failed to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Director’s Exhibits 52, 111. Claimant appealed and the Board affirmed the denial of benefits. *Leslie v. Ratliff Coal Sales, Inc.*, BRB No. 09-0461 BLA (Feb. 18, 2010) (unpub.). Thereafter, claimant filed a second request for modification on August 16, 2010. Director’s Exhibit 116. The district director issued a Proposed Decision and Order awarding benefits on August 23, 2010. Director’s Exhibit 96. Employer requested a hearing, which was held on April 29, 2014, before Judge Merck (the administrative law judge). Director’s Exhibit 129. At the hearing, the parties informed the administrative law judge that the only issue to be decided was the applicability of Section 422(l) of the Act, 30 U.S.C. §932(l) (2012),³ to this case. In his Decision and Order issued on April 14, 2015, which is the subject of this appeal, the administrative law judge found that Section 932(l) is not applicable, based on the filing date of the survivor’s claim, and he denied benefits.

¹ Claimant is the widow of the miner, who died on January 31, 2002. Director’s Exhibit 10. At the time of his death, the miner was receiving federal black lung benefits on a claim he filed that was awarded by Administrative Law Judge Thomas F. Phalen, Jr., on January 18, 2000. Director’s Exhibit 1.

² Claimant initially filed an appeal with the Board, but that appeal was dismissed at the request of claimant in order for her to pursue modification. *Leslie v. Ratliff Coal Sales, Inc.*, BRB No. 06-0225 BLA (Dec. 9, 2005) (unpub. Order).

³ Section 932(l) provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to survivor’s benefits without having to establish that the miner’s death was due to pneumoconiosis. 30 U.S.C. §932(l) (2012).

On appeal, claimant contends that the administrative law judge erred in denying benefits. Employer responds, urging affirmance of the denial of benefits.⁴ The Director, Office of Workers' Compensation Programs, has declined to file a substantive response unless specifically requested to do so by the Board.

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.⁵ 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).

Claimant asserts that the administrative law judge erred in finding that Section 932(l) is not applicable to this case, as she filed each of her two requests for modification after January 1, 2005, satisfying the provision of the amendment. Contrary to claimant's contention, the November 25, 2005 and August 16, 2010 requests for modification do not constitute "claims" for purposes of determining the applicability of Section 932(l). See 20 C.F.R. 725.310. The administrative law judge observed correctly that "[a] petition for modification filed under 20 C.F.R. §725.310 in a survivor's claim does not constitute a claim that is filed; rather, the modification petition *relates back* to an originally filed claim, or subsequent claim." Decision and Order at 3 (internal quotations omitted); see 20 C.F.R. §725.310. Therefore, Section 932(l) is applicable to a post-January 1, 2005 modification request only if it relates back to an original claim that was filed after January 1, 2005.

The Board has held that the operative date for determining eligibility for survivor's benefits under Section 932(l) is the date that the survivor's claim was filed. See *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *aff'g Stacy v. Olga Coal Co.*, 24 BLR 1-207 (2010), *cert. denied*, 568 U.S. 127 (2012); *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010). Because the current survivor's claim was filed on March 4, 2002, and not after January 1, 2005, the

⁴ Claimant filed her Petition for Review on June 17, 2015. Employer filed its Response Brief on February 11, 2016, requesting that the Board accept the filing of this pleading out of time. Employer represented that the late filing of its Response Brief was a consequence of representations made by claimant's counsel's office. By Order dated March 7, 2016, the Board accepted employer's Response Brief and allowed claimant ten days to file a reply brief. Claimant has not filed a reply brief.

⁵ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, because claimant's coal mine employment was in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1.

administrative law judge correctly found that Section 932(l) is not applicable.⁶ 30 U.S.C. §932(l) (2012).

Claimant also argues that the administrative law judge erred in failing to find that she is entitled to survivor's benefits, based on a mistake in a determination of fact pursuant to 20 C.F.R. §725.310.⁷ The administrative law judge, however, did not render any findings under 20 C.F.R. §725.310, noting that, by agreement of the parties at the hearing, the only issue for resolution before him was whether claimant was entitled to derivative survivor's benefits under Section 932(l). Decision and Order at 3 n.3., *citing* Hearing Transcript at 6, 9.⁸ Claimant, having failed to raise her argument that she is

⁶ Although claimant is not entitled to derivative benefits, based on the filing date of her March 4, 2002 claim, she may wait one year after the issuance of this decision to file a subsequent survivor's claim, pursuant to 20 C.F.R. §725.309, in order to satisfy the eligibility requirements for derivative benefits under Section 932(l). *See Union Carbide Corp. v. Richards*, 721 F.3d 307, 314, 25 BLR 2-321, 2-331-32 (4th Cir. 2013).

⁷ The sole ground for modification in a survivor's claim is that a mistake in a determination of fact was made with regard to the prior denial. *Wojtowicz v. Duquesne Light Company*, 12 BLR 1-162, 1-164 (1989).

⁸ The following exchange is reflected in the hearing transcript between the administrative law judge and counsel regarding the contested issues to be resolved in this case:

Judge Merck: . . . I want to go ahead and capture this before I get to the Employer's Exhibits and the Claimant's Exhibits. Although when you look at the [Department of Labor Form CM-]1025, it indicates that there are . . . [other] issues that are to be decided . . . the parties have informed me that the only issue for me to decide with regard to this case is the applicability of the [Patient Protection and Affordability Care Act (PPACA)] and that if the PPACA is applicable, then the [c]laimant is entitled to benefits and that if she is not, if the PPACA is not applicable, then she is not entitled to benefits. Have I correctly stated the one issue in front of me?

Mr. Roberts [Claimant's counsel]: Yes, your Honor.

Mr. Jones [Employer's counsel]: Yes, your Honor.

Hearing Transcript at 6; *see* Director's Exhibit 129 (CM-1025 List of Contested Issues). Furthermore, in a post-hearing brief filed on June 30, 2014, claimant's counsel represented that the "parties agreed that the only issue before the Administrative Law

entitled to benefits based on a mistake in a determination of fact while the case was pending before the administrative law judge, cannot raise it now before the Board. *See Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-312 (2003); *Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-6 (1995); *Taylor v. 3D Coal Co.*, 3 BLR 1-350 (1981).

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits in a Second Modification of a Survivor's Claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

Judge to decide in this case was the applicability of the PPACA[.]” Claimant’s Post-Hearing Brief at 1.