

BRB No. 01-0802 BLA

JUNE MILWEE)	
(Widow of ALBERT MILWEE))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: _____
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

June Milwee, Harlan, Kentucky, *pro se*.¹

Rita Roppolo (Eugene Scalia, 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: McGRANERY, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

¹Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant,² without the assistance of counsel, appeals the Decision and Order (01-BLA-0097) of Administrative Law Judge Thomas F. Phalen, Jr. denying benefits on a survivor's 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).³ Because claimant's 1999 duplicate survivor's claim was not filed within a year of the denial of claimant's prior, 1995 survivor's claim, the administrative law judge denied benefits in accordance with 20 C.F.R. §725.309 (2000).⁴ On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds by letter, urging the Board to affirm the administrative law judge's Decision and Order.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 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 rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The pertinent procedural history of this case is as follows: Claimant's initial survivor's claim was filed on October 18, 1995. Director's Exhibit 16. This survivor's claim was denied by the Department of Labor on August 1, 1996. *Id.* Because claimant did not pursue this survivor's claim any further, the denial became final. Claimant's most recent survivor's claim was filed on December 13, 1999. Director's Exhibit 1.

As previously noted, claimant's prior survivor's claim was filed in 1995. Director's Exhibit 16. The administrative law judge stated that "the District Director found that '[claimant's] [1999] claim cannot be considered a request for modification per §725.310 [(2000)] as it was not filed within one (1) year after [the] denial of the original [1995] claim

²Claimant is the widow of the miner, Albert Milwee, who died on July 16, 1995. Director's Exhibits 1, 7, 16.

³The 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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

⁴The revisions to the regulations at 20 C.F.R. §§725.309 and 725.310 apply only to claims filed after January 19, 2001.

had become final.” Decision and Order at 3. The administrative law judge therefore concluded, “I agree with the Director and find that [c]laimant has not met the one year requirement of §725.309 [(2000)] in this case.” *Id.* Pursuant to 20 C.F.R. §725.309(c) and (d) (2000), 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 survivor's claim is considered a petition for modification, thereby satisfying the requirements of 20 C.F.R. §725.310 (2000). *See Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992); *Mack v. Matoaka Kitchekan Fuel*, 12 BLR 1-197 (1989). Since claimant’s 1999 survivor’s claim was filed more than one year after the final denial of claimant’s prior 1995 survivor’s claim, it could not be deemed a petition for modification pursuant to 20 C.F.R. §725.310 (2000). We hold that this survivor’s claim was properly denied as a duplicate survivor’s claim. *See* 20 C.F.R. §725.310 (2000); *Watts, supra*; *Mack, supra*.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge