

BRB No. 04-0709 BLA

AUDREY WRIGHT	)	
(Widow of ASA M. WRIGHT)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 05/12/2005
	)	
A & E COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Order Dismissal of Survivor's Claim of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Bobby Steve Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

Rita Roppolo (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the May 7, 2004 Order Dismissal of Survivor's Claim (04-BLA-5013) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) 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). The administrative

law judge dismissed the survivor's claim filed by claimant, the miner's widow, on January 22, 2001, Director's Exhibit 45, based on his finding that there was no action taken within one year of the district director's December 23, 2002 denial of survivor's benefits in the instant claim.<sup>1</sup> *Id.* On appeal, claimant contends that the district director initiated modification at 20 C.F.R. §725.310 of his December 23, 2002 denial of benefits. Claimant thus argues that the administrative law judge's contrary findings and his dismissal of the survivor's claim, were erroneous. Both employer and the Director, Office of Workers' Compensation Programs (the Director), respond, and contend that the administrative law judge properly dismissed the survivor's claim because claimant failed to request modification or take any action on the claim subsequent to the district director's December 23, 2002 denial of benefits. Employer and the Director thus argue in support of an affirmance of the decision below.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Claimant asserts that certain actions taken in connection with the *miner's* claim were sufficient to constitute a request for modification of the denial of benefits in the survivor's claim. The pertinent procedural history in the miner's claim is as follows: The miner filed his claim on March 16, 1998. Director's Exhibit 1. The district director found the miner entitled to benefits on December 7, 1998, and, at employer's request, a hearing was held. *See* Director's Exhibit 39. Administrative Law Judge Pamela Lakes Wood awarded benefits by Decision and Order dated August 2, 2000. Director's Exhibit 44. The Board, in *Wright v. A & E Coal Company*, BRB No. 00-1097 BLA (Sept. 28, 2001)(unpublished), affirmed in part and vacated in part Judge Wood's decision, and remanded the case for further findings regarding Dr. Rasmussen's opinion on disability causation at 20 C.F.R. §718.204(c). Director's Exhibit 44. By Order dated December 14, 2001, Judge Wood remanded the miner's claim to the district director, for the purposes of seeking clarification of Dr. Robinette's opinion, as well as for appropriate development of the record under the revised regulatory standard provided at 20 C.F.R. §718.204(c) concerning the cause of the miner's respiratory or pulmonary disability. *Id.* Due to a procedural irregularity involving employer's Motion for Reconsideration filed with the Board on November 28, 2001 but not served on the Office of Administrative Law Judges, Judge Wood reissued her remand order on March 11, 2003, following the Board's March 14, 2002 denial of employer's Motion for Reconsideration. Director's Exhibits 43, 44. By letter dated April 9, 2003, the district director sought clarification from Dr. Robinette of his April 23, 1999 report, and indicated that at issue in the miner's claim was whether coal workers' pneumoconiosis played a material role in worsening the

---

<sup>1</sup> The miner passed away on November 12, 2000. *See* Director's Exhibit 45.

miner's respiratory or pulmonary impairment. Director's Exhibit 44. Dr. Rasmussen clarified his opinion by report dated April 30, 2003. *Id.* By letter to employer's counsel at the time, Lois A. Kitts of Baird & Baird, dated June 17, 2003, the district director indicated that Dr. Rasmussen's opinion "appears to support our previous finding that Mr. Wright was entitled to benefits." *Id.* The district director further wrote:

If you do not agree that Mr. Wright was totally disabled due to coal workers' pneumoconiosis, this case must be returned to the Office of Administrative Law Judges for further proceedings.

It is noted that the survivor's claim filed by Mr. Wright's widow was denied on December 23, 2002. Although there has been no appeal of that decision, the timeframe for requesting modification has not expired. Further consideration will be given to the survivor's claim only if a timely request for modification is received.

*Id.*

Employer requested a hearing in the miner's claim on July 16, 2003. *Id.* The district director referred the case to the Office of Administrative Law Judges on September 26, 2003, and indicated, "Benefits for the period from [March 1, 1998] through October 31, 2000 have been paid by the Trust Fund. This represents all monthly benefits due in Mr. Wright's claim." Director's Exhibit 46. In a corresponding September 26, 2003 "Memorandum to File," the district director stated:

The survivor's claim, dated January 23, 2001, and included as Director's Exhibit No. 45, was denied by the District Director on December 23, 2002. To date there has been no appeal or request for modification.

The miner's claim was remanded to the District Director on March 11, 2003, for clarification of Dr. Robinette's opinion, as well as for appropriate development of the record under the new regulatory standard. Such action has been taken and the file is being returned for further proceedings.

Unmarked Document. The cover sheet to Director's Exhibit 45 indicates, "This exhibit is a copy of the evidence in LW-1's claim file. LW has not appealed the decision in her claim. A copy of the evidence is included for information."<sup>2</sup> Director's Exhibit 45.

In his Order Dismissal of Survivor's Claim, the administrative law judge indicated that the case "ostensibly comes as part of a consolidated case... and was set for hearing on May 11, 2004..." Order of Dismissal at 1. The administrative law judge then noted

---

<sup>2</sup> The record supports the interpretation of "LW" as "living widow." See Director's Exhibit 45.

that employer had filed a Motion to Clarify, “advising that a living miner’s claim was filed on March 9, 1998, but that subsequently, Mr. Wright expired, and a survivor’s claim was filed under the new regulations, effective January 20, 2001.” *Id.* The administrative law judge noted the district director’s December 23, 2002 denial of the survivor’s claim and determined that “the widow did not appeal and the District Director closed the claim.” *Id.* Specifically, the administrative law judge rejected claimant’s argument that the proffer of Dr. Robinette’s April 30, 2003 medical report “should be imputed to the survivor’s claim as a request for modification.” Order at 2. The administrative law judge found that a review of the file revealed that claimant did not formally or informally request modification of the district director’s December 23, 2002 denial; that the exhibits in the survivor’s claim were sent to the Office of Administrative Law Judges as an exhibit, not because a hearing had been requested in the survivor’s claim. The administrative law judge further noted that Dr. Robinette’s April 30, 2003 report was submitted to the district director, at the district director’s request, in connection with Judge Wood’s remand order in the miner’s claim. The administrative law judge noted that the district director did not treat Dr. Robinette’s April 30, 2003 report as a request for modification in the survivor’s claim, and subsequently specifically noted, by letter dated June 17, 2003, that the time within which claimant could properly seek modification under 20 C.F.R. §725.310 of the district director’s December 23, 2002 denial of benefits in the survivor’s claim, had not yet expired. Order of Dismissal at 2; *see* Director’s Exhibit 44. The administrative law judge concluded that the “record reflects that the first mention of a request for modification commenced with the brief of the Claimant filed in this matter on April 5, 2004.” Order of Dismissal at 3. The administrative law judge thus found that the survivor’s claim was not properly before him, and he dismissed it. *Id.*

Claimant initially asserts that the district director, on June 17, 2003, independently reconsidered the issue of whether the miner’s death was due to pneumoconiosis, and, thereby timely initiated modification of the district director’s December 23, 2003 denial of benefits in the survivor’s claim. Claimant argues that the district director, on his own initiative, “deliberately chose to investigate” his December 23, 2002 denial of benefits in the survivor’s claim and consolidated that claim with the miner’s claim. Claimant’s Brief at 3. Specifically, claimant relies on the district director’s June 17, 2003 letter to employer’s counsel at the time, Lois A. Kitts of Baird & Baird, wherein the district director, after considering Dr. Robinette’s April 30, 2003 opinion developed in connection with the miner’s claim, reaffirmed the district director’s prior award of benefits in the miner’s claim. The district director therein also stated:

It is noted that the survivor’s claim filed by Mr. Wright’s widow was denied on December 23, 2002. Although there has been no appeal of that decision, the timeframe for requesting modification has not expired. Further consideration will be given to the survivor’s claim only if a timely request for modification is received.

Director's Exhibit 45. Claimant further asserts that, subsequent to employer's July 16, 2003 request for a hearing following the district director's award of benefits in the miner's claim, (1) the Office of Administrative Law Judges assigned case numbers to *both* claims; and (2) the district director transferred to the Office of Administrative Law Judges the Director's exhibits which contained all of the exhibits in *both* claims. Claimant argues that these facts "created the appearance" that the district director had independently "reopened" the survivor's claim, which eliminated the need for claimant to file her own request for modification of the district director's December 23, 2002 denial of benefits. Claimant's Brief at 4. Claimant asserts, "This factual situation was fostered by the Director's investigation of the issue of death due to pneumoconiosis and Dr. Robinette's medication (*sic*) determination that supports a finding of death due to pneumoconiosis." *Id.* Claimant argues, "The District Director obviously was faced with the issue of whether the new evidence from Dr. Robinette was sufficient to meet the standard necessary to succeed on a modification claim." Claimant's Brief at 7.

Claimant's contentions lack merit. The record supports the administrative law judge's findings that the district director's development of Dr. Robinette's April 30, 2003 opinion regarding disability causation occurred in connection with the deceased miner's claim, and that its submission was in direct response to Judge Wood's March 11, 2003 remand order; it had no relation to the survivor's claim. Director's Exhibits 43, 44. Further, claimant's assertion that the district director, by virtue of his June 17, 2003 letter to employer's counsel at the time, initiated modification of his December 23, 2002 denial of benefits in the survivor's claim, is based on a distortion of the record. The district director, in his June 17, 2003 letter, specifically informed claimant that further consideration of the survivor's claim would be given only if a timely request for modification were filed. Director's Exhibit 45. Further, upon transfer of the miner's claim to the Office of Administrative Law Judges following employer's request for a hearing, the district director explicitly indicated that the exhibits from the survivor's claim, contained at Director's Exhibit 45, were provided for "information" as claimant had not challenged the district director's denial of benefits in the survivor's claim. *Id.* Lastly, while the administrative law judge indicated in his Order of dismissal that "this case ostensibly comes as part of a consolidated case," the record contains no proof that the miner's and survivor's claims were ever consolidated.<sup>3</sup>

Claimant next contends that the district director did not make a final determination to deny benefits in the survivor's claim until he issued his June 17, 2003 letter, thereby affording claimant until June 17, 2004 to seek modification at 20 C.F.R. §725.310 of that

---

<sup>3</sup> The record does not contain a copy of the Notice of Hearing issued by the administrative law judge in this case. Even if the administrative law judge assigned a case number to the survivor's claim, as well as the miner's claim, such action would not *per se* establish that there had been a timely request for modification made in the survivor's claim, as claimant suggests.

denial. Claimant argues that the district director therein reconsidered the merits of the survivor's claim and "effectively reaffirmed [the district director's] prior denial in the widow's claim and continued on to explain that the widow could still file a request for modification at an unspecified time." Claimant's Brief at 9.

Claimant's contention lacks merit. The record refutes claimant's assertion that the district director took any action in connection with the survivor's claim when he issued his June 17, 2003 letter. *See* Director's Exhibit 44. Rather, the district director, *inter alia*, specifically alerted claimant of her need to act in order to have him give further consideration to the previously denied survivor's claim. Because claimant did not seek modification at 20 C.F.R. §725.310 or otherwise take action on the survivor's claim following its December 23, 2002 denial by the district director, the administrative law judge properly concluded that the claim was not viable and dismissed it.

Because the record supports the administrative law judge's dismissal of the survivor's claim as not properly before him, and because the record, conversely, does not support claimant's assertion that she sought, or the district director initiated, modification of his December 23, 2002 denial of benefits in the survivor's claim, we reject claimant's arguments on appeal and affirm the decision below.

Accordingly, the Order Dismissal of Survivor's Claim of the administrative law judge is affirmed.

SO ORDERED.

---

NANCY S. DOLDER, Chief  
Administrative Appeals Judge

---

ROY P. SMITH  
Administrative Appeals Judge

---

BETTY JEAN HALL  
Administrative Appeals Judge