

BRB No. 04-0739 BLA

ILLIE JENT)	
(Widow of RANT JENT))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	DATE ISSUED: 05/23/2005
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

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

Illie Jent, Hindman, Kentucky, *pro se*.

Michelle S. Gerdano (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: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow,¹ appeals, without the assistance of counsel, the Decision and Order - Denial of Benefits (04-BLA-5551) of Administrative Law Judge Thomas F. Phalen, Jr. on a subsequent 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.

¹ The miner's death certificate indicates that he died on March 14, 1997 due to myocardial infarction. Director's Exhibit 1. On June 16, 1997, claimant filed a claim for survivor's benefits dated June 11, 1997. *Id.* The administrative law judge's denial of benefits in the 1997 claim was affirmed by the Board in 2000, and claimant did not timely pursue the claim thereafter. On October 16, 2002, claimant filed the instant subsequent survivor's claim dated October 15, 2002. Director's Exhibit 2.

§901 *et seq.* (the Act). The administrative law judge found that the instant claim constituted a subsequent survivor's claim pursuant to 20 C.F.R. §725.309(d). The administrative law judge further found that claimant was unable to satisfy the requirements of Section 725.309(d) because there was no change in an applicable condition of entitlement unrelated to the miner's physical condition at the time of his death. Accordingly, the administrative law judge denied benefits and the claim.

Claimant generally appeals from the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), responds, and urges the Board to affirm the decision below as it is supported by substantial evidence and is in accordance with law.

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. *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The regulation at 20 C.F.R. §725.309(d) provides in pertinent part:

If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see §725.502(a)(2)), the later claim shall be considered a subsequent claim for benefits. A subsequent claim shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part, except that the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see §§725.202(d) (miner), 725.212 (spouse), 725.218 (child), and 725.222 (parent, brother, or sister)) has changed since the date upon which the order denying the prior claim became final.

20 C.F.R. §725.309(d). 20 C.F.R. §725.309(d)(3) further provides: "A subsequent claim filed by a surviving spouse, child, parent, brother, or sister shall 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(d)(3).

The procedural history of this case is as follows: On June 16, 1997, claimant filed her initial application for benefits, which was dated June 11, 1997. Director's Exhibit 1. After the district director denied the claim, claimant requested a formal hearing and the

case was transferred to the Office of the Administrative Law Judges. *Id.* Subsequent to a hearing, the administrative law judge denied benefits by Decision and Order dated April 22, 1999. *Id.* The administrative law judge credited the miner with six and three-quarters years of coal mine employment. On the merits of the claim, the administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), but was insufficient to establish that the miner's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(c) or that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). *Id.* Thus, the administrative law judge denied benefits. Claimant appealed. *Id.* The Board, in *Jent v. Director, OWCP*, BRB No. 99-0817 BLA (Apr. 28, 2000)(unpublished), affirmed the administrative law judge's denial of benefits based on claimant's failure to establish death due to pneumoconiosis at 20 C.F.R. §718.205(c). *Id.*

On September 11, 2002, claimant filed a motion to withdraw her 1997 survivor's claim. *Id.* The district director granted claimant's motion by Proposed Decision and Order dated September 16, 2002. *Id.* Subsequently, on October 4, 2002, the district director set aside and vacated that Proposed Decision and Order, noting that claimant had taken no action within a year of the Board's April 28, 2000 Decision and Order in *Jent* and, thus, the Board's decision had become effective April 27, 2000 and constituted the final denial of the 1997 claim. *Id.*

Claimant filed the instant claim for survivor's benefits on October 16, 2002. Director's Exhibit 2. On September 23, 2003, the district director denied the claim as a subsequent survivor's claim under 20 C.F.R. §725.309(d). Director's Exhibit 13. Pursuant to claimant's request, the case was transferred to the Office of Administrative Law Judges on December 23, 2003. Director's Exhibits 14-16. While the case was pending before the administrative law judge, the Director filed a motion to dismiss the claim. The Director argued that claimant could not establish a change in an applicable condition of entitlement unrelated to the miner's physical condition at the time of this death, as required under 20 C.F.R. §725.309(d). Specifically, the Director noted that the prior survivor's claim, filed in 1997, was denied because claimant failed to establish both that the miner's pneumoconiosis was due to coal mine employment at 20 C.F.R. §718.203(c) and that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c).

In his Decision and Order – Denial of Benefits dated May 27, 2004, the administrative law judge determined that the instant claim, filed in 2002, was a subsequent claim for benefits under 20 C.F.R. §725.309(d) because it was filed more than one year after the effective date of the final decision denying the prior survivor's claim, filed in 1997. The administrative law judge noted that the prior claim “was not denied due to a failure to meet a condition of entitlement unrelated to [the] Miner's physical condition,” and that claimant had established therein that she was not married and that

she was dependent on the miner at the pertinent time. Decision and Order at 5; *see* 20 C.F.R. §725.212(a). The administrative law judge added, “Thus, in her subsequent claim, the only applicable conditions of entitlement that Claimant could establish with new evidence relate to [the] Miner’s physical condition. Therefore, I find that Claimant’s subsequent claim must be denied on the basis of the prior denial. [20 C.F.R.] §725.309(d)(3).” Decision and Order at 5. The administrative law judge thus denied the claim.

In considering the instant subsequent survivor’s claim, the administrative law judge properly determined that it was subject to automatic denial under 20 C.F.R. §725.309(d)(3) because there was no change in an applicable condition of entitlement unrelated to the miner’s physical condition at the time of his death. Decision and Order at 5; Director’s Exhibit 1. Because claimant is unable to satisfy the requirements of 20 C.F.R. §725.309(d), which include proving such a change, we affirm the administrative law judge’s denial of benefits in the instant case.² *See Watts v. Peabody Coal Co.*, 17 BLR 1-68, 1-70 (1992)(applies previous regulation governing duplicate survivors’ claims); *Mack v. Matoaka Kitchehan Fuel*, 12 BLR 1-197, 1-199 (1989) (same).

² By letter to the Board dated June 11, 2004, claimant filed this appeal of the decision below, and stated, “To me it is not fair to turn someone down, with out (*sic*) even giving them a chance to speak their [opinion] about the circumstances.” We hold harmless the administrative law judge’s failure to hold a hearing, as requested by claimant, given that benefits have properly been denied in this case, not based on any factual issue, but as a matter of law. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the Decision and Order - Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge