

BRB No. 01-0251 BLA

OLLIE M. CHARLES (Widow of FRENCHMAN W. CHARLES))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED:
)	
CLINCHFIELD COAL COMPANY)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Dismissal of Claim of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Ollie M. Charles, Davenport, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia for employer.

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

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order of Dismissal of Claim (2000-BLA-1071) of Administrative Law Judge Linda S.

¹ Claimant is Ollie M. Charles, the miner's widow. Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Chapman rendered 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).² This case involves claimant's third claim for survivor's benefits.

The miner died of a gunshot wound on June 3, 1984. Claimant filed her first claim for survivor's benefits on September 17, 1984. Director's Exhibit 21-1.³ The District Director of the Office of Workers' Compensation Programs denied benefits on July 5, 1985 because the evidence submitted by claimant did not establish that the miner's death was due to pneumoconiosis. Director's Exhibit 21-9. Claimant took no further action on the claim.

Claimant filed her second claim for survivor's benefits on May 9, 1995. Director's Exhibit 22-1. During an informal conference held before the District Director on May 15, 1996, employer learned of the earlier denied claim. Employer immediately raised the defense that claimant's 1995 claim was subject to denial under 20 C.F.R. §725.309(d)(2000). Director's Exhibit 22-31. Section 725.309 provides in relevant part that "[i]f an earlier survivor's claim filed under this part has been finally denied, the new claim filed under this part shall also be denied unless the [District Director] determines that the later claim is a request for modification and the requirements of §725.310 are met." 20 C.F.R. §725.309(d)(2000). In turn, Section 725.310 authorizes the District Director to reconsider the terms of a denial of benefits "on grounds of a change in conditions or because of a mistake in a determination of fact," but only within "one year after the denial of a claim." 20 C.F.R. §725.310 (2000). Claimant, through her lay representative at the conference, agreed that her second claim was not a request for modification but disagreed with employer's contention that her claim was subject to denial under 20 C.F.R. §725.309(d)(2000). Director's Exhibit 22-31.

The District Director denied the second claim in a Proposed Decision and Order issued on May 28, 1996. Director's Exhibit 22-31. The District Director found that since claimant's second claim for survivor's benefits was filed more than one year after the final denial of her first claim, her second claim must also be denied pursuant to 20 C.F.R. §725.309(d)(2000). *Id.*

On May 15, 1997, claimant filed a timely request for modification of the May

² 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 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.

³ Director's Exhibits 21 and 22 contain multiple documents which are numbered but not paginated. We will refer to documents within Director's Exhibits 21 and 22 by their hyphenated exhibit number.

28, 1996 decision and submitted additional medical evidence. Director's Exhibit 22-35. Employer moved for dismissal on May 27, 1997 and again on June 3, 1997, contending that the claim should be denied under 20 C.F.R. §725.309(d)(2000). Director's Exhibit 22-37, 38. The District Director denied modification on June 16, 1997 on the grounds that claimant's second survivor's claim must be denied under 20 C.F.R. §725.309(d)(2000). Director's Exhibit 22-39. Claimant took no further action on the second claim.

Claimant filed her third and current claim for survivor's benefits on January 27, 1999. Director's Exhibit 1. The District Director denied benefits on February 5, 1999, finding that the claim must be denied pursuant to 20 C.F.R. §725.309(d)(2000), and that the record did not demonstrate that the miner's death was due to pneumoconiosis. Director's Exhibit 4. Claimant requested a hearing, Director's Exhibits 6, 9, and employer again raised 20 C.F.R. §725.309(d). Director's Exhibits 8, 13. At a July 28, 1999 informal conference, claimant agreed, through her lay representative, that her third claim was not a request for modification. Director's Exhibit 13. On August 5, 1999, the District Director issued a Proposed Decision and Order denying the third claim pursuant to 20 C.F.R. §725.309(d)(2000). Director's Exhibit 13.

On July 24, 2000, claimant timely requested modification of the most recent decision and filed additional medical evidence with the District Director. Director's Exhibit 14. Employer responded that the claim should remain denied by operation of 20 C.F.R. §725.309(d)(2000). Director's Exhibit 16. The District Director denied modification on August 4, 2000, again finding that claimant's third claim was subject to denial under 20 C.F.R. §725.309(d)(2000). Director's Exhibit 15. Claimant requested a hearing, the case was forwarded to the Office of Administrative Law Judges, and a hearing was scheduled for January 10, 2001. Director's Exhibits 17, 23.

Prior to the scheduled hearing, employer filed a motion for summary judgment with the administrative law judge, alleging that there was no genuine issue of material fact regarding either the claim's procedural history or whether employer had raised the Section 725.309 defense. Employer's Motion, Sep. 19, 2000. By order issued September 29, 2000, the administrative law judge advised claimant and the Director, Office of Workers' Compensation Programs (the Director), that they had until October 20, 2000 to respond to employer's motion. No responses were filed.

In the ensuing Decision and Order, the administrative law judge discussed the procedural history of claimant's three claims. The administrative law judge found that because claimant's third claim was filed more than one year after the denial of her earlier claims, claimant's third claim must also be denied pursuant to 20 C.F.R. §725.309(d). Consequently, the administrative law judge found that no genuine issue of material fact existed and that employer was entitled to judgment as a matter

of law. Accordingly, the administrative law judge granted employer's motion for summary judgment, denied the claim pursuant to 20 C.F.R. §725.309(d), and canceled the hearing.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance, and the Director has declined to participate in this appeal.

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 Co.*, 12 BLR 1-176, 1-177 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Under 20 C.F.R. §725.452(c), "[a] full evidentiary hearing need not be conducted if a party moves for summary judgment and the administrative law judge determines that there is no genuine issue as to any material fact and that the moving party is entitled to the relief requested as a matter of law." 20 C.F.R. §725.452(c); see also 29 C.F.R. §18.40(a)(Motion for Summary Decision); *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69, 1-72 (2000). In reviewing an administrative law judge's order granting summary judgment, the Board views the record in the light most favorable to the nonmoving party. *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204, 207 (1999).

We have reviewed the record and we hold that the administrative law judge properly granted summary judgment. Review of the record indicates that claimant's third claim for survivor's benefits was filed more than one year after the final denial of her second claim. Director's Exhibits 1, 22. The record further indicates that employer affirmatively raised Section 725.309(d) throughout the proceedings before the District Director, Director's Exhibits 8, 13, 16, 23, and again as the basis for a motion for summary judgment before the administrative law judge. Therefore, claimant's third claim constitutes a duplicate survivor's claim subject to denial under Section 725.309(d). See 20 C.F.R. §725.309(d)(2000).

Claimant's submission of additional evidence does not alter the analysis. Once a year has passed since the final denial of a claim, only miners have the option of filing a new claim based on a showing of a material change in conditions. See 20 C.F.R. §725.309(d)(2000). That option is not provided to survivors. See 20 C.F.R. §725.309(d)(2000); *Watts v. Peabody Coal Co.*, 17 BLR 1-68, 1-70 (1992); *Clark v. Director, OWCP*, 9 BLR 1-205, 1-209-210 (1986), *rev'd on other grounds*, *Clark v. Director, OWCP*, 838 F.2d 197, 11 BLR 2-46 (6th Cir. 1988). Additionally, claimant's

request for modification of the District Director's denial order does not alter the procedural character of the underlying claim. See *Hess v. Director, OWCP*, 21 BLR 1-

141, 1-143 (1998). Procedurally, the claim remains a claim for survivor's benefits filed more than one year after the final denial of a previous survivor's claim, and thus remains subject to the terms of Section 725.309(d).

In summary, the administrative law judge correctly concluded that since claimant's third claim for benefits was filed more than one year after the final denial of her second claim, her third claim was subject to denial as a duplicate claim under Section 725.309(d). See *Watts, supra*. Consequently, the administrative law judge properly found that no genuine issue of material fact existed and that employer was entitled to judgment as a matter of law. See 20 C.F.R. §725.452(c); 20 C.F.R. §18.40(d); *Pukas, supra*. Therefore, we affirm the grant of summary judgment to employer.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge