

BRB No. 04-0248 BLA

LOUISE LILLY ARNOLD)
(Widow of JAMES ARNOLD))
)
 Claimant-Petitioner)
)
 v.)
)
 ISLAND CREEK COAL COMPANY)
) DATE ISSUED: 11/30/2004
 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 Denying Claim of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Louise Arnold, Richwood, West Virginia, *pro se*.

Mary Rich Maloy (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order Denying Claim (03-BLA-6146) of Administrative Law Judge Pamela Lakes Wood in 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). The

¹Claimant is Louise Lilly Arnold, widow of the miner, James Arnold, who filed her first claim for benefits on March 2, 1999. Director's Exhibit 2. Claimant filed her second claim for benefits on December 27, 2001. *Id.* at 4.

administrative law judge granted employer's Motion for Summary Judgment. The administrative law judge found that the instant claim failed to meet the requirements of 20 C.F.R. §725.310 (2000) and, therefore, constituted a subsequent survivor's claim pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order granting employer's Motion for Summary Judgment and denying benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 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).²

The procedural history of this case, in pertinent part, is as follows. Claimant filed her initial application for survivor's benefits on March 2, 1999. Director's Exhibit 2. A claims examiner for the United States Department of Labor (DOL) denied the survivor's

²The regulation at 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."

claim on March 31, 1999 because the evidence failed to establish that the miner's death was due to pneumoconiosis. *Id.* By letter dated March 28, 2000, claimant's counsel requested an informal conference and formal hearing on the March 31, 1999 denial. *Id.* Claimant's March 28, 2000 letter was stamped *received* by DOL on April 6, 2000. *Id.* On April 6, 2000, DOL denied claimant's request as untimely because it was not made within *sixty* days of the March 31, 1999 denial. *Id.*

Claimant filed her second application for benefits on December 27, 2001. *Id.* at 4. The district director issued an Order requesting that claimant show cause why her claim should not be denied as a subsequent survivor's claim pursuant to Section 725.309(d). *Id.* at 20. Thereafter, the district director denied claimant's second claim for failure to demonstrate a change in a condition of entitlement, pursuant to Section 725.309(d). *Id.* at 21. Claimant disagreed with the denial and the case was referred to the Office of Administrative Law Judges. *Id.* at 22, 26.

While the case was pending before the Office of Administrative Law Judges, employer filed a Motion for Summary Judgment pursuant to 20 C.F.R. §725.452(c).³ In its motion, employer asserted that summary judgment was appropriate because there was no genuine issue of material fact. Specifically, employer stated that an evidentiary hearing could not change the procedural history of this case, involving a subsequent survivor's claim which must be denied in accordance with Section 725.309(d), because it cannot be deemed a timely request for modification. On October 6, 2003, the administrative law judge issued an Order to Show Cause within thirty days why claimant's case should not be dismissed with prejudice based on claimant's failure to provide evidence of an applicable change in a condition of entitlement, unrelated to the miner's physical condition at the time of his death, since the adjudication of her prior claim. By letter dated October 17, 2003, claimant's daughter-in-law⁴ responded that

³The regulation at 20 C.F.R. §725.452(c) provides:

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. All parties shall be entitled to respond to the motion for summary judgment prior to decision thereon.

⁴On March 27, 2003, claimant submitted a form authorizing Pam Arnold, claimant's daughter-in-law, to represent claimant in her black lung case. Director's Exhibit 22. There is no indication in the record that Pam Arnold is an attorney.

claimant did not receive notice of the denial of her previous claim until March of 1999 and that claimant was entitled to federal black lung benefits.⁵

In her Decision and Order, the administrative law judge determined that claimant's present claim, filed in 2001, is a subsequent claim for benefits pursuant to Section 725.309(d) because it was filed more than one year after the effective date of the final order denying her earlier claim. Decision and Order at 3. The administrative law judge considered whether an applicable condition of entitlement has changed, noting that, in accordance with Section 725.309(d)(2), those conditions "are limited to the conditions upon which the prior denial was based." *Id.* The administrative law judge stated that claimant's previous claim was denied because the evidence failed to show that pneumoconiosis caused the miner's death. *Id.* Therefore, the administrative law judge found that claimant cannot show a change in an applicable condition of entitlement because the previous "denial was based solely on medical evidence that is not subject to change." *Id.*

In considering the facts of this case, the administrative law judge determined that claimant's hearing request on DOL's March 31, 1999 denial of claimant's first claim could not be considered a request for modification pursuant to Section 725.310 (2000) because it was not filed within one year of DOL's denial. *Id.* at 2 n.3. In assessing the timeliness of claimant's modification request, the administrative law judge focused on April 6, 2000, the date claimant's letter requesting a hearing was received by DOL. *Id.* at 2. However, 20 C.F.R. §725.303(b) provides that "[a] claim submitted by mail shall be considered filed as of the date of delivery unless a loss or impairment of benefits rights would result, in which case a claim shall be considered filed as of the date of its postmark." Although an envelope in the record indicates that claimant's request for an informal conference and hearing was postmarked April 4, 2000 in Fayetteville, West Virginia,⁶ that date is also not within a year of the March 31, 1999 denial of claimant's previous claim. We deem harmless any error the administrative law judge may have

⁵In the October 17, 2003 letter, reference is made to cancelled checks in relation to the attorney claimant hired in conjunction with her first claim. The Board notes that a claimant in a federal black lung case is entitled to representation by an attorney and that, if benefits are awarded, fees for this representation may be paid by the miner's employer or the Black Lung Disability Trust Fund. The Board has held that in order to receive compensation for legal services performed on claimant's behalf, counsel must successfully prosecute the claim. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); *Director, OWCP v. Hemingway Transport Inc.*, 1 BRBS 73, 75 (1974).

⁶The office address of claimant's attorney, who represented claimant in her previous claim, was in Fayetteville, West Virginia. Director's Exhibit 2.

made in using the date of receipt of claimant's letter to find that claimant's hearing request was not a timely request for modification because both the postmark date and the delivery date of claimant's letter requesting a hearing are untimely. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Therefore, we affirm the administrative law judge's finding that claimant's hearing request cannot be considered a timely request for modification. See *Stacy v. Cheyenne Coal Co.*, 21 BLR 1-111, 1-114 (1999); see generally *Dempsey v. Sewell Coal Co.*, BRB Nos. 03-0615 BLA, 03-0615 BLA-A (Jun. 28, 2004)(*en banc*)(an administrative law judge is given broad discretion to handle procedural matters); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*)(same).

The administrative law judge next discussed claimant's allegation, in her October 17, 2003 letter, that she did not receive notice of the March 31, 1999 denial of her first claim until she contacted DOL by telephone. Decision and Order at 4. The record does not reveal the date that claimant contacted DOL and received notice of the denial. The administrative law judge stated, assuming that claimant did not receive notice of the denial of her previous claim until March 28, 2000, the date claimant's attorney sent a letter requesting an informal conference and hearing, "her request for relief on that basis is untimely." *Id.* Specifically, the administrative law judge stated that when claimant and her attorney received notice⁷ that her request for a formal hearing had been denied, to protect her interests, they should have contacted DOL and informed DOL of the failure to give claimant notice of her denied claim. *Id.* However, as the administrative law judge states, claimant waited over a year and a half to file her second claim on December 27, 2001 and waited "more than two years" to inform DOL by letter dated October 17, 2003 of her lack of notice. *Id.*

The administrative law judge found claimant's actions analogous to an abandonment of her first claim. Decision and Order at 4. The administrative law judge, citing 20 C.F.R. §725.409,⁸ stated:

⁷Although the record does not reveal the date that claimant contacted the United States Department of Labor and received notice of the denial of her first claim, the administrative law judge assumed that claimant received notice no later than March 28, 2000, the date of the letter claimant's counsel wrote requesting an informal conference and hearing. Decision and Order at 4.

⁸Although the administrative law judge cited to the revised regulation at 20 C.F.R. §725.409, the former regulation is applicable to claimant's first claim filed on March 2, 1999. However, the old regulation at 20 C.F.R. §725.409 (2000) provided the same language relied upon by the administrative law judge as the new regulation, specifically, that a claim may be denied by reason of abandonment where claimant fails "[t]o pursue the claim with reasonable diligence." Additionally, Section 725.409 (2000) stated that a

Liberally assuming that Claimant received actual notice of the denial of her claim on April 6, 2000 when the Department of Labor denied her request for a formal hearing, she waited over a year before contacting the Department of Labor again . . . with the filing of her second claim on December 27, 2001.

Id. The administrative law judge concluded that “Claimant’s first claim, even presuming late notice, was not pursued with reasonable diligence [in accordance with Section 725.409(a)(3) (2000)] and could reasonably have been deemed abandoned.” *Id.* Based on the foregoing, we hold that the administrative law judge reasonably concluded that claimant’s “failure to inform [DOL] and place evidence on the record concerning her lack of notice for more than two years, leaves no issue of fact to be determined at a hearing.” *Id.*; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

In considering the present claim pursuant to Section 725.309(d), the administrative law judge properly found that claimant failed to demonstrate that one of the applicable conditions of entitlement had changed since the prior denial of benefits on March 31, 1999, Decision and Order at 3. 20 C.F.R. §725.309(d); *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). Because claimant is unable to satisfy the requirements of Section 725.309(d), we hold that the administrative law judge permissibly exercised her discretion in granting the employer’s Motion for Summary Judgment. 20 C.F.R. §725.452(c). Consequently, we affirm the administrative law judge’s denial of benefits.

denial by reason of abandonment becomes final unless claimant responds within thirty days after such notice is sent.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge