

Claimant,¹ without the assistance of counsel,² appeals the Decision and Order - Denial of Benefits (03-BLA-5534) of Administrative Law Judge Robert L. Hillyard 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). 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). Decision and Order at 4. The administrative law judge found that claimant is unable to satisfy the requirements of Section 725.309(d) because none of the applicable conditions of entitlement included at least one condition unrelated to the miner's physical condition at the time of his death. *Id.* at 5. Accordingly, benefits were denied.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's Decision and Order denying benefits.

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

¹Claimant is Adrienne Swiney, widow of the miner, Lloyd H. Swiney, who filed her first claim for benefits on August 21, 1997. Director's Exhibit 1. Claimant filed her second claim for benefits on October 25, 2002. Director's Exhibit 3.

²Susie Davis, a benefits counselor with the Kentucky Black Lung Coalminers & Widows Association of Pikeville, Kentucky, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Davis is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

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). The 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.” 20 C.F.R. §725.309(d)(3).

The procedural history of this case, in pertinent part, is as follows. Claimant filed her initial application for survivor’s benefits on August 21, 1997. Director's Exhibit 1. Claimant’s first claim was finally denied by the Benefits Review Board on April 13, 2001.³ *Id.* The Board affirmed Administrative Law Judge Daniel J. Roketenetz’s denial based on claimant’s failure to establish that the miner’s death was due to pneumoconiosis. *Id.* By letter dated April 9, 2002, claimant requested an extension of time to submit evidence. Claimant’s request was treated as a request for modification. The district director denied claimant’s modification request on the basis that it was untimely. *Id.*

In his response to claimant’s appeal, the Director contends that the district director properly found claimant’s April 9, 2002 request for an extension of time to submit evidence to be untimely as a request for modification. Director's Brief at 2 n.1. The Board’s decision finally denying claimant’s first claim became effective on April 13, 2001, which was the date the decision was filed with the Clerk of the Board. *Stevedoring Services of America v. Director, OWCP [Mattera]*, 29 F.3d 513, 28 BRBS 65(CRT) (9th Cir. 1994); see *Danko v. Director, OWCP*, 846 F.2d 366, 11 BLR 2-157 (6th Cir. 1988). Therefore, the one-year time period for claimant to request modification ran through April 13, 2002. Because April 13, 2002 was a Saturday, the one-year modification period was extended until Monday, April 15, 2002. 20 C.F.R. §725.311(c); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-16 (2003). We agree with the Director that claimant was required to file a modification request by April 15, 2002. Because the record contains no

³The Board initially issued a Decision and Order with a date stamped April 13, 1999, in error. Director's Exhibit 1. Thereafter, the Board issued an errata dated April 17, 2001 changing the issue date of the Board’s Decision and Order to April 13, 2001. *Id.*

evidence regarding the date claimant's letter was mailed, the date claimant's letter was received by the district director must be used to assess the timeliness of claimant's request. 20 C.F.R. §725.303(b); *Gross*, 23 BLR at 1-13. Therefore, as the Director asserts, claimant's request for an extension of time to submit evidence cannot be considered a timely request for modification because it was received by the district director on April 16, 2002. 20 C.F.R. §725.310 (2000).

The administrative law judge did not discuss in his Decision and Order whether claimant's April 9, 2002 request for an extension of time to submit evidence should have been considered a timely request for modification. The administrative law judge stated only that claimant's second claim "did not satisfy the requirements of a motion for modification." Decision and Order at 4. Because claimant's letter cannot be considered a timely request for modification, we deem harmless any error the administrative law judge may have made in failing to specifically address whether claimant's request for an extension of time to submit evidence was a timely request for modification. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant filed her second claim for benefits on October 25, 2002. Director's Exhibit 3. The district director issued an Order instructing claimant to show cause why her claim should not be denied as a subsequent survivor's claim pursuant to Section 725.309(d). Director's Exhibit 10. Claimant did not respond to the district director's Order to Show Cause. 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). Director's Exhibit 12. Claimant disagreed with the denial and the case was referred to the Office of Administrative Law Judges.

While this case was pending before the Office of Administrative Law Judges, the Director and claimant requested that a decision be made on the record, which the administrative law judge granted. In his Decision and Order, the administrative law judge determined that claimant's present claim, filed in 2002, 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 decision denying her earlier claim. Decision and Order at 3. The administrative law judge noted that the denial of claimant's prior claim "was based upon the Miner's physical condition at the time of his death." *Id.* at 5. Accordingly, the administrative law judge concluded that claimant's present claim must be denied pursuant to Section 725.309(d)(3) because the only condition of entitlement at issue in this claim is whether the miner's death was due to pneumoconiosis, which is "necessarily related to the Miner's physical condition at the time of his death." *Id.*

In considering the present claim pursuant to Section 725.309(d), the administrative law judge properly found that none of the applicable conditions of entitlement included at least one condition unrelated to the miner's physical condition at the time of his death.

Id. Because claimant is unable to satisfy the requirements of Section 725.309(d), we affirm the administrative law judge's denial of benefits. *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).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge