

BRB No. 08-0342 BLA

B.W.)
(Child of F.W.))
)
Claimant-Petitioner)
) DATE ISSUED: 11/26/2008
v.)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Order of Dismissal of Adele H. Odegard, Administrative Law Judge, United States Department of Labor.

B.W., Birmingham, Alabama, *pro se*.

Sarah M. Hurley (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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:

Claimant¹ appeals, without the assistance of counsel, the Order of Dismissal (07-BLA-5931) of Administrative Law Judge Adele H. Odegard (the administrative law judge) dismissing 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).²

¹ Claimant is the child of the deceased miner, who died on February 28, 1985. Director's Exhibit 1.

² The Department of Labor (DOL) has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations

Claimant filed a survivor's claim on December 29, 2006.³ The district director denied the claim on April 6, 2007 because she found that claimant failed to establish that an applicable condition of entitlement had changed since the date upon which the order denying her prior survivor's claim⁴ became final. 20 C.F.R. §725.309. At claimant's request, the case was forwarded to the Office of Administrative Law Judges (the OALJ) for a formal hearing. However, on November 26, 2007, the Director, Office of Workers' Compensation Programs (the Director), moved to dismiss the claim, contending that the claim was a subsequent survivor's claim that did not meet the requirements of 20 C.F.R. §725.310 and, therefore, had to be dismissed based upon the denial of the earlier claim. The administrative law judge ordered claimant to show cause within fifteen days why her 2006 survivor's claim should not be dismissed. After receiving no response from claimant, the administrative law judge dismissed claimant's 2006 survivor's claim.

On appeal, claimant generally contends that the administrative law judge erred in dismissing her 2006 survivor's claim. The Director has filed a Motion to Remand, requesting that the Board vacate the administrative law judge's Order of Dismissal and remand the case for further consideration. The Director contends that a 1985 survivor's claim filed by claimant, as well as a 1983 duplicate claim filed by the miner, are still pending. Specifically, the Director argues that the district director, in denying claimant's 1985 survivor's claim and the miner's 1983 claim, did not act upon claimant's hearing request. Consequently, the Director requests that the Board remand the case to the district director with directions to prepare the miner's 1983 claim and claimant's 1985 survivor's claim for a formal hearing before the OALJ.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are

became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2008). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former version of a regulation remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations.

³ The record reflects that the miner's coal mine employment was in Alabama. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

⁴ Claimant previously filed a claim for survivor's benefits on March 1, 1985. Director's Exhibit 1.

rational, and are in accordance with applicable 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 Director contends that the miner’s 1983 duplicate claim and claimant’s 1985 survivor’s claim are still pending. For the reasons set forth below, we agree.

The miner filed a duplicate claim on September 13, 1983.⁵ Director’s Exhibit 1. The district director denied the claim on December 17, 1984. *Id.* At the miner’s request, the case was forwarded to the OALJ for a formal hearing. *Id.* However, the miner died on February 28, 1985, before a hearing could be held. *Id.*

Claimant filed a survivor’s claim on March 1, 1985. The district director denied the survivor’s claim on April 22, 1985. Both the miner’s claim and the survivor’s claim were consolidated for hearing, which was held on March 18, 1987 before Administrative Law Judge A. A. Simpson.

In a Decision and Order dated August 11, 1987, Judge Simpson found that the evidence did not establish that the miner suffered from pneumoconiosis or that the miner’s death was due to pneumoconiosis. Director’s Exhibit 1. Accordingly, Judge Simpson denied both claims. Pursuant to claimant’s appeal, the Board affirmed Judge Simpson’s denial of benefits. [*B.W.*] *v. Director, OWCP*, BRB No. 87-2566 BLA (Feb. 26, 1991) (unpub.). The Board subsequently denied claimant’s motion for reconsideration. [*B.W.*] *v. Director, OWCP*, BRB No. 87-2566 BLA (June 12, 1991) (Order) (unpub.).

Claimant timely requested modification on May 15, 1992. *See* 20 C.F.R. §725.310 (2000); Director’s Exhibit 1. The district director denied modification on June 19, 1992. In the denial letter, the district director advised claimant:

If you disagree with this finding, you may write to this office and ask that your claim be scheduled for a formal hearing conducted by the [OALJ] of the United States Department of Labor. If you want a hearing, you may request a hearing in writing within thirty (30) days from the date of this letter.

Director’s Exhibit 1.

⁵ The miner initially filed a claim for benefits with the Social Security Administration on February 24, 1970. Director’s Exhibit 1. This claim was finally denied on October 21, 1981. *Id.*

Claimant, without the assistance of counsel, filed a letter dated July 2, 1992, requesting “a formal hearing conducted by the [OALJ] of the United States Department of Labor.” Director’s Exhibit 1. The district director then scheduled an informal conference, which was held on August 20, 1992. In a Proposed Decision and Order dated September 1, 1992, the district director again denied benefits on both claims. *Id.* The district director informed the parties that any party desiring a hearing had to request one, in writing, within thirty days of the Proposed Decision, or the Decision would become final. *Id.* There is no indication that claimant took any further action until she filed a second survivor’s claim on December 29, 2006. Director’s Exhibit 2.

The Director urges the Board to apply the reasoning in *Plesh v. Director, OWCP*, 71 F.3d 103, 20 BLR 2-30 (3d Cir. 1995),⁶ and hold that claimant’s July 2, 1992 hearing request, although made before the district director had completed processing of the claim, triggered the district director’s obligation to forward the miner’s 1983 claim and claimant’s 1985 survivor’s claim to the [OALJ] for a formal hearing.

Section 19(c) of the Longshore and Harbor Workers’ Compensation Act states in pertinent part that the district director “shall make or cause to be made such investigation as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon.” 33 U.S.C. §919(c), as incorporated into the Act by 30 U.S.C. §932(a).

The regulations provide that:

In any claim for which a formal hearing is requested or ordered, and with respect to which the [district director] has completed development and adjudication without having resolved all contested issues in the claim, the [district director] shall refer the claim to the Office of Administrative Law Judges for a hearing.

20 C.F.R. §725.421(a) (2000).

⁶ In *Plesh v. Director, OWCP*, 71 F.3d 103, 20 BLR 2-30, (3d Cir. 1995), the United States Court of Appeals for the Third Circuit recognized the validity of premature hearing requests, *i.e.*, hearing requests filed before the district director completes the processing of the claim and enters a final order. The Third Circuit rejected the argument that a miner, after filing a request for a hearing, is required to take some further action after the district director issues his final order. *Plesh*, 71 F.3d at 111-112, 20 BLR at 2-45-47. The Third Circuit further rejected the contention that such a miner is required to file a second request for a hearing after the district director issues his final order. The court determined that the initial request for a hearing is sufficient. *Id.*

Section 725.450 further provides that:

Any party to a claim . . . shall have a right to a hearing concerning any contested issue of fact or law unresolved by the [district director]. There shall be no right to a hearing until the processing and adjudication of the claim by the [district director] has been completed.

20 C.F.R. §725.450 (2000).

Based upon the Director's concession that claimant's premature hearing request (the July 6, 1992 letter) triggered the district director's obligation to forward the miner's 1983 claim and claimant's 1985 survivor's claim for a formal hearing, we hold that the miner's 1983 claim and claimant's 1985 survivor's claim are still pending.⁷ Consequently, we remand the case to the district director with directions to prepare the miner's 1983 claim and claimant's 1985 survivor's claim for a formal hearing before the OALJ.⁸

⁷ The Director, Office of Workers' Compensation Programs (the Director), urges the Board to extend the holding in *Plesh* to all claims filed prior to January 20, 2001, that arise outside of the jurisdiction of the United States Court of Appeals for the Third Circuit. Because of our reliance upon the Director's concession that claimant is entitled to a hearing on the miner's 1983 claim and her 1985 survivor's claim, we need not address the Director's request at this time. Our holding is, therefore, limited to the facts of this case.

⁸ Because claimant's 1985 survivor's claim is still pending, claimant's 2006 survivor's claim merges with the 1985 claim. See 20 C.F.R. §725.309(d) (2000).

Accordingly, the administrative law judge's Order of Dismissal is vacated, and the case is remanded to the district director for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge