

BRB No. 99-0225 BLA

ELEANOR T. BANYAR	)	
(Widow of WILLIAM C. BANYAR)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Richard A. Veon (Pepper, Gordon, Breen & Weinberg, P.C.), Philadelphia, Pennsylvania, for claimant.

Jennifer U. Toth (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant<sup>1</sup> appeals the Decision and Order (98-BLA-1049) of Administrative Law Judge Robert D. Kaplan dismissing a survivor's claim filed pursuant to the

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<sup>1</sup>Claimant is the surviving spouse of the deceased miner who died on June 18, 1988. Director's Exhibit 5.

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). This case involves a duplicate 1998 survivor's claim. Because this claim was not filed within a year of the denial of claimant's prior 1988 survivor's claim, the administrative law judge dismissed the claim. On appeal, claimant argues that the administrative law judge erred in dismissing her 1998 survivor's claim and not permitting her to re-open her 1988 survivor's claim. The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's dismissal of claimant's 1998 survivor's claim. In a reply brief, claimant argues, *inter alia*, that the Director failed to timely raise the defense of a duplicate claim pursuant to 20 C.F.R. §725.309.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are 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).

Claimant argues that the administrative law judge erred in denying her 1998 duplicate survivor's claim. Section 725.309(d) provides that a duplicate survivor's claim must be denied unless the later claim is a request for modification and the requirements of 20 C.F.R. §725.310 are met. 20 C.F.R. §725.309(d); *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992); *Mack v. Matoaka Kitchekan Fuel*, 12 BLR 1-197 (1989). In the instant case, claimant did not file her second claim in accordance with the provisions of Section 725.310. Claimant's first claim, filed on July 18, 1988, was finally denied by the Board on December 27, 1991. *Banyar v. Director, OWCP*, BRB No. 90-2254 BLA (Dec. 27, 1991) (unpublished). Claimant took no further action with respect to this claim, but rather filed a second claim on January 29, 1998, more than one year after the denial of her initial claim. Director's Exhibit 1. Thus, the later claim did not satisfy the timeliness requirement set forth in Section 725.310(a) and, according to the terms of Section 725.309(d), was properly denied as a duplicate survivor's claim. 20 C.F.R. §725.310(a); *see Watts, supra; Mack, supra*.

Claimant also argues that the administrative law judge erred in not re-opening her 1988 survivor's claim. Because the evidence submitted in connection with her 1988 survivor's claim did not address whether the miner's death was hastened by pneumoconiosis,<sup>2</sup> claimant contends that she was denied a full and fair hearing. We

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<sup>2</sup>Under Section 718.205(c)(2), pneumoconiosis will be considered a substantially contributing cause of the miner's death if it actually hastened the miner's death. *Lukosevich v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989).

disagree. The administrative law judge noted that claimant “had the opportunity to seek modification of the denial of [her] 1988 claim for up to one year after the Board affirmed [the] denial of that claim on December 27, 1991.” Decision and Order at 3. The administrative law judge also noted that claimant provided no explanation for why she waited until January of 1998 to seek redress. *Id.* Moreover, the administrative law judge properly found that claimant’s later claim did not satisfy the timeliness requirement set forth in Section 725.310(a).

We also reject claimant’s contention that the Director failed to timely raise the defense of Section 725.309. The district director denied the claimant’s 1998 survivor’s claim on November 13, 1998, noting, *inter alia*, that the denial was pursuant to 20 C.F.R. §725.309. Director’s Exhibit 2. The district director noted that no material change in condition had occurred since the previous denial and that modification of the prior claim would be untimely. *Id.*

Accordingly, the administrative law judge’s Decision and Order dismissing claimant’s 1998 survivor’s claim is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge