

BRB No. 99-1310 BLA

MARIAN L. HAND)
(Widow of DALLAS HAND))
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED: _____
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Summary Decision and Order Denying Benefits of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Marian L. Hand, Tower City, Pennsylvania, *pro se*.

Michelle S. Gerdano (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,¹ without the assistance of counsel, appeals the Summary Decision and Order Denying Benefits (99-BLA-0895) of Administrative Law Judge Ainsworth H. Brown on a duplicate survivor's claim filed in 1999 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*

¹Claimant is the surviving spouse of Dallas Hand, the miner, who died on April 28, 1982. The miner's death certificate indicates that he died due to acute circulatory failure, myocardial infarction and arteriosclerosis. Director's Exhibit 13.

seq. (the Act).² Pursuant to 20 C.F.R. §725.309(d),³ the administrative law judge summarily denied claimant's duplicate survivor's claim inasmuch as this claim was filed more than one year after the denial of her prior 1992 duplicate survivor's claim.

In her letter to the Board, claimant recites evidence in support of her contentions that the miner had nine years of coal mine employment and suffered from

²Claimant filed the instant claim on March 1, 1999. Director's Exhibit 1. Claimant previously filed three survivor's claims, in 1982, 1987 and 1992. Director's Exhibits 2, 6 at 1, and Director's Exhibit 38. The Board has considered the survivor's claims of claimant four times, with the Board's most recent disposition being its 1997 Decision and Order. Director's Exhibits 37, 6 at 7, 6 at 24, 6 at 68. The procedural history is outlined in the Board's 1997 Decision and Order. *Id.* The Board, in *Hand v. Director, OWCP*, BRB No. 97-0444 BLA (Sept. 25, 1997)(unpub.), affirmed the administrative law judge's denial of claimant's 1992 duplicate survivor's claim under 20 C.F.R. §725.309(d). Claimant then filed a Petition for Review with the United States Court of Appeals for the Third Circuit, which denied claimant's petition by Judgment Order dated February 23, 1998. Director's Exhibit 6 at 70. The record shows that claimant took no further action until she filed the instant claim.

³Section 725.309(d) provides in relevant part: "If 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).

pneumoconiosis related to his exposure to coal dust. Claimant also suggests bias on the part of the administrative law judge. In response to claimant's *pro se* appeal, the Director, Office of Workers' Compensation Programs, (the Director), urges the Board to affirm the administrative law judge's summary disposition in the instant case. The Director argues that the instant claim, even if considered to be a timely request for modification of the Third Circuit's February 23, 1998 denial of claimant's Petition for Review, must fail because claimant cannot establish grounds for modification under *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994), and claimant's prior claim was properly denied as a duplicate survivor's claim under Section 725.309(d). The Director further asserts that the record contains "absolutely no evidence that Mr. Hand either suffered with or died from coal workers' pneumoconiosis... Mrs. Hand could not triumph even if her claim were adjudicated on the merits." Director's Brief at 2.

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 (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).

In the instant case, the administrative law judge initially indicated that the Director filed a motion for summary decision under Section 725.309(d) in light of the fact that claimant's prior 1992 claim had been denied as a duplicate survivor's claim. The administrative law judge then addressed the relevant date of filing of the instant 1999 claim. He indicated,

On August 17, 1999 the Director moved for a summary decision based on 20 C.F.R. §725.309(d). The Claimant has not responded.

The recital of the procedural (sic) is accurate except that the date changes on the current claim are March 15, and March 22, 1999. I note that there is a handwritten entry on the application form of "2-20-99." If this were the date the matter would have been timely, and even if it had been received a year and seven days following the last adjudication it would have been considered to be a timely petition for modification by the Benefits Review Board.

Since the Claimant has not contested the Director's motion and more than a year had elapsed since the last decision in the record, I GRANT the

motion of the Director and the application is DENIED and the hearing is CANCELED.

Summary Decision and Order Denying Benefits at 1. Accordingly, the instant claim was denied.

We affirm the administrative law judge's denial of the instant duplicate survivor's claim under Section 725.309(d) as it is rational, supported by substantial evidence, and in accordance with law. The Board has held that if an earlier survivor's claim is denied, a subsequent survivor's claim must also be denied, based on the prior denial, unless the subsequent claim is considered a motion for modification, satisfying the requirements of 20 C.F.R. §725.310. *Watts v. Peabody Coal Co.*, 17 BLR 1-68, 1-70-71 (1992); *Mack v. Matoaka Kitchekan Fuel*, 12 BLR 1-197, 1-199 (1989); *see* 20 C.F.R. §725.309(d).⁴ Further, a claim is considered filed on the day it is received by the office in which it is first filed. 20 C.F.R. §725.303(a)(1). The instant claim, dated (by hand) February 20, 1999 or February 27, 1999, was stamped as received on March 1, 1999 by the Social Security Administration office in Pottsville, Pennsylvania. (The claim is also stamped as received by the district director's office in Wilkes-Barre, Pennsylvania on March 15, 1999 and March 22, 1999.) Director's Exhibit 1. Therefore, under Section 725.303(a)(1), the instant claim is considered filed on March 1, 1999 when it was received in Pottsville, Pennsylvania.

Claimant's prior 1992 claim was denied by the United States Court of Appeals for the Third Circuit on February 23, 1998. Director's Exhibit 6 at 70. Claimant did not take the necessary action within a year of the denial of her 1992 duplicate survivor's claim, and thus, the administrative law judge correctly determined that more than a year had elapsed since the last decision in the record. Because the instant 1999 claim was filed more than one year after the Third Circuit's Judgment Order in *Hand*, it does not satisfy the timeliness requirement set forth in Section 725.310(a). We, therefore, affirm the administrative law judge's denial of the instant duplicate survivor's claim pursuant to Section 725.309(d). *See Watts, supra; Mack, supra.*⁵

⁴20 C.F.R. §725.309(d) provides in relevant part: "If 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).

⁵We note that even if the instant 1999 survivor's claim is considered to be a request for modification under 20 C.F.R. §725.310, a finding of entitlement is precluded, nonetheless, because claimant cannot establish grounds for modification. Specifically, claimant cannot establish a change in the deceased miner's condition, and the prior denial contains no mistake

Further, we note that in granting the Director's motion for summary decision, the administrative law judge canceled the hearing. In *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69 (2000), the Board held that the Act and regulations mandate that an administrative law judge hold a hearing on any claim, including a request for modification filed with the district director, whenever a party requests such a hearing, unless such hearing is waived by the parties or a party requests summary judgment. The Director moved for summary decision in the instant claim on August 17, 1999. The record contains no evidence contradicting the administrative law judge's statement that claimant did not respond to the Director's motion for summary decision. The record reflects that claimant participated in a 1985 hearing before Administrative Law Judge Frank J. Marcellino regarding her 1982 initial survivor's claim, and in a 1988 hearing before Administrative Law Judge Thomas W. Murrett regarding her 1987 claim. The record further reflects that claimant agreed to a decision on the record by the administrative law judge in connection with her 1992 claim. Director's Exhibit 6 at 16. Thus, we hold that the administrative law judge did not err in granting the Director's motion and canceling the hearing in the instant case.

Further, we reject claimant's assertion that the administrative law judge was biased against her case. The Board has held that charges of bias or prejudice are not to be made lightly, and must be supported by concrete evidence inasmuch as this is a heavy burden for the charging party to satisfy. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107-108 (1992). A review of the record reveals no evidence of bias on the administrative law judge's part.

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

SO ORDERED.

BETTY JEAN HALL, Chief

in a determination of fact as the Board properly denied the prior 1992 duplicate survivor's claim under 20 C.F.R. §725.309(d). Moreover, the Third Circuit subsequently denied claimant's Petition for Review of the Board's decision.

Administrative Appeals Judge

ROY P. SMITH

Administrative Appeals Judge

MALCOLM D. NELSON, Acting

Administrative Appeals Judge