

BRB No. 09-0310 BLA

K.S.)
(Widow of W.S.))
)
Claimant-Petitioner)
)
v.)
)
HELEN MINING COMPANY)
)
and) DATE ISSUED: 10/05/2009
)
VALLEY CAMP COAL COMPANY)
)
Employer/Carrier-)
Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Thomas M. Burke,
Administrative Law Judge, United States Department of Labor.

K.S., Homer City, Pennsylvania, *pro se*.

George E. Roeder, III and Kathy L. Snyder (Jackson Kelly PLLC),
Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order
Denying Benefits (08-BLA-5709) of Administrative Law Judge Thomas M. Burke (the

administrative law judge) with respect to a request for modification of a subsequent survivor's claim filed on October 14, 2004, 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 The administrative law judge denied this subsequent survivor's claim in accordance with 20 C.F.R. §725.309(b)(3),³ as he found that claimant failed to establish a change in an applicable condition of entitlement.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. 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 considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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.⁴ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The regulations provide that a subsequent claim, filed more than one year after the effective date of a final order denying a claim, must be denied unless the claimant

¹ Claimant is the widow of the miner, who died on November 3, 1976. Director's Exhibit 4.

² The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³ The revisions to the regulations at 20 C.F.R. §§725.309 and 725.310 apply only to claims filed after January 19, 2001. *See* 20 C.F.R. §725.2.

⁴ The record indicates that the miner was employed in the coal mining industry in Pennsylvania. Director's Exhibits 1, 5, 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309. A subsequent claim filed by a surviving spouse must be denied unless the applicable conditions of entitlement pursuant to 20 C.F.R. §725.212 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); *Boden v. G. M. & W. Coal Co.*, 23 BLR 1-38 (2004); *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992); *Mack v. Matoaka Kitchekan Fuel*, 12 BLR 1-197 (1989).

The procedural history of this case is as follows: Claimant filed her first survivor's claim on November 10, 1976. Director's Exhibit 1. On May 19, 1981, Administrative Law Judge Robert J. Shea issued a Decision and Order awarding benefits, based on the invocation of the interim presumption that the miner was totally disabled due to pneumoconiosis at the time of his death at 20 C.F.R. §727.203(a).⁵ *Id.* The Board affirmed Judge Shea's award of benefits. [*K.S.*] *v. Helen Mining Co.*, BRB No. 81-1285 BLA (July 30, 1984)(unpub.). However, the United States Court of Appeals for the Third Circuit reversed the Board's affirmance of Judge Shea's award of benefits because it was not supported by substantial evidence. *Helen Mining Co. v. [K.S.]*, No. 84-3631 (3d Cir. June 26, 1985).

Claimant filed her second survivor's claim on August 15, 1985, which the Department of Labor construed as a request for modification. Director's Exhibit 1. On September 6, 1988, Administrative Law Judge Richard K. Malamphy issued a Decision and Order denying benefits, based on claimant's failure to establish a basis for modification of the denial at 20 C.F.R. §725.310 (1988). *Id.* Further, on December 16, 1988, Judge Malamphy issued an Order denying claimant's motion for rehearing. *Id.* By letter dated September 21, 1990, claimant filed a request for modification. *Id.* However, by letter dated October 1, 1990, a claims examiner advised claimant that her request for modification was not processed because it was untimely and it did not include additional evidence. *Id.* Claimant took no further action with respect to this claim.

Claimant filed her third survivor's claim on February 22, 2000. Director's Exhibit 2. This claim was denied by a claims examiner on March 2, 2000 because it was a duplicate survivor's claim under 20 C.F.R. §725.309 (2000),⁶ as a prior claim was denied

⁵ Section 727.201 states that "[b]enefits are provided under the Act...to certain survivor's of a miner who died due to or while totally (and in certain cases, partially) disabled by pneumoconiosis." 20 C.F.R. §727.201.

⁶ Section 725.309(d) (2000) 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 (2000) are met. 20 C.F.R. §725.309(d) (2000).

over a year ago and administratively closed. *Id.* Claimant filed a request for modification on November 30, 2000. *Id.* The district director denied claimant's request for modification on December 5, 2000 because the claim was a duplicate survivor's claim under 20 C.F.R. §725.309 (2000), as no further action was taken from claimant for one year after the 1988 denial of her claim. *Id.* By letter dated February 26, 2001, claimant filed an appeal of the denial, which the Department of Labor treated as a request for modification. *Id.* The district director denied claimant's request for modification on March 2, 2001 because the claim was a duplicate survivor's claim under 20 C.F.R. §725.309 (2000), as no further action was taken from claimant for one year after the 1988 denial of her claim. *Id.* Claimant took no further action with respect to this claim.

Claimant filed her fourth, and current, survivor's claim on October 14, 2004. Director's Exhibit 4. This claim was denied by a claims examiner on March 18, 2005 because claimant did not demonstrate a change in an applicable condition of entitlement. Director's Exhibit 16. Claimant filed a request for modification on May 13, 2005. Director's Exhibit 20. On May 17, 2005, a claims examiner denied claimant's request for modification because the claim was a subsequent survivor's claim under 20 C.F.R. §725.309(d)(3), as claimant did not demonstrate a change in an applicable condition of entitlement since the prior denials. Director's Exhibit 21. By letter dated May 31, 2005, claimant filed a request for modification. Director's Exhibit 23. On April 19, 2006, Administrative Law Judge Daniel L. Leland issued a Decision and Order denying benefits because the claim was a subsequent survivor's claim under 20 C.F.R. §725.309(d)(3), as claimant's initial claim was denied solely for reasons relating to the miner's physical condition, namely, that the evidence did not prove that the miner's death was due to pneumoconiosis. Director's Exhibit 42. Claimant filed a request for modification on June 19, 2006. Director's Exhibit 43. On June 14, 2007, Administrative Law Judge Daniel L. Leland issued a Decision and Order denying benefits because the claim was a subsequent survivor's claim under 20 C.F.R. §725.309(d)(3), as claimant's initial claim was denied solely for reasons relating to the miner's physical condition, namely, that the evidence did not prove that the miner's death was due to pneumoconiosis. Director's Exhibit 58. By letter dated March 21, 2008, claimant filed a request for modification. Director's Exhibit 60. The case was returned the Office of Administrative Law judges and assigned to the administrative law judge, who scheduled a hearing for January 7, 2009.⁷ Employer filed a Motion for Summary Judgment dated

⁷ By letter dated April 2, 2008, a claims examiner stated that because claimant did not submit any additional evidence, or indicate an intention to do so, he interpreted claimant's request for modification as a contention that the previous decision from the Office of Administrative Law Judges was based on a mistake in a determination of fact. Director's Exhibit 61.

October 24, 2008. By Order dated October 29, 2008, the administrative law judge ordered claimant to show cause why employer's motion for summary judgment should not be granted.

In his Decision and Order dated December 19, 2008, the administrative law judge noted that the current claim, filed on October 14, 2004, was a subsequent survivor's claim under 20 C.F.R. §725.309(d), as it was filed more than one year after the effective date of the final decision denying the prior duplicate survivor's claim, which was issued on March 2, 2001. Further, the administrative law judge found that "[c]laimant's initial survivor's claim was denied solely because of an issue relating to the miner's physical condition at the time of his death, specifically, it was determined that the evidence did not establish that the miner's death was attributable to pneumoconiosis." Decision and Order at 2. The administrative law judge therefore denied benefits in accordance with 20 C.F.R. §725.309(d)(3), as claimant's current claim is a subsequent survivor's claim. Consequently, the administrative law judge granted employer's motion for summary judgment, denied benefits, and cancelled a hearing scheduled for January 7, 2009.⁸

We affirm the administrative law judge's denial of the current claim as it is rational, supported by substantial evidence, and in accordance with the law. In considering claimant's subsequent survivor's claim, the administrative law judge properly determined that it was subject to automatic denial under 20 C.F.R. §725.309(d)(3) because there was no change in an applicable condition of entitlement unrelated to the miner's physical condition at the time of his death. Because claimant is unable to satisfy the requirements of 20 C.F.R. §725.309(d)(3), which include proving such a change, we affirm the administrative law judge's denial of the current claim. 20 C.F.R. §725.309(d)(3); *see Watts*, 17 BLR at 1-70; *Mack*, 12 BLR at 1-199.

⁸ The administrative law judge properly granted employer's motion for summary judgment and cancelled the hearing scheduled for January 7, 2009. *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(recognizing that an administrative law judge has broad discretion in handling procedural matters).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge