

BRB No. 99-1041 BLA

ROCKY HAGER)	
(Son of CAMDEN HAGER))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BETHENERGY MINES, INCORPORATED)	
)	DATE ISSUED:
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Rocky Hager, Hernshaw, West Virginia, *pro se*.

William S. Mattingly (Jackson & Kelly), Morgantown, West Virginia, for employer.

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 Decision and Order (97-BLA-1498) of Administrative Law Judge Edward Terhune Miller denying benefits on 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). This claim involves a duplicate survivor's claim. The administrative law judge found that as claimant's second claim can not

¹Claimant, Rocky Hager, is the surviving equitably adopted disabled son of Camden Hager, the miner. Director's Exhibit 25; Decision and Order at 4.

be considered a petition for modification pursuant to 20 C.F.R. §725.310, the claim must be denied as a duplicate survivor's claim pursuant 20 C.F.R. §725.309(d). Decision and Order at 4. The administrative law judge further noted that the medical evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis. Decision and Order at 4-5. Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond in this appeal.

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. *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 rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence and contain no reversible error therein. Section 725.309(d) provides that a duplicate survivor's claim must be denied on the basis of the earlier claim unless the latter claim is a request for modification and the requirements of Section 725.310 are met (*i.e.*, the subsequent claim is filed within one year of the last denial of the earlier claim.). *See* 20 C.F.R. §§725.309(d), 725.310; *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992), *aff'd*, 9 F.3d 111 (6th Cir. 1993)(table); *Mack v. Matoaka Kitchikan Fuel*, 12 BLR 1-197 (1989); *Clark v. Director, OWCP*, 838 F.2d 197, 200, 11 BLR 2-46, 2-50 (6th Cir. 1988); *see also Jordan v. Director, OWCP*, 892 F.2d 482, 489, 13 BLR 2-184, 2-194 (6th Cir. 1989). Claimant's initial survivor's claim was ultimately denied on January 6, 1994. Director's Exhibit 17. Claimant took no further action until he filed his second survivor's claim on May 1, 1996. Director's Exhibit 1. Because the second claim was filed over one year after the denial of the first survivor's claim, the administrative law judge properly found that the second survivor's claim did not constitute a petition for modification pursuant to Section 725.310 and that the second survivor's claim must be denied as a duplicate claim pursuant to Section 725.309(d). *See Watts, supra; Mack, supra; Clark, supra; see also Jordan, supra.* Thus, we affirm the administrative law judge's denial of benefits on claimant's second survivor's claim as it is supported by substantial evidence and

in accordance with law.²

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

²The administrative law judge further rationally determined that the death certificate and the relevant opinion of Dr. Sopher failed to establish that the miner's death was due to pneumoconiosis. *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 969 (1993); Director's Exhibits 7, 16, 17; Decision and Order at 4-5.