

BRB No. 03-0152 BLA

SUE NEAL)
(Widow of MACK NEAL))
)
 Claimant-Petitioner)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS=) DATE ISSUED: 09/26/2003
)
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Sue Neal, Pikeville, Kentucky, *pro se*.

Jennifer U. Toth (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel,² appeals the Decision and Order - Denial

¹ Claimant, Sue Neal, is the widow of the miner, Mack Neal, who died on March 29, 1992. Director=s Exhibits 7, 27. The miner filed applications for benefits on December 14, 1978, February 3, 1983, and July 5, 1991, which were finally denied on August 5, 1981, July 14, 1983, and December 31, 1991, respectively. Director=s Exhibits 24-26. Subsequent to the miner=s death, claimant filed her first survivor=s claim for benefits on April 6, 1992, which was finally denied on August 20, 1992. Director=s Exhibit 27. Thereafter, claimant filed a duplicate survivor=s claim on December 11, 2000, which is the subject of the instant appeal. Director=s Exhibit 1.

of Benefits (02-BLA-0090) of Administrative Law Judge Thomas F. Phalen, Jr. on a duplicate survivor=s 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).³ Initially, the administrative law judge discussed the procedural history of the case, found that the duplicate claims provisions set forth in Section 725.309(d)(3) applied, and concluded that the claim could be summarily denied pursuant to that regulation. The administrative law judge, nevertheless, addressed the merits of entitlement and, adjudicating the claim pursuant to 20 C.F.R. Part 718, found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. '718.202(a) or that the miner=s death was due to pneumoconiosis pursuant to 20 C.F.R. '718.205(c). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge=s findings that the evidence failed to establish the existence of pneumoconiosis and that the miner=s death was due to pneumoconiosis. The Director, Office of Workers= Compensation Programs, (the Director) has filed a response brief, contending that, although the administrative law judge erred in citing 20 C.F.R. '725.309(d)(3), as governing this duplicate survivor=s claim because the claim was filed prior to January 19, 2001, *see* 20 C.F.R. '725.2, the applicable regulation set forth in 20 C.F.R. '725.309(d)(2000) similarly provides that the claim must be denied as a matter of law, and thus, the administrative law judge=s denial was proper. Alternatively, the Director asserts that the administrative law judge properly found that no medical evidence supports the claim on the merits, and hence, urges affirmance of the denial.

² Susie Davis, the President of Kentucky Black Lung Association of Pikeville, Kentucky, requested on behalf of claimant that the Board review the administrative law judge=s decision, but Ms. Davis is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

³ 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.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Consistent with the requirements of Section 725.309(c), (d)(2000), the Board has held that if an earlier survivor's claim is finally denied, a subsequent survivor's claim must also be denied based on the prior denial, unless claimant's subsequent claim is considered a request for modification thereby satisfying the requirements of Section 725.310 (2000).⁴ 20 C.F.R. ' 725.309(c), (d)(2000); *Watts v. Peabody Coal Co.*, 17 BLR 1-68, 1-70-71 (1992); *Mack v. Matoaka Kitchikan Fuel*, 12 BLR 1-197, 1-199 (1989); see *Clark v. Director, OWCP*, 9 BLR 1-205 (1986), *rev'd on other grounds*, *Clark v. Director, OWCP*, 838 F.2d 197, 11 BLR 2-46 (6th Cir. 1988).

The administrative law judge found that claimant's application for benefits, filed on December 11, 2000, was considered a duplicate survivor's claim and, because it was subject to the newly revised provision set forth in Section 725.309(d)(3), could not be dismissed since it was filed more than one year after the denial of her first survivor's application for benefits in 1992. Decision and Order at 3. Although the newly revised regulation at Section 725.309(d)(3) is applicable only to claims filed after January 19, 2001, the administrative law judge's finding that the claim is subject to automatic denial because it failed to satisfy the requirements of Section 725.310 (2000) was proper under Section 725.309(c), (d)(2000) and the administrative law judge's reliance on Section 725.309(d)(3) is harmless error. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Consequently, because claimant failed to satisfy the requirements of Section 725.310 (2000), the administrative law judge was required to deny the duplicate survivor's claim. See 20 C.F.R. ' 725.309(d) (2000); see *Watts*, 17 BLR at 1-70-71; *Mack*, 12 BLR at 1-199, and we need not consider his findings on the merits. See *Larioni*, 6 BLR 1-1276.⁵

⁴ Pursuant to Section 725.310 (2000), upon his or her own initiative or upon the request of any party, the district director may, at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of the claim, reconsider the terms of an award or denial of benefits. 20 C.F.R. ' 725.310 (2000).

⁵ Application of the duplicate survivor's claim provisions has been rejected in cases where the party opposing entitlement has either waived reliance on it or has failed to raise it at any stage in the proceedings. See *Jordan v. Director, OWCP*, 892 F.2d 482, 13 BLR 2-184 (6th Cir. 1989); *Clark v. Director, OWCP*, 838 F.2d 197, 11 BLR 2-46 (6th Cir. 1988), *rev'g on other grounds*, 9 BLR 1-205 (1986); *Watts*, 17 BLR at 1-71. A

review of the record in this case, however, reveals that when the case was referred to the Office of Administrative Law Judge for a formal hearing, the issue of whether the claim should be denied pursuant to 20 C.F.R. ' 725.309 (2000) was listed as a contested issue by the Director, Office of Workers= Compensation Programs (the Director). Director=s Exhibit 28. Accordingly, because he contested this claim on the basis that it was a duplicate survivor=s claim and should have been subject to automatic denial pursuant to Section 725.309 (2000), the Director neither waived reliance on Section 725.309(d)(2000) nor failed to raise it during the proceedings on this claim. *See* Director=s Exhibit 28; *see also* Director=s Brief at 5.

Accordingly, the Decision and Order - Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge