



BRB No. 14-0439 BLA

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| LOIS JEAN KISER DONNELLY |) | |
| (Widow of EDD KISER) |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | DATE ISSUED: 09/21/2015 |
| |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Respondent |) | DECISION and ORDER |

Appeal of the Order of Dismissal of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Lois Jean Kiser Donnelly, Elizabethton, Tennessee, *pro se*.

Kathleen H. Kim (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Order of Dismissal (2011-BLA-06347) of Administrative Law Judge Daniel F. Solomon rendered on a subsequent survivor's claim¹ filed on April 7, 2011, pursuant to provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (the Act). The relevant procedural history of this case

¹ Claimant is the widow of a miner, Edd Kiser, who died on January 24, 1988. Director's Exhibit 1. Claimant filed an initial survivor's claim on February 29, 1988, which was denied by Administrative Law Judge John H. Bedford in a decision issued on

is as follows. In a Proposed Decision and Order issued on June 6, 2011, the district director denied the subsequent survivor's claim and gave claimant thirty days to request a hearing. Claimant responded by filing a CM-1078 Authorization of Representative form on July 7, 2011, indicating that she did not have a representative, nor did she have any evidence to submit. Nevertheless, she reported that she wanted her claim to remain open. The district director granted claimant an additional fifteen days to request a hearing, and she did so on July 19, 2011.

After the case was assigned to the administrative law judge, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision on July 18, 2014. The administrative law judge issued an Order on July 23, 2014, cancelling the scheduled August 18, 2014 hearing, and giving claimant until August 28, 2014 to respond to the Director's motion. Claimant filed two letters with the administrative law judge, noting in a letter filed on August 7, 2014, that she did not have any evidence to present in support of her subsequent claim. In the administrative law judge's Order of Dismissal, he found that claimant was unable to prove that an applicable condition of entitlement unrelated to the miner's physical condition at the time of death had changed since the denial of her prior claim, as is required under 20 C.F.R. §725.309(c)(4). He also observed that amended Section 411(c)(4), 30 U.S.C. §921(c)(4), and amended Section 422(l), 30 U.S.C. §932(l), do not assist claimant in establishing her entitlement to benefits.² Consequently, the administrative law judge granted the Director's Motion for Summary Decision and dismissed the claim.

June 4, 1990. Director's Exhibit 1. Judge Bedford determined that, although claimant proved that the miner had pneumoconiosis, she did not prove that the miner's death was due to pneumoconiosis under 20 C.F.R. §718.205(c). *Id.* The Board affirmed the denial of survivor's benefits on August 27, 1992. *Kiser v. Director, OWCP*, BRB No. 90-1791 BLA (Aug. 27, 1992) (unpub.). Claimant took no further action until filing her subsequent claim. Director's Exhibit 2.

² Under amended Section 411(c)(4), a miner's death is presumed to be due to pneumoconiosis if he or she worked at least fifteen years in underground coal mine employment, or coal mine employment in conditions substantially similar to those of an underground mine, and suffered from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305. The amendments also revived Section 422(l), which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l).

On appeal, claimant alleges that dismissal of her claim was inappropriate because it is rational to conclude that the miner had pneumoconiosis, based on his twenty-two years of coal mine employment. The Director urges the Board to affirm the administrative law judge's Order of Dismissal.³

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (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.⁴ 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).

After reviewing the procedural history of this case, and the administrative law judge's Order, we hold that dismissal of claimant's subsequent survivor's claim is appropriate. The regulation at 20 C.F.R. §725.309(c)(4), requires that "[a] subsequent claim filed by a surviving spouse . . . must be denied unless the applicable conditions of entitlement in such claim include at least one condition unrelated to the miner's physical condition at the time of his death." 20 C.F.R. §725.309(c)(4); see *Boden v. G.M. & W. Coal Co.*, 23 BLR 1-39, 1-40 (2004); *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992). In claimant's initial survivor's claim, she proved that the miner had pneumoconiosis caused by his coal mine employment, but her claim was denied because she did not establish that the miner's death was due to pneumoconiosis. Director's Exhibit 1. Because the condition of entitlement that claimant failed to establish in her prior claim was related *only* to the miner's physical condition at the time of his death, the administrative law judge properly found that an award of benefits in her subsequent survivor's claim was precluded under 20 C.F.R. §725.309(c)(4). See *Boden*, 23 BLR at 1-41; *Watts*, 17 BLR at 1-70-71; Order of Dismissal at 2.

The administrative law judge also determined correctly that the rebuttable presumption of death due to pneumoconiosis, set forth in amended Section 411(c)(4), does not assist claimant. This presumption is not available in a survivor's subsequent

³ As the miner's coal mine employment occurred prior to January 1, 1970, liability for the payment of benefits rests with the Black Lung Disability Trust Fund. Director's Exhibit 7; 20 C.F.R. §725.490(a).

⁴ The record reflects that the miner's coal mine employment was in Virginia. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

claim, like the present one, where the conditions of entitlement that claimant failed to establish in the initial claim relate solely to the miner's physical condition at the time of his death. See *Moser v. Director, OWCP*, 25 BLR 1-97, 1-101 & n.4 (2013); 20 C.F.R. §725.309(c)(4). In addition, the administrative law judge correctly found that amended Section 422(l) is not applicable in this case because the miner's claim for benefits was finally denied prior to his death. See *Union Carbide Corp. v. Richards*, 721 F.3d 307, 314, 25 BLR 2-321, 2-331-32 (4th Cir. 2013); Director's Exhibit 1; Order of Dismissal at 2.

Finally, claimant's specific argument on appeal, that the miner must have had pneumoconiosis in light of his twenty-two year coal mine employment history, does not identify an error in the administrative law judge's Order of Dismissal. The miner was found to have pneumoconiosis in claimant's first survivor's claim, and claimant's current claim was not denied because she failed to prove that the miner had pneumoconiosis. Rather, the administrative law judge found that claimant did not satisfy the requirement that she prove that a condition unrelated to the miner's physical condition at the time of his death had changed.⁵ 20 C.F.R. §725.309(c)(4), see Order of Dismissal at 2. For these reasons, whether the miner had pneumoconiosis was not a relevant issue in claimant's subsequent survivor's claim.

In light of the foregoing, we affirm the administrative law judge's finding that claimant did not establish that an applicable condition of entitlement unrelated to the miner's physical condition at the time of his death changed after the denial of her prior claim as required by 20 C.F.R. §725.309(c)(4). Consequently, we further affirm the administrative law judge's decision to grant the Director's Motion for Summary Decision.

⁵ An example of a condition unrelated to the miner's physical condition at the time of his death is claimant's status as an eligible survivor. If the denial of claimant's 1988 survivor's claim was based on a finding that she was not an eligible surviving spouse because she was in a second marriage, she could have prevented dismissal of her subsequent survivor's claim by proving that she is no longer married. See 20 C.F.R. §§725.212(a)(1), 725.309(c)(4).

Accordingly, the administrative law judge's Order of Dismissal is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge