

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 22-0312 BLA

GRACIE KIDD)	
Survivor of ARNOLD KIDD)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
RANGER FUEL CORPORATION)	DATE ISSUED: 01/18/2024
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Order Granting Motion to Dismiss Subsequent Survivor's Claim of William P. Farley, Administrative Law Judge, United States Department of Labor.

Cameron Blair and Joseph Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for Employer.

Emma Cusumano (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, BUZZARD, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals Administrative Law Judge (ALJ) William P. Farley's Order Granting Motion to Dismiss Subsequent Survivor's Claim (2021-BLA-05279) rendered on a survivor's subsequent claim filed on May 8, 2019, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The relevant procedural history is as follows: Claimant's prior claim, filed on March 14, 2017, was denied by the district director on July 26, 2017, by reason of abandonment because she failed to provide documentation essential for processing the claim and did not respond to the district director's Order to Show Cause. Director's Exhibit 2. A denial by reason of abandonment is "deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c). Her current claim, filed on May 8, 2019, was denied by the district director on September 2, 2020 for failure to establish that the Miner had pneumoconiosis or that his death was due to pneumoconiosis. Director's Exhibits 4, 25.

Pursuant to Claimant's request for a hearing, this case was transferred to the Office of Administrative Law Judges, where it was assigned to the ALJ. Director's Exhibits 27, 29; ALJ's September 2, 2021 Notice of Assignment, Hearing, and Initial Prehearing Order. Employer moved to dismiss the claim, arguing that because Claimant's prior claim was denied as abandoned, she failed to establish the Miner had pneumoconiosis or that his death was due to pneumoconiosis. Employer's Motion to Dismiss at 5. Since those conditions of entitlement related to the Miner's physical condition at the time of his death, Employer contended that Claimant could not establish a change in an applicable condition of entitlement in her current claim. *Id.* Claimant opposed Employer's motion. In a March 30, 2022 Order Granting Motion to Dismiss Subsequent Survivor's Claim, the ALJ found that because the prior denial by reason of abandonment was "a final judgment on the merits," Claimant could not establish a change in an applicable condition of entitlement. Order at 3. He therefore dismissed her subsequent claim and canceled the scheduled hearing.

¹ Claimant is the widow of the Miner, who died on December 1, 2015. Director's Exhibit 12. Because the Miner did not establish entitlement to benefits during his lifetime, Section 422(l) of the Act, 30 U.S.C. §932(l) (2018), 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 survivor's benefits, is not applicable in this case.

On appeal, Claimant argues the ALJ erred in dismissing her claim. The Director, Office of Workers' Compensation Programs (the Director), agrees and urges the Benefits Review Board to vacate the ALJ's Order and remand the case for him to determine whether Claimant can establish a change in an applicable condition of entitlement unrelated to the Miner's physical condition at the time of his death. Employer filed a response, urging the Board to affirm the denial of benefits. The Director filed a reply to Employer's response, reiterating his arguments.

The Board's scope of review is defined by statute. We must affirm the ALJ's Order if it is rational, supported by substantial evidence, and in accordance with applicable law.² 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362 (1965).

A subsequent survivor's claim, filed more than one year after the effective date of a final order denying survivor's benefits, must be denied unless new evidence establishes a change in an "applicable condition of entitlement" 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). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3).

Claimant and the Director argue the ALJ erred in finding Claimant could not establish a change in an applicable condition of entitlement under 20 C.F.R. §725.309. Claimant's Brief at 7-13; Director's Brief at 3-4; Director's Reply Brief at 1-4. We agree.

Although the ALJ cited a portion of the current regulation at 20 C.F.R. §725.309(c), Order at 2, he concluded that Claimant could not establish a change in an applicable condition of entitlement based upon case law applying the prior regulation, which has been substantively revised. Order at 3 n.7 (citing *Watts v. Peabody Coal Co.*, 17 BLR 1-68, 1-70 (1992) and *Marck v. Matoaka Kitchikan Fuel*, 12 BLR 1-197, 1-199 (1989)). The previous rule applied by the ALJ mandated automatic denial of all subsequent survivors' claims. *See* 20 C.F.R. §725.309(d) (1999) ("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 deputy commissioner determines that the later claim is a request for modification and the requirements of §725.310 are met."). Conversely, the current applicable rule allows surviving spouses to file subsequent claims if the threshold requirements of 20 C.F.R.

² This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

§725.309 are met. More specifically, it provides that a survivor's subsequent claim "must be denied unless the applicable conditions 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).³

The district director denied Claimant's prior claim by reason of abandonment. Director's Exhibit 2. A denial by reason of abandonment "shall be deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c). The applicable conditions of entitlement for a surviving spouse are that 1) the surviving spouse is unmarried; 2) the spouse was dependent on the miner at the relevant time; and 3) the miner's death was due to pneumoconiosis, or the miner was awarded benefits and the surviving spouse is eligible for automatic entitlement under Section 422(l) of the Act. 20 C.F.R. §725.212(a)(1)-(3).

Because Claimant's prior claim was denied as abandoned, she failed to establish (among other things) that she was unmarried, a condition of entitlement that is unrelated to the Miner's physical condition. 20 C.F.R. §725.212(a). Thus, Claimant could establish a change in an applicable condition of entitlement in her subsequent claim if she proves she is not currently married. 20 C.F.R. §§725.212(a)(1), 725.309(c), 725.409; *see also Consolidation Coal Co. v. Dir., OWCP [Buris]*, 732 F.3d 723, 727 (7th Cir. 2013) (explaining that a miner who abandoned his prior claim could meet his threshold burden by "establishing a change in *any* of the applicable conditions of entitlement") (emphasis added). Therefore, the ALJ erred by not affording Claimant the opportunity to establish a change in her marital status, a condition of entitlement previously adjudicated against her and unrelated to the Miner's physical condition at the time of his death. *See* 20 C.F.R. §725.309(c)(4).

We reject Employer's argument that Claimant's subsequent claim cannot be considered because she has not "alleged that, in fact, there was a change in one of those conditions of entitlement between the filing of her 2017 claim and her 2019 claim." Employer's Response Brief at 12-13. Because the prior claim's denial on the grounds of

³ The revised regulation permitting consideration of a survivor's subsequent claim if the claimant can establish a change in at least one condition unrelated to the miner's physical condition was initially set forth at 20 C.F.R. §725.309(d)(3) (2001). 65 Fed. Reg. 79,920, 80,068 (Dec. 20, 2000). When the Department later revised the regulations to implement the Affordable Care Act's (ACA's) 2010 amendments to the Black Lung Benefits Act (BLBA), *see* Pub. L. No. 111-148, §1556 (2010), that regulation was renumbered as 20 C.F.R. §725.309(c)(4). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013) (also substituting the word "must" for "shall" throughout 20 C.F.R. §725.309).

abandonment became final, we must accept that Claimant failed to establish she was unmarried when her first claim was denied as a matter of res judicata despite what she stated on her benefits claim forms. *Lisa Lee Mines v. Director, OWCP* [Rutter], 86 F.3d 1358, 1360-61 (4th Cir. 1996) (en banc) (holding that, if a denial is final, it must be accepted as correct in its legal conclusions and that determination is off-limits to criticism); Director's Reply Brief at 2.⁴ Therefore, if Claimant establishes she is currently unmarried, she will have proven a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c)(4). See *Rutter*, 86 F.3d at 1364-64; accord *U.S. Steel Mining Co., LLC v. Dir., OWCP* [Jones], 386 F.3d 977, 989 (11th Cir. 2004) (“[T]he ‘one element’ test does not compel a comparison of the evidence associated with the second claim with the evidence presented at the first claim; rather, it mandates a comparison of the second claim’s evidence with the conclusions reached in the prior claim.”).

Employer argues that accepting Claimant’s and the Director’s arguments would nullify 20 C.F.R. §725.409(c) because there would be no consequences for abandoning a survivor’s claim. Employer’s Brief at 13-14. But there are consequences for abandoning a survivor’s claim. Survivors are entitled to benefits dating from the month of the miner’s death. See 20 C.F.R. §725.213(a). However, a survivor who prevails on a subsequent claim may not obtain benefits “for any period prior to the date upon which the order denying the prior claim became final.” 20 C.F.R. §725.309(c)(6). Thus, even if Claimant’s present claim is successful, she cannot obtain benefits for the period between December 2015, when the Miner died, and August 2017, when the denial of her prior claim by abandonment became final. *Id.*

Regardless of whether Employer considers those consequences sufficiently severe, we must apply the regulations as written. Claimant is entitled to file a subsequent claim if she establishes a change in at least one applicable condition of entitlement that is unrelated to the miner’s physical condition at the time of his death. 20 C.F.R. §725.309(c)(4); see *Jones*, 386 F.3d at 989. If she does, she is entitled to have her claim considered on the merits because, with limited exceptions, “none of the findings made in connection with the prior [denied] claim,” including those relating to the miner’s physical condition, “will be binding on any party in the adjudication of the subsequent claim.” 20 C.F.R. §725.309(c)(5).

⁴ While *Rutter* was decided under the pre-2001 version of the BLBA regulations, the revised subsequent-claim rule in 20 C.F.R. §725.309 adopts *Rutter*’s “one-element” test. See 65 Fed. Reg. at 79,968.

We therefore vacate the ALJ's Order dismissing the subsequent survivor's claim.⁵ On remand, the ALJ must consider whether Claimant established a change in an applicable condition of entitlement unrelated to the Miner's physical condition at the time of his death. 20 C.F.R. §725.309(c)(4). If Claimant is successful in doing so, the ALJ must consider her subsequent claim on the merits.

Accordingly, we vacate the ALJ's Order Granting Motion to Dismiss Subsequent Survivor's Claim and remand the case for further consideration consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

⁵ Because we have vacated the ALJ's determination that Claimant did not establish a change in an applicable condition of entitlement, we need not address Claimant's arguments that her subsequent claim must be considered on its merits based on the remedial nature of the Act and the interests of justice. Claimant's Brief at 10-11. Similarly, we need not address her argument that the passage of the ACA created a change in an applicable condition of entitlement, or her contention that there are several other ways in which she may establish a change in an applicable condition of entitlement unrelated to the Miner's physical condition at the time of his death. *Id.* at 7-10, 11-13.