

BRB No. 04-0286 BLA

LORETTA K. BODEN)
(Widow of PAUL A. BODEN))

Claimant-Petitioner)

v.)

DATE ISSUED: 10/22/2004

G.M. & W. COAL COMPANY,)
INCORPORATED)

and)

STATE WORKERS' INSURANCE)
FUND (PENNSYLVANIA))

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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Loretta K. Boden, Rockwood, Pennsylvania, *pro se*.

Estelle Kokales (Marshall, Dennehey, Warner, Coleman & Goggin), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (2003-BLA-5147) of Administrative Law Judge Michael P. Lesniak denying benefits on a subsequent 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).¹ Based on the date of filing,² the administrative law judge adjudicated this claim pursuant to 20 C.F.R Part 718. The administrative law judge found the evidence of record sufficient to establish that the miner had pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, and that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), but further found that the provisions of 20 C.F.R. §725.309(d)(3) had not been satisfied, which precluded an award of benefits. Accordingly, benefits were denied.

On appeal, claimant generally contends that she is entitled to benefits. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate 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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge*

¹ 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. Revised 20 C.F.R. §725.309 applies to this claim because the claim was filed on July 30, 2001.

²The record indicates that the miner, Paul A. Boden, filed a claim for benefits on February 25, 1988, which was denied by the district director on August 12, 1988. Director's Exhibit 1. The miner filed a second application for benefits on February 5, 1992, which was denied on April 26, 1994, by Administrative Law Judge Daniel L. Leland, due to the miner's failure to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000), although employer had stipulated to the existence of coal workers' pneumoconiosis. Director's Exhibit 1. The miner died on November 24, 1997, and claimant, Loretta K. Boden, filed an application for survivor's benefits on April 2, 1998 which was denied by the district director on July 7, 1998, as claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to C.F.R. §718.205 (2000). Director's Exhibits 2, 4, 13. Claimant filed a second application for survivor's benefits on July 30, 2001. Director's Exhibit 5.

Coal Co., 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. 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).

The regulations provide that a subsequent claim, filed more than one year after the effective date of a final order denying a survivor's claim, must be denied unless the claimant 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(d). A subsequent claim filed by a surviving spouse shall be denied unless the applicable conditions of entitlement at 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); *see generally Coleman v. Director, OWCP*, 345 F.3d 861, 23 BLR 2-1 (11th Cir. 2003); *Tonelli v. Director, OWCP*, 878 F.2d 1083, 12 BLR 2-319 (8th Cir. 1989); *Adkins v. Director, OWCP*, 878 F.2d 151, 12 BLR 2-313 (4th Cir. 1989); *Clark v. Director, OWCP*, 838 F.2d 197, 11 BLR 2-46 (6th Cir. 1988); *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992).

In the present case, the record indicates that claimant's first claim, filed on April 2, 1998, was finally denied by the district director on July 7, 1998. Director's Exhibits 2, 4. Claimant took no further action with respect to this claim, but filed a second claim on July 30, 2001, more than one year after the denial of her initial claim. Director's Exhibit 5. Because the condition of entitlement that claimant failed to demonstrate in her initial claim related solely to the miner's physical condition at the time of his death, *i.e.*, whether the miner's death was due to pneumoconiosis, the administrative law judge properly found that entitlement was precluded. Decision and Order at 14; 20 C.F.R. §725.309(d)(3). As the administrative law judge's findings pursuant to Section 725.309(d)(3) are in accordance with law, we affirm his denial of survivor's benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge