BRB No. 00-0722 BLA

NANCY DONCHAK (Widow of NICHOLAS DONCHAK) Claimant-Petitioner v. BEAR RIDGE SHOPS, INCORPORATED and TRAVELERS INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Summary Decision and Order Denying Benefits of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Maureen E. Calder and A. Judd Woytek (Marshall, Dennehey, Warner, Coleman, & Goggin), Bethlehem, Pennsylvania, for employer/carrier.

Michelle Gerdano (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals the Summary Decision and Order Denying Benefits (00-BLA-0284) of Administrative Law Judge Ainsworth H. Brown 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).[2] This case is before the Board for the second time. In the initial Decision and Order, Administrative Law Judge Ralph A. Romano entered a default judgment against employer inasmuch as employer, after receiving notification of the survivor's claim, failed to respond in any manner in order to contest entitlement and failed to attend the formal hearing. Accordingly, benefits were awarded. Director's Exhibit 27. By order dated May 28, 1998, Administrative Law Judge Romano summarily denied the Motion for Reconsideration of the Director, Office of Worker's Compensation Programs (the Director). Director's Exhibit 28. On appeal, the Director argued that the administrative law judge erred in awarding a default judgment against employer because it failed to respond and appear at the hearing. On cross-appeal, employer's insurance carrier argued that because it was never properly notified of the claim by Department of Labor, the case must be remanded to allow it to defend the claim or in the alternative, the claim must be denied as a duplicate claim survivor's claim pursuant to 20 C.F.R. §725.309(d)(2000). On appeal, the Board vacated Administrative Law Judge Romano's award of default judgment against employer holding that, even though employer's unexcused failure to attend the hearing constituted a waiver of its right to present evidence at the hearing, the Director's contest of claimant's entitlement to benefits established a genuine unresolved issue to be determined at the time of the hearing and therefore, precluded summary judgment. Furthermore, the Board vacated the award of benefits because employer's insurance carrier was never properly notified of the claim and of its potential liability and remanded the case to the district director to provide employer's insurance carrier an opportunity to contest the instant claim on the merits. *Donchak v. Bear Ridge Shops, Inc.*,

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[1] Claimant, Nancy Donchak, is the widow of the miner, Nicholas Donchak, who died on September 17, 1976. Director's Exhibit 5. The miner filed an application for benefits on June 5, 1973, which was finally denied on July 11,1980. Director's Exhibit 22. Subsequent to the miner's death, claimant filed a survivor's claim for benefits with the Social Security Administration (SSA) on October 4, 1976, which was denied by SSA on January 24, 1977 and by the Department of Labor (DOL) on May 13, 1980 and July 17, 1980. Director's Exhibit 23. Subsequently, claimant filed a duplicate survivor's claim on March 31, 1997. Director's Exhibit 1.

[2] 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 65 Fed. Reg. 80,045-80,107 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

BRB Nos. 98-1270 BLA and 98-1270 BLA-A (Jul. 16, 1999)(unpub.); Director's Exhibit 45. Accordingly, the case was remanded for consideration of the merits and the duplicate claims provision at Section 725.309(d)(2000).

Pursuant to the Board's remand, the district director found merit in claimant's contention that the duplicate claims provision should not be mechanically applied and found that claimant established the existence of coal workers' pneumoconiosis but denied the claim because claimant failed to establish that the miner's death was due to pneumoconiosis. Director's Exhibit 49. Thereafter, claimant requested a formal hearing and the case was transferred to the Office of Administrative Law Judges. Administrative Law Judge Ainsworth H. Brown (the administrative law judge), pursuant to employer's motion to dismiss the claim, and after discussing the procedural history of the case and citing the evidence which was part of the record, found that the duplicate claims provisions at Section 725.309(d)(2000) applied, summarily denied the claim on that basis, and cancelled the scheduled hearing. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge committed reversible error by mechanically applying the duplicate claims provisions at Section 725.309 (2000) to summarily deny the claim. Employer responds, urging affirmance of the denial of benefits. The Director has filed a response brief, likewise urging affirmance of the denial.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which all the parties have responded asserting that regulations at issue do not affect the outcome of this case. Based on the briefs submitted by the parties and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, we will proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge erred in summarily denying the

instant duplicate claim pursuant to Section 725.309 (2000)[3] because the Department of Labor (DOL) never advised her of the ramifications of the duplicate claims provisions at Section 725.309 when it denied her initial claim on July 17, 1980, even though it knew she was acting without legal representation at the time. Further, claimant contends that the administrative law judge erred in finding that her lack of representation by counsel was not a determinative factor in this case inasmuch as the July 17, 1980 notice of denial informed claimant "of almost every aspect of the Federal Black Lung Regulations applicable to her case except for the duplicate claim regulations," and "at no time during the processing of her initial claim for benefits was Claimant advised of the duplicate claim provisions." Claimant's Brief at 4. Employer and the Director respond, contending that claimant's failure to respond to the July 17, 1980 notice of denial from DOL, which provided an opportunity for claimant either to submit additional evidence or to request a hearing within sixty days of the denial, Director's Exhibit 23, notwithstanding her lack of representation, rendered any subsequent applications for benefits subject to the provisions at Section 725.309.

Consistent with the requirements of Section 725.309(c)(2000), the Board has held that if an earlier survivor's claim is denied, a subsequent survivor's claim must also be denied based on the prior denial unless the district director determines that the subsequent claim is a request for modification under Section 725.310. *Watts v. Peabody Coal Co.*, 17 BLR 1-68, 1-70-71 (1992); *Mack v. Matoaka Kitchekan Fuel*, 12 BLR 1-197, 1-199 (1989); *see* 20 C.F.R. §725.309(d); *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). Pursuant to Section 725.310, 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).

In the instant case the administrative law judge found that claimant's lack of legal

[3] Inasmuch as claimant's initial claim was a Part B claim subject to review under the regulations set forth in Part 727, the administrative law judge erroneously applied Section 725.309(d) (2000) rather than Section 725.309(c) (2000). Nevertheless, we deem this error harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), because both subsections mandate the denial of a duplicate survivor's claim that does not satisfy the requirements of Section 725.310. *See* 20 C.F.R. §§725.309(c), (d)(2000), 725.310 (2000).

representation at the time of the 1980 denial of her first survivor's claim was not a determinative factor in deciding whether this duplicate survivor's claim had to be denied pursuant to the provisions of Section 725.309(c)(2000) since it was clear that claimant "understood the notice sent to her," and was provided the opportunity to submit additional evidence, request a hearing, or seek reconsideration within one year, but "did nothing until 1997," when she filed her second claim. Decision and Order at 2; *see Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985); Decision and Order at 2-3. Consequently, the administrative law judge found that Section 725.309(d)(2000) was applicable to the instant 1997 duplicate survivor's claim and denied the 1997 claim on that basis. *See Watts, supra*; *Mack, supra*. The administrative law judge further found that the applicability of the duplicate claims provision could not have been anticipated until claimant filed her second claim for benefits and, after citing to the meager evidentiary record, noted that "adducing probative evidence at this late date would appear to be a daunting task," and that it was "questionable that a meaningful rebuttal could be maintained." Decision and Order at 3.

In the instant case, the records shows that claimant was clearly advised by the July 17, 1980 notice of denial that she had a right to submit additional evidence or request a hearing within sixty days of the denial. As the administrative law judge found, claimant did neither and waited for seventeen years to file a duplicate claim. The record demonstrates, in fact, that she never submitted any additional evidence after the July 17, 1980 denial, not even with the duplicate claim, nor does claimant allege that she ever requested modification of the July 17, 1980 denial. With respect to claimant's June 11, 1980 response to the initial denial of her claim on May 13, 1980, in which she requested a copy of the miner's case file and requesting more time to submit evidence, we agree with the administrative law judge that DOL's July 17, 1980 notice of denial advising her of her right to submit additional evidence was sufficient to render any error made by DOL's failure to respond to claimant's June 11, 1980 request harmless in the instant case.[4]

Claimant also contends that the administrative law judge erred in his consideration of the medical evidence by merely reciting to the medical evidence contained in the record, without rendering a specific determination regarding the issue of death due to pneumoconiosis. Claimant contends that because the x-ray evidence of record establishes the

[4] Claimant concedes, "... it is true that the July 17, 1980 Notice of Denial advised the Claimant of her right to submit additional evidence or request a hearing on her claim ... ." Claimant's Brief at 3.

existence of complicated pneumoconiosis, it establishes that the miner's death was due to pneumoconiosis. Contrary to claimant's contention, however, the administrative law judge is not required to reconsider the medical evidence of record and adjudicate the duplicate survivor's claim on the merits, unless her claim satisfies the requirements for modification at Section 725.310 (2000). *See* 20 C.F.R. §725.309(c). This case was remanded by the Board for a consideration of the merits and the duplicate claims provision. The administrative law judge's application of the duplicate claims provision, however, renders a finding on the merits moot.

Finally, claimant avers that because she has already endured a three-year delay in the processing of her 1997 claim as a result of the district director's initial failure to properly notify the insurance carrier in this case of the pending claim, the Board should reverse the administrative law judge's denial in this case and reinstate the prior award instead of remanding the claim to the administrative law judge. Any delay incurred in the processing of claimant's 1997 duplicate claim, however, has no bearing on whether the administrative law judge properly applied Section 725.309(c). Because claimant did not take any action within a year of the denial of her initial survivor's claim, we affirm the administrative law judge's summary denial of claimant's duplicate survivor's claim pursuant to 20 C.F.R. §725.309(c). *See Watts, supra*; *Mack, supra*.

Accordingly, the Summary Decision and Order Denying Benefits of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge