

BRB No. 00-0825 BLA

LAURA B. CLEVINGER)
(Widow of KENNETH CLEVINGER))

Claimant-Petitioner)

v.)

DOMINION COAL CORPORATION)

and)

SUN COAL COMPANY)

Employer-Respondent)

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law
Judge, United States Department of Labor.

Laura B. Clevinger, Grundy, Virginia, *pro se*.

Joseph W. Bowman (Street, Street, Street, Scott & Bowman), Grundy,
Virginia, for employer.

Mary Forrest-Doyle (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, SMITH, Administrative
Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant,¹ the miner's widow and without the assistance of counsel,² appeals the Decision and Order (99-BLA-1063) of Administrative Law Judge Daniel J. Roketenetz denying benefits on a 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 This claim involves a duplicate survivor's claim.⁴ The administrative law judge found that as claimant's second claim cannot be considered a petition for modification pursuant to 20 C.F.R. §725.310 (1999), the claim must be denied as a duplicate survivor's claim pursuant 20 C.F.R. §725.309(d) (1999).⁵ Decision and Order at 3. The administrative law judge further noted that the medical evidence of record was insufficient to establish that the miner's death was due to, or hastened by, pneumoconiosis.⁶ Decision and Order at 3-5. Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law

¹Claimant is Laura B. Clevinger, the miner's widow. The miner, Kenneth Clevinger, died on January 1, 1992, and claimant filed the instant survivor's claim, the subject of this appeal, on July 10, 1998. Director's Exhibits 1, 5.

²Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

³The 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.

⁴Claimant filed her initial claim for benefits on September 15, 1992, which was finally denied on May 28, 1993. Director's Exhibit 24. Claimant filed a second claim for benefits on July 10, 1998. Director's Exhibit 1.

⁵The amendments to the regulations at 20 C.F.R. §§725.309 and 725.310 do not apply to claims, such as this, which were pending on January 19, 2001; rather the versions of these regulations as published in the 1999 Code of Federal Regulations are applicable. *See* 20 C.F.R. §725.2(c), 65 Fed. Reg. 80,057 (2000).

⁶This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the Commonwealth of Virginia. *See* Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

judge erred in denying benefits. Employer responds urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that she will not respond in this appeal.

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 9, 2001, to which employer and the Director have responded asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Claimant has not responded to the Board's order.⁷ Based on the briefs submitted by employer and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of 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. *Stark v. Director, OWCP*, 9 BLR 1-36 (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. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

⁷Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on March 9, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence and contain no reversible error therein. Section 725.309(d) (1999) provides that a duplicate survivor's claim must be denied on the basis of the earlier claim unless the latter claim is a request for modification and the requirements of Section 725.310 (1999) are met (*i.e.*, the subsequent claim is filed within one year of the last denial of the earlier claim.). *See* 20 C.F.R. §§725.309(d), 725.310 (1999); *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992), *aff'd*, 9 F.3d 111 (6th Cir. 1993)(table); *Mack v. Matoaka Kitchehan Fuel*, 12 BLR 1-197 (1989); *Clark v. Director, OWCP*, 838 F.2d 197, 200, 11 BLR 2-46, 2-50 (6th Cir. 1988); *see also Jordan v. Director, OWCP*, 892 F.2d 482, 489, 13 BLR 2-184, 2-194 (6th Cir. 1989). Claimant's initial survivor's claim, filed on September 15, 1992, was ultimately denied on May 28, 1993. Director's Exhibit 24. Claimant took no further action until she filed her second survivor's claim on July 10, 1998. Director's Exhibit 1. Because the second claim was filed over one year after the denial of the first survivor's claim, the administrative law judge properly found that the second survivor's claim did not constitute a petition for modification pursuant to Section 725.310 (1999) and that the second survivor's claim must be denied as a duplicate claim pursuant to Section 725.309(d) (1999). *See Watts, supra; Mack, supra; Clark, supra; see also Jordan, supra.* Thus, we affirm the administrative law judge's denial of benefits on claimant's second survivor's claim as it is supported by substantial evidence and in accordance with law.⁸

⁸The administrative law judge further rationally determined that the death certificate and the relevant opinions of Drs. Abrenio, Naeye and Hansbarger failed to establish that the miner's death was due to, or hastened by, pneumoconiosis. *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 969 (1993); Director's Exhibits 5, 7, 24; Decision and Order at 4-5.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge