

BRB No. 99-0524 BLA

LELA BUNCH)
(Widow of ELMER LOVELL BUNCH))

Claimant-Petitioner)

v.)

DATE ISSUED:

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

Respondent)

DECISION AND ORDER

Appeal of the Order of Dismissal of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Lela Bunch, Corbin, Kentucky, *pro se*.

Jennifer U. Toth (Henry L. Solano, 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: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Order of Dismissal (98-BLA-1123) of Administrative Law Judge Robert L. Hillyard on a survivor's claim

¹ Claimant is the widow of the miner, Elmer Lovell Bunch, who died on October 16, 1978. Director's Exhibit 16 at 7. There is no evidence in the record that the miner filed a claim for benefits during his lifetime.

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). Noting the procedural history in this case, the administrative law judge found that the instant claim failed to meet the requirements of 20 C.F.R. §725.310 and, therefore, constituted a duplicate survivor's claim pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge dismissed the survivor's claim. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. In response, the Director, Office of Workers' Compensation Programs (the Director), urges affirmance of the administrative law judge's Order of Dismissal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Section 725.309(d) 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 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; *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1993), *aff'd*, 9 F.3d 111 (6th Cir. 1993)(table); *Mack v. Matoaka Kitchenkan Fuel*, 12 BLR 1-197 (1989); see also *Jordan v. Director, OWCP*, 892 F.2d 482, 13 BLR 2-184 (6th Cir. 1989).

The procedural history of this case, in pertinent part, is as follows. Claimant filed her initial application for survivor's benefits on October 23, 1978. Director's Exhibit 15 at 57. On August 15, 1979, the district director denied the survivor's claim because the evidence failed to establish the existence of pneumoconiosis arising out of coal mine employment or that the miner's death was due to pneumoconiosis. *Id.* at 43. No further action was taken on this claim.

Claimant filed a second application for benefits on March 26, 1984. Director's Exhibit 15 at 121. The district director denied benefits on June 4, 1984, April 30, 1986 and August 4, 1987. Director's Exhibit 15 at 104-106. The district director conducted an informal conference and again denied benefits because the instant claim was a refiled claim not filed within one year of the prior denial so as to

constitute a request for modification.² Director's Exhibit 15 at 67. The claim was thereafter transferred to the Office of Administrative Law Judges. Following a formal hearing, Administrative Law Judge Charles W. Campbell issued a Decision and Order on January 24, 1989, denying the second survivor's claim, based on his finding that claimant did not file a timely request for modification under Section 725.310 and, therefore, Section 725.309(d) requires denial of this refiled survivor's claim. Director's Exhibit 15 at 16. By Decision and Order dated September 10, 1991, the Board affirmed the administrative law judge's denial of benefits.³ *Bunch v. Director, OWCP*, BRB No. 89-0481 BLA (Sept. 10, 1991) (unpub.).

Claimant filed a third application for survivor's benefits on October 13, 1995. Director's Exhibit 16 at 11. On March 8, 1996, the district director denied this claim, finding that claimant failed to establish the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis. In addition, the district director found that claimant filed a prior survivor's claim which was denied more than one year prior to the current claim and, therefore, stated that the current claim is not a request for modification and must be denied under Section 725.309(d). Director's Exhibit 16 at 1. No further action was taken on this claim.

² In addition, the district director found the medical evidence insufficient to establish entitlement to benefits on the merits. Director's Exhibit 15 at 67.

³ Claimant's motion for reconsideration was denied by the Board. *Bunch v. Director, OWCP*, BRB No. 89-0481 BLA (Dec. 10, 1993)(Order)(unpub.).

Claimant filed her fourth and current application for benefits on June 24, 1997. Director's Exhibit 1. The district director denied this survivor's claim on October 1, 1997 and January 27, 1998.⁴ Director's Exhibits 6, 7. Following an informal conference, the district director again denied benefits finding that because the new claim cannot be considered a request for modification, the refiled survivor's claim must be technically denied, as provided by Section 725.309(d). Director's Exhibit 13. Thereafter, the case was transferred to the Office of Administrative Law Judges. Director's Exhibit 17. On January 29, 1999, while the case was pending before the Office of Administrative Law Judges, the Director filed a Motion to Dismiss the survivor's claim in accordance with Section 725.309. On February 3, 1999, the administrative law judge issued an Order to Show Cause why the survivor's claim should not be dismissed. Claimant responded by letter dated February 6, 1999, disagreeing with the Director's Motion to Dismiss and requesting a hearing.

The administrative law judge, having found that claimant's current claim was filed more than one year after the denial of her prior survivor's claim, correctly stated that "where the record contains two or more survivor's claims filed by the same claimant, the subsequent claim must be denied on the same basis as the earlier claim. Duplicate survivor's claims may only be considered if the subsequent claim satisfies Section 725.310." Order of Dismissal at 1-2. Thus, since claimant's current, duplicate survivor's claim filed in June 1997, which the Director previously challenged, was filed more than one year after the final denial of claimant's third survivor's claim, filed in 1995 and denied in March 1996, thereby not meeting the requirements of Section 725.310, the administrative law judge properly denied benefits. 20 C.F.R. §§725.309(d), 725.310; see *Jordan, supra*; *Clark, supra*; *Watts, supra*; *Mack, supra*.

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

SO ORDERED.

⁴ In particular, the district director found that claimant failed to establish the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis. Additionally, he found that claimant filed a prior survivor's claim which was denied more than one year prior to the current claim and stated that the current claim is not a request for modification and must be denied under Section 725.309(d). Director's Exhibits 6, 7.

ROY P. SMITH

Administrative Appeals Judge

JAMES F. BROWN

Administrative Appeals Judge

REGINA C. McGRANERY

Administrative Appeals Judge