

BRB No. 04-0366 BLA

DELLA RUTH HARDING )  
(Widow of JAMES MARSHALL HARDING) )  
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 Claimant-Petitioner )  
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 v. )  
 )  
 DIRECTOR, OFFICE OF WORKERS' ) DATE ISSUED: 02/07/2005  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Respondent ) DECISION and ORDER

Appeal of the Decision Order – Denial of Benefits of Robert L. Hillyard,  
Administrative Law Judge, United States Department of Labor.

William J. Hackworth, lay representative, Lima, Ohio, for claimant.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor, Donald S. Shire,  
Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor;  
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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL,  
Administrative Appeals Judges.

PER CURIAM:

Claimant, the widow of the miner, appeals the Decision and Order – Denial of  
Benefits (03-BLA-6365) of Administrative Law Judge Robert L. Hillyard (the administrative  
law judge) 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).<sup>1</sup> The administrative law judge found that because claimant's initial, survivor's

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<sup>1</sup> 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. All citations to

claim was denied solely on the basis of the miner's physical condition at the time of his death, the instant, survivor's claim must be denied as a matter of law pursuant to 20 C.F.R. §725.309(d)(3).<sup>2</sup> Accordingly, the administrative law judge denied the subsequent, survivor's claim.

The relevant history of this claim is as follows. Claimant married the miner on January 24, 1986. Director's Exhibit 3. The miner died on July 13, 1989. *Id.* Claimant remarried Mr. John Aton on November 4, 1989. *Id.* at 11 (unpaginated). Claimant filed a survivor's claim with the Department of Labor (DOL) on September 3, 1989. *Id.* This claim was denied by the district director on January 3, 1990 for the following reasons: the evidence did not show that the miner had pneumoconiosis; the evidence did not show that pneumoconiosis arose at least in part out of coal mine employment; the evidence did not establish that pneumoconiosis caused the miner's death; and the evidence did not show that claimant was an eligible survivor of the deceased miner. *Id.*

Claimant filed a subsequent, survivor's claim with DOL on August 15, 2002. Director's Exhibit 5. Along with the subsequent, survivor's claim, claimant submitted additional medical evidence relating to the miner's physical condition as well as evidence indicating that she was divorced from Mr. Aton in 1990. Director's Exhibit 10. The district director denied the subsequent, survivor's claim on May 12, 2003 stating that the regulations required claimant to demonstrate a change in a condition of entitlement and that the information she had submitted with her subsequent, survivor's claim did not demonstrate a change in any condition of entitlement. Director's Exhibit 20. Claimant, by her lay representative, requested a hearing on the claim before the Office of Administrative Law Judges. Identified as issues contested by the Director and to be addressed at the hearing were: the length of the miner's coal mine employment; the existence of pneumoconiosis; whether the miner's pneumoconiosis arose out of coal mine employment; whether the miner was disabled; whether the miner's disability or death were due to pneumoconiosis; and whether the evidence established a material change in conditions pursuant to 20 C.F.R.

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the regulations, unless otherwise noted, refer to amended regulations.

<sup>2</sup> Section 725.309(d)(3) states, in applicable part:

...a subsequent claim filed by a surviving spouse... shall be denied unless the applicable conditions of entitlement in such claims 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).

§725.309(c), (d). Director's Exhibit 23. Following the November 6, 2003 hearing, the administrative law judge denied benefits stating that claimant had not alleged a change unrelated to the miner's physical condition at the time of the miner's death, nor did he find that such change had occurred, as required to show a material change in conditions in subsequent, survivor's claims. 20 C.F.R. §725.309(d)(3). Accordingly, the administrative law judge concluded that because the first, survivor's, claim was denied based upon the miner's physical condition at the time of his death, *i.e.*, because the evidence failed to establish the existence of pneumoconiosis, causality, or death due to pneumoconiosis, the subsequent, survivor's claim must also be denied on that basis pursuant to Section 725.309(d)(3).

On appeal, claimant challenges the administrative law judge's finding that she failed to establish that a change in an applicable condition of entitlement since the prior denial. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting that the denial of benefits be vacated and the case remanded to the administrative law judge. The Director agrees with claimant that the administrative law judge erred when he found that claimant's initial, survivor's claim was denied solely based on the miner's physical condition at the time of his death, *i.e.*, the evidence did not establish pneumoconiosis, causality, or death due to pneumoconiosis, although the Director contends that the purported divorce decree is not credible and the credible medical evidence does not establish pneumoconiosis or death due to pneumoconiosis. Attached to her reply brief claimant submits additional evidence in support of her appeal, a signed divorce decree and additional x-ray evidence.<sup>3</sup>

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 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The record reflects that the district director denied claimant's initial, survivor's claim not only because the evidence failed to establish the existence of pneumoconiosis, causality, and death due pneumoconiosis, but also because it failed to establish that claimant was an

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<sup>3</sup> Claimant has submitted a divorce decree signed by a Judge from the Court of Common Pleas in Ohio along with her reply to the Director's brief. As the Director correctly notes, in his brief, claimant had previously submitted an unsigned copy of the same purported divorce decree. Director's Exhibit 10; Director's Brief at 4-5. The signed copy of the purported divorce decree submitted with her reply brief constitutes new evidence, however, which the Board may not consider. 20 C.F.R. §802.301(b).

eligible survivor of the miner, apparently due to her November 4, 1989 remarriage. Director's Exhibit 3 at 1. In denying benefits on claimant's subsequent, survivor's claim, however, the administrative law judge stated that benefits must be denied as a matter of law pursuant to 20 C.F.R. §725.309(d)(3) because claimant's prior claim was denied based on the miner's physical condition at the time of his death, *i.e.*, the evidence failed to show the existence of pneumoconiosis, causality, or death due to pneumoconiosis. Decision and Order at 6. The administrative law judge failed to acknowledge, however, that the first, survivor's claim was also denied because claimant failed to establish that she was an eligible survivor of the miner, a condition of entitlement unrelated to the miner's physical condition as defined in 20 C.F.R. §725.309(d)(3). Accordingly, because the record contains evidence, *i.e.*, a copy of a purported 1990 divorce decree dissolving claimant's remarriage, which could, if credited, show that claimant is an eligible survivor of the miner, we vacate the administrative law judge's denial of the subsequent, survivor's claim and remand the case to the administrative law judge to reconsider the evidence pursuant to Sections 725.309(d)(3). *See* 20 C.F.R. §§725.212, 725.213.

If, on remand, the administrative law judge finds that claimant has established that she is an eligible survivor of the miner within the meaning of Section 725.309(d)(3), *see* 20 C.F.R. §§725.212, 725.213, then the administrative law judge must render findings as to whether claimant has established that the miner suffered from pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a) and 718.203 and, whether the evidence establishes that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205(c)(5); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993) *see also* 20 C.F.R. §725.309(d)(4).

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is vacated, and the case is remanded to the administrative law judge for further proceedings consistent with this decision.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge