

BRB No. 10-0389 BLA

MARIAN L. HAND)
(Widow of DALLAS HAND))
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED: 02/28/2011
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Order Denying Benefits of William S. Colwell,
Administrative Law Judge, United States Department of Labor.

Marian L. Hand, Tower City, Pennsylvania, *pro se*.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen James,
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:

Claimant¹ appeals, without the assistance of counsel, the Order Denying Benefits (2010-BLA-5223) of Administrative Law Judge William S. Colwell (the administrative law judge), rendered on a survivor's subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). This case has a protracted procedural history, and is now before the Board for the eighth time. As we have set forth previously, beginning in 1982, claimant has filed

¹ Claimant is the miner's widow. The miner died on April 28, 1982. Director's Exhibit 9.

multiple survivor's claims and requests for modification of the denial of those claims.² In the Order Denying Benefits that is the subject of the current appeal, the administrative law judge found that claimant's current, subsequent survivor's claim did not satisfy the criteria of 20 C.F.R. §725.309(d), precluding an award of benefits. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's Order Denying Benefits.

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. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law.³ 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).

In this case, the administrative law judge correctly found that claimant's subsequent survivor's claim must be denied as a matter of law. Accordingly, we will affirm the administrative law judge's Order Denying Benefits.

A subsequent claim, filed more than one year after the effective date of a final order denying a 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. A subsequent claim filed by a surviving spouse "shall be denied unless the applicable conditions of entitlement in such claim 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); *Boden v. G. M. & W. Coal Co.*, 23 BLR 1-38, 1-40-41 (2004).

² The Board set forth the history of each of claimant's claims and modification requests in its last decision, in which the Board affirmed the denial of survivor's benefits for the seventh time. *M.H. [Hand] v. Director, OWCP*, BRB No. 07-0803 BLA, slip op. at 3-4 (June 20, 2008)(unpub.).

³ The record indicates that the miner's coal mine employment was in Pennsylvania. Director's Exhibits 1, 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

Claimant's first survivor's claim, filed on May 13, 1982, was finally denied on June 29, 1990, because the medical evidence did not establish that the miner's death was due to pneumoconiosis. *See* n.2, *supra*. More than one year later, claimant filed a second survivor's claim, on June 29, 1992. That claim, and a third subsequent claim that claimant filed on March 1, 1999, were both automatically denied, based on the final denial of her first claim.⁴ *Id.*

Claimant filed her current survivor's claim on May 28, 2003. Director's Exhibit 3. It was denied by Administrative Law Judge Adele Higgins Odegard on May 16, 2007, based on 20 C.F.R. §725.309(d). Pursuant to claimant's appeal, the Board affirmed the denial of benefits. *M.H. [Hand] v. Director, OWCP*, BRB No. 07-0803 BLA (June 20, 2008)(unpub.).

Claimant timely requested modification of the denial of benefits pursuant to 20 C.F.R. §725.310, informing the district director that she "[could not] provide any new medical evidence." Director's Exhibit 59. At claimant's request, the district director forwarded claimant's subsequent claim to the Office of Administrative Law Judges for a hearing. Director's Exhibit 63.

Prior to the scheduled hearing, the Director moved to dismiss the claim, arguing that, since the basis of the first survivor's claim denial related solely to the miner's physical condition at the time of his death, and that denial was final, 20 C.F.R. §725.309(d)(3) barred claimant from litigating the current survivor's claim. By letter dated January 26, 2010, claimant objected to the Director's motion, and reiterated her request for a hearing. The administrative law judge found that claimant's subsequent claim had to be denied under 20 C.F.R. §725.309(d). He therefore denied benefits, and canceled the hearing.

The administrative law judge correctly denied benefits. The conditions of entitlement that claimant failed to demonstrate in her initial claim related solely to the

⁴ The Department of Labor has amended the regulations implementing the Black Lung Benefits Act, including the regulation at 20 C.F.R. §725.309. Those regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2010). Where we cite a former version of a regulation, we will cite to the 2000 version of the Code of Federal Regulations. Claimant's subsequent claims that were filed before January 19, 2001 were denied under the former version of 725.309, which required the automatic denial of a survivor's claim filed more than one year after the final denial of a previous survivor's claim. *See* 20 C.F.R. §725.309(d)(2000). Claimant's current subsequent claim is governed by the revised version of 20 C.F.R. §725.309(d), set forth in the text above.

miner's physical condition at the time of his death, that is, whether the miner's death was due to pneumoconiosis. Therefore, the administrative law judge properly found that, in this claim, entitlement was precluded. 20 C.F.R. §725.309(d)(3); *see Boden*, 23 BLR at 1-40-41. As the administrative law judge's findings pursuant to Section 725.309(d)(3) are in accordance with law, we affirm the administrative law judge's denial of benefits. *McFall*, 12 BLR at 1-177.

We also affirm the administrative law judge's determination to cancel the hearing. The Act and regulations mandate that an administrative law judge hold a hearing on any claim, including a request for modification filed with the district director, whenever a party requests such a hearing, unless such hearing is waived by the parties or a party requests summary judgment pursuant to 20 C.F.R. §725.452.⁵ *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69, 1-72 (2000). Here, the Director's motion to dismiss this subsequent claim was the equivalent of a request for summary judgment, as the Director asserted, and the administrative law judge determined, that claimant's entitlement was precluded as a matter of law. *See* 20 C.F.R. §725.452(c). Thus, the administrative law judge did not err when he canceled the hearing. *See Pukas*, 22 BLR at 1-72.

⁵ Section 725.452(c) provides:

A full evidentiary hearing need not be conducted if a party moves for summary judgment and the administrative law judge determines that there is no genuine issue as to any material fact and that the moving party is entitled to the relief requested as a matter of law. All parties shall be entitled to respond to the motion for summary judgment prior to decision thereon.

20 C.F.R. §725.452(c).

Accordingly, the administrative law judge's Order Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge