

BRB No. 12-0395 BLA

JULIA SMITH )  
(Widow of CHARLES SMITH) )  
 )  
 Claimant-Petitioner )  
 )  
 v. ) DATE ISSUED: 02/27/2013  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Respondent ) DECISION and ORDER

Appeal of the Decision and Order of Administrative Law Judge Joseph E. Kane, United States Department of Labor.

Byron L. Potts (Byron L. Potts & Co., LPA), Columbus, Ohio, for claimant.

Anne Marie Scarpino (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:

Claimant<sup>1</sup> appeals the Decision and Order (2011-BLA-5848) of Administrative Law Judge Joseph E. Kane denying benefits on a survivor's claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a subsequent survivor's claim filed on October 20, 2010.

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<sup>1</sup> Claimant is the surviving spouse of the miner, who died on February 3, 1969. Director's Exhibit 7.

Claimant filed her initial claim for survivor's benefits on November 10, 1970. Director's Exhibit 1. In a Decision and Order dated March 11, 1983, an administrative law judge denied benefits because the evidence did not establish that the miner was totally disabled due to pneumoconiosis at the time of his death, or that the miner's death was due to pneumoconiosis. *Id.*

Claimant filed a subsequent survivor's claim on October 20, 2010. Director's Exhibit 3. On March 9, 2011, the district director issued a Proposed Decision and Order denying benefits. Director's Exhibit 9. At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing.

By Order dated February 1, 2012, the administrative law judge ordered the parties to show cause why the case was not subject to automatic denial pursuant to 20 C.F.R. §725.309(d). Claimant filed a response opposing the dismissal of her claim. The Director, Office of Workers' Compensation Programs, did not file a response.

In a Decision and Order dated March 28, 2012, the administrative law judge found that, because claimant's 2010 survivor's claim was not filed within a year of the denial of her prior claim, it was considered a subsequent claim. Because claimant failed to demonstrate a change in one of the applicable conditions of entitlement unrelated to the miner's physical condition at the time of his death, the administrative law judge denied benefits in accordance with 20 C.F.R. §725.309.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to pneumoconiosis. The Director responds in support of the administrative law judge's denial of benefits.<sup>2</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Consistent with the requirements of 20 C.F.R. §725.309(d)(3), the Board has held that if an earlier survivor's claim is finally denied, a subsequent survivor's claim must also be denied based on the prior denial, unless claimant's subsequent claim is considered a request for modification thereby satisfying the requirements of 20 C.F.R. § 725.310 or,

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<sup>2</sup> Claimant also asserts a claim to benefits for a "loss of consortium" as a result of the miner's death from pneumoconiosis. Claimant's Brief at 10. As the Director, Office of Workers' Compensation Programs, accurately notes, there is no provision in the Act for such a claim.

claimant demonstrates a change in one of the applicable conditions of entitlement unrelated to the miner's physical condition at the time of his death. *See* 20 C.F.R. §725.309(d); *Boden v. G.M. & W. Coal Co.*, 23 BLR 1-39, 1-41 (2004); *Watts v. Peabody Coal Co.*, 17 BLR 1-68, 1-70-71 (1992).

In this case, claimant's second claim for benefits, filed on October 20, 2010, fails to satisfy the requirements of 20 C.F.R. §725.310 because it was filed nearly forty years after she filed her first claim for benefits on November 10, 1970. Director's Exhibits 1, 3. Moreover, because the condition of entitlement that claimant failed to demonstrate in her initial claim related solely to the miner's physical condition at the time of his death, the administrative law judge properly found that entitlement was precluded. 20 C.F.R. §725.309(d)(3); *Boden*, 23 BLR at 1-41; *Watts*, 17 BLR at 1-70-71.

The administrative law judge also considered the impact of amendments to the Act that were enacted on March 23, 2010, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010). Relevant to a survivor's claim, the amendments revive Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l). The administrative law judge properly found that claimant is not eligible for benefits under the automatic entitlement provisions of amended Section 932(l), because the miner was not determined to be eligible to receive benefits at the time of his death.<sup>3</sup> 30 U.S.C. §932(l); Decision and Order at 4; Director's Exhibit 1.

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<sup>3</sup> The amendments also reinstated the presumption at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a survivor establishes that the miner had at least fifteen years of underground coal mine employment or comparable surface mine employment, and had a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S. C. §921(c)(4)). However, because the conditions that claimant failed to demonstrate in her initial survivor's claim related solely to the miner's physical condition at the time of his death, the administrative law judge properly determined that claimant cannot benefit from the Section 411(c)(4) presumption. 20 C.F.R. §725.309(d)(3); *Moser v. Director, OWCP*, BLR , BRB No. 12-0293 BLA (Feb. 26, 2013); Decision and Order at 3-4.

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

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