

BRB No. 01-0410 BLA

DOLLIE KENDRICK )  
(Widow of Robert Kendrick) )

Claimant-Petitioner )

v. )

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

Respondent )

DATE ISSUED: \_\_\_\_\_

DECISION and ORDER

Appeal of the Order of Dismissal of Daniel F. Solomon, Administrative Law Judge,  
United States Department of Labor.

Dollie Kendrick, Ypsilanti, Michigan, *pro se*.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL,  
Administrative Appeals Judges.

PER CURIAM:

Claimant<sup>1</sup> appeals, without the assistance of counsel,<sup>2</sup> the Order of Dismissal (00-BLA-0736) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) on a duplicate 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>3</sup> The

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<sup>1</sup>Claimant is the widow of the miner, who died on May 27, 1983. Director's Exhibit 3.

<sup>2</sup>James Plaunt, claimant's son-in-law, filed a letter on behalf of claimant with the Board on March 8, 2001. Mr. Plaunt indicated therein, "Mrs. Kendrick and I approach the Benefits Review Board *pro se*." Claimant's Letter at 1. We acknowledge that claimant filed this appeal without legal counsel and that she proceeds *pro se*. 20 C.F.R. §802.211(e).

<sup>3</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 65 Fed. Reg. 80,045 - 80,107 (2000)(to be codified at 20

administrative law judge initially found that claimant's response to his December 15, 2000 Show Cause Order was not responsive to the issue as set forth in the Order. The administrative law judge denied the instant claim under 20 C.F.R. §725.309(d) (2000) as he found that it was a duplicate survivor's claim which does not meet the requirements for modification under 20 C.F.R. §725.310 (2000).

On appeal, claimant submits evidence and contends that the Board is bound to find in her favor based on proof that the miner was totally disabled due to pneumoconiosis which arose from his coal mine employment. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in response to claimant's appeal.

In an appeal by a claimant proceeding 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 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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hichman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

The pertinent procedural history is as follows: Claimant apparently filed her first survivor's claim on June 13, 1983. *See* Director's Exhibit 1 at 2.<sup>4</sup> Judge Avery denied that claim on its merits in his Decision and Order - Denying Benefits dated September 29, 1986. *Id.* Claimant did not appeal from Judge Avery's Decision and Order and took no further action on this claim. Claimant filed a second claim on January 29, 1999, which the district director denied under 20 C.F.R. §725.309(d).<sup>5</sup> Director's Exhibits 2, 4. Claimant thereafter requested a hearing on April 27, 1999. Director's Exhibit 5. By letter dated May 6, 1999, the district director acknowledged claimant's request for a hearing, and reiterated his position that the instant claim constituted a duplicate survivor's claim barred under 20 C.F.R. §725.309(d). Director's Exhibit 6. On September 14, 1999, the district director issued a Memorandum of Conference in which he recommended a denial of the instant claim under 20 C.F.R. §725.309(d) (2000). Director's Exhibit 7. On October 23, 1999, claimant submitted additional evidence. Director's Exhibit 9. By letter dated March 14, 2000, the district director explained the status of the case, and reaffirmed his denial of the claim under 20

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<sup>4</sup>Claimant's initial claim, referred to by Judge Avery in his Decision and Order dated September 29, 1986, is not contained in the record received by the Board.

<sup>5</sup> The regulation at 20 C.F.R. §725.309(d) (2000) provides in pertinent part:

If an earlier survivor's claim filed under this part has been finally denied, the new claim filed under this part shall also be denied unless the [district director] determines that the later claim is a request for modification and the requirements of [20 C.F.R.] §725.310 [(2000)] are met.

20 C.F.R. §725.309(d) (2000). The amendments to the regulation at 20 C.F.R. §725.309 (2000) do not apply to claims, such as the instant claim, which were pending on January 19,

C.F.R. §725.309(d) (2000). Director's Exhibit 10. Claimant again requested a hearing on April 2, 2000, and the district director transferred the case to the Office of Administrative Law Judges pursuant to claimant's request. Director's Exhibit 11-13. In his Order of Dismissal dated January 5, 2001, which is the subject of the instant appeal, the administrative law judge indicated that the hearing was set for January 23, 2001, that he had issued an Order to Show Cause on December 15, 2000, and that claimant's response to the Order was not responsive to the issue as set forth therein. The administrative law judge determined that good cause had not been established for claimant's failure to request, in a timely manner under 20 C.F.R. §725.310 (2000), modification of Administrative Law Judge C. Richard Avery's Decision and Order - Denying Benefits dated September 29, 1986. In this regard, the administrative law judge found that claimant, who filed her first claim on June 13, 1983, did not appeal from Judge Avery's 1986 Decision and Order, but filed this second survivor's claim in January of 1999. *See* Director's Exhibits 1, 2. The administrative law judge denied the instant claim under 20 C.F.R. §725.309(d) (2000) as he found that it was a duplicate survivor's claim which does not meet the requirements for modification under 20 C.F.R. §725.310 (2000). The administrative law judge thus dismissed claimant's request for a hearing and cancelled the hearing.

We affirm the administrative law judge's denial of the instant claim as it is rational, supported by substantial evidence and in accordance with law. Under 20 C.F.R. §725.309 (c) and (d) (2000) if an earlier survivor's claim is finally denied, a subsequent survivor's claim

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2001. *See* 20 C.F.R. §725.2.

must also be denied based on the prior denial unless claimant's subsequent claim is considered to be a motion for modification which satisfies the requirements of 20 C.F.R. §725.310 (2000). *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992); *Mack v. Matoaka Kitchikan Fuel*, 12 BLR 1-197 (1989); see *Clark v. Director, OWCP*, 9 BLR 1-205 (1986), *rev'd on other grounds, Clark v. Director, OWCP*, 838 F.2d 197, 11 BLR 2-46 (6th Cir. 1988). The administrative law judge properly determined that the instant claim must be denied as a duplicate survivor's claim as it does not meet the requirements for modification. Specifically, claimant filed the instant survivor's claim on January 29, 1999, more than one year after Judge Avery's Decision and Order - Denying Benefits, which was dated September 29, 1986 and filed with the district director on October 7, 1986. Director's Exhibits 1, 2. Moreover, the record shows that the Director has relied on the duplicate survivor's claims regulations at each stage of the adjudication of the instant claim. Director's Exhibits 4, 6, 7, 10; cf. *Jordan v. Director, OWCP*, 892 F.2d 482, 13 BLR 2-184 (6th Cir. 1989). We, therefore, affirm the administrative law judge's denial of the instant duplicate claim for survivor's benefits under 20 C.F.R. §725.309(d) (2000).

Accordingly, the administrative law judge's Order of Dismissal 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