

BRB No. 04-0439 BLA

MARY F. LINVILLE)	
(Widow of BUDDY LINVILLE))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ISLAND CREEK COAL COMPANY)	DATE ISSUED: 01/13/2005
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Mary F. Linville, Amherstdale, West Virginia, *pro se*.

Mary Rich Maloy (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order (03-BLA-6523) of Administrative Law Judge Richard A. Morgan denying benefits on a

¹Claimant is the widow of the deceased miner, Buddy Linville. The miner filed a claim with the Social Security Administration on May 23, 1973. Director's Exhibit 1. After several administrative denials by the Social Security Administration, this claim was finally denied by the Department of Labor on August 26, 1988. *Id.* The miner died on July 26, 1996. Director's Exhibits 1, 2, 11.

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). The administrative law judge adjudicated this subsequent survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge denied this subsequent survivor's claim in accordance with 20 C.F.R. §725.309(d)(3). On appeal, claimant generally challenges the administrative law judge's denial of survivor's benefits. Employer responds to claimant's appeal, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *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 rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The pertinent procedural history of this case is as follows: Claimant filed the initial survivor's claim on July 14, 1997. Director's Exhibit 2. This survivor's claim was denied by the Department of Labor on January 20, 1998 because claimant failed to establish the existence of pneumoconiosis, that pneumoconiosis arose out of coal mine employment, and that the miner's death was caused by pneumoconiosis. *Id.* Although claimant filed a request for a hearing on March 2, 1998, she subsequently withdrew the request.² *Id.* Claimant filed a request for modification on February 27, 1999. *Id.* On March 11, 1999, the Department of Labor denied claimant's request for modification because it was untimely filed. *Id.* Claimant filed another survivor's claim – a duplicate claim, rather than a request for modification – on August 31, 1999. Director's Exhibit 3. On November 26, 1999, this survivor's claim was denied by the Department of Labor because claimant failed to establish the existence of pneumoconiosis, that pneumoconiosis arose out of coal mine employment, that the miner's death was caused by pneumoconiosis, and thus, claimant failed to establish a material change

²In a letter dated June 1, 1998, the district director confirmed his May 26, 1998 telephone conversation with claimant. Director's Exhibit 2. Specifically, the district director confirmed that claimant requested the withdrawal of her March 2, 1998 request for a hearing. *Id.* In addition, the district director confirmed that he advised claimant that a request for modification must be filed within one year from the date of the denial of her claim. *Id.* Lastly, the district director advised claimant that the Department of Labor would not take further action on her claim until it received a request for modification. *Id.*

in conditions.³ *Id.* Since claimant did not pursue this survivor's claim any further, the denial became final.

On February 21, 2002, claimant filed the most recent survivor's claim – a subsequent claim under 20 C.F.R. §725.309, rather than a request for modification under 20 C.F.R. §725.310 (2000). Director's Exhibit 5. The Department of Labor denied this claim on May 1, 2003 because claimant failed to establish a change in any conditions of entitlement. Director's Exhibit 19. Claimant filed a request for a hearing on May 19, 2003. Director's Exhibit 21. While the case was pending before the Office of Administrative Law Judges, employer filed a motion for summary judgment on January 7, 2004 on grounds that there is no genuine issue as to any material fact. Specifically, employer argued that claimant's 2002 subsequent survivor's claim must be denied pursuant to 20 C.F.R. §725.309(d)(3). On January 21, 2004, Administrative Law Judge Richard A. Morgan issued a Decision and Order granting employer's motion for summary judgment. As previously noted, claimant's 2002 survivor's claim was filed more than one year after claimant's 1999 survivor's claim. Director's Exhibits 3, 5. Consequently, the present claim does not satisfy the requirements of a request for modification.⁴

In considering claimant's 2002 subsequent survivor's claim, the administrative law judge concluded that "the current claim for survivor's benefits must be denied pursuant to 20 C.F.R. §725.309(d)(3)." Decision and Order at 2. The pertinent regulation provides that "[a] subsequent claim filed by a surviving spouse, child, parent, brother, or sister 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). In this case, the administrative law judge correctly stated that "[t]he only issues in this case involve the miner's physical condition; no other condition of entitlement is involved in this case." Decision and Order at 2. Thus, since the only conditions of entitlement in claimant's 2002 subsequent survivor's claim relate to the miner's physical condition at the time of his death, we hold that this 2002 subsequent survivor's claim was properly denied in accordance with 20 C.F.R. §725.309(d)(3). *See generally Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992); *Mack v. Matoaka Kitchehan Fuel*, 12 BLR 1-197

³The district director noted that the denial was made pursuant to 20 C.F.R. §725.309 (2000). Director's Exhibit 3.

⁴The pertinent regulation provides that "[u]pon his or her own initiative, or upon the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the district director may, at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits." *See* 20 C.F.R. §725.310(a).

(1989).

Accordingly, the administrative law judge's Decision and 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