

BRB No. 02-0267 BLA

CATHERINE WILCE)
(Widow of FRANCIS WILCE))
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED: _____
)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,))
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Order Granting Motion to Dismiss (Denial) of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Harry T. Coleman (Abrahamsen, Moran & Conaboy, P.C.), Scranton, Pennsylvania, for claimant.

Michelle S. Gerdano (Eugene Scalia, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Order Granting Motion to Dismiss (Denial) (01-BLA-1099) of Administrative Law Judge Ainsworth H. Brown (the administrative law judge) on a duplicate

¹Claimant is the surviving spouse of Francis Wilce, the miner, who died on December 31, 1991. Director's Exhibit 3.

survivor's claim² 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).³ The administrative law judge denied, pursuant to 20 C.F.R. §725.309(d) (2000),⁴ the instant claim because it was filed on July 25, 1996, more than one year after the November 13, 1992 denial of claimant's prior claim filed on February 19, 1992. *See* Director's Exhibits 1, 10. The administrative law judge found that the fact that claimant seeks modification of the denial of the instant 1996 claim does not change the fact that it is a duplicate survivor's claim, time-barred under 20 C.F.R. §725.309(d) (2000). The administrative law judge thus granted the Motion to Dismiss Claim filed by the Director, Office of Workers' Compensation Programs (the Director), and cancelled the hearing. On appeal, claimant contends that she was denied the

²Claimant filed the instant claim for survivor's benefits on July 25, 1996. Director's Exhibit 1.

³The 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 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

⁴The 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, 2001. *See* 20 C.F.R. §725.2, 65 Fed. Reg. 80,057. 20 C.F.R. §725.309(d) (2000) provides, in relevant 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 §725.310 are met." 20 C.F.R. §725.309(d) (2000).

opportunity to establish a material change in conditions under 20 C.F.R. §725.309(d) (2000) when the administrative law judge granted the Director's Motion to Dismiss Claim and cancelled the hearing. Claimant submits that the Board must view the protracted procedural history of this case as having worked an injustice, and asserts that the treatment accorded her case runs counter to the goal of the Act to provide benefits to coal miners who die or are totally disabled due to pneumoconiosis and to their dependents. Claimant thus urges the Board to remand the case to the administrative law judge for a hearing. The Director responds, and seeks affirmance of the decision below. The Director argues that the administrative law judge properly denied the instant 1996 claim as a duplicate survivor's claim under 20 C.F.R. §725.309(d) (2000) and granted the Director's Motion to Dismiss Claim prior to the scheduled hearing.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Prior to the hearing scheduled for December 6, 2001, the Director filed a Motion to Dismiss Claim. The Director argued that under 20 C.F.R. §725.309(d) (2000), the instant 1996 claim was not viable as it was filed more than one year after the denial of claimant's 1992 claim and constituted a duplicate survivor's claim. The Director argued that claimant had, however, timely requested modification of the denial of the instant 1999 claim, and referred to claimant's argument, asserted upon her August 20, 1999 appeal of Judge Kaplan's Decision and Order denying modification and the 1996 claim, *see* Director's Exhibit 27, that it was due to the ineffective assistance of counsel that her petition for modification was not filed within one year of the denial of her 1992 claim. The Director further asserted that even if the 1996 amended death certificate and the 1996 opinion of Dr. Salvatore Pettinato were to be considered, this evidence is insufficient to meet claimant's burden to establish death due to pneumoconiosis under 20 C.F.R. §718.205(c). The Director urged the administrative law judge to deny the instant 1996 claim under 20 C.F.R. §725.309(d) (2000).

The administrative law judge granted the Director's Motion to Dismiss Claim in his Order Granting Motion to Dismiss (Denial) dated November 29, 2001, from which claimant now appeals. The administrative law judge stated that a claimant may not establish a material change in conditions under 20 C.F.R. §725.309(d) (2000) in a duplicate survivor's claim. He determined, however, that claimant could have asserted, had she acted within one year of the denial of her 1992 claim, modification based on a mistake in a determination of fact contained in that denial. He found that claimant did not do so and took no action until she filed the instant 1996 claim. The administrative law judge concluded that the fact that claimant requests modification of the denial of the instant 1996 claim does not change the

fact that it is subject to denial as a duplicate survivor's claim. He stated, "Mrs. Wilce slept on her rights from 1992 to 1996 and this has the effect of precluded (sic) further adjudication on the merits." Order Granting Motion to Dismiss (Denial) at 2. The administrative law judge cancelled the hearing and stated:

The regulations would have to be rewritten to say that the summary denial provision would only apply if one remand (sic) a decision and order following a formal hearing for this situation, but I do not have that authority. Only the Department of Labor upon appropriate rule making or Congress may do that.

Id. Accordingly, the claim was denied.

Claimant contends that the administrative law judge, by cancelling the hearing, erroneously denied her the opportunity to establish a material change in conditions in the instant 1999 claim based on the evidence which she was prepared to present at the hearing. Claimant further argues that the Board must view the procedural history of this case as having worked an injustice, which runs counter to the goal of the Act to provide benefits to miners who are totally disabled or die due to pneumoconiosis and to their dependents. Claimant seeks a remand of the case to the administrative law judge for a hearing so that the administrative law judge may consider evidence which claimant was prepared to submit at the hearing. The Director argues that the administrative law judge's decisions to grant the Director's Motion to Dismiss Claim and to cancel the hearing are in accordance with law, including the regulation at 20 C.F.R. §725.452(c).⁵

⁵20 C.F.R. §725.452(c) was not revised and provides:

Claimant's contentions lack merit. The administrative law judge properly denied the instant 1996 claim based on his finding that it constitutes a duplicate survivor's claim and is time-barred and subject to denial under 20 C.F.R. §725.309(d) (2000). The Board has held that if an earlier survivor's claim is denied, a subsequent survivor's claim must also be denied, based on the prior denial, unless the subsequent claim is considered a motion for modification, satisfying the requirements of 20 C.F.R. §725.310 (2000). *Watts v. Peabody Coal Co.*, 17 BLR 1-68, 1-70-71 (1992); *Mack v. Matoaka Kitchekan Fuel*, 12 BLR 1-197, 1-199 (1989); *see* 20 C.F.R. §725.309(d) (2000). In this case, the administrative law judge correctly found that more than a year had elapsed since the district director's November 13, 1992 denial of claimant's 1992 claim when, on July 25, 1996, claimant filed the instant claim for survivor's benefits. Director's Exhibits 1, 10. Hence, the instant 1996 claim does not satisfy the timeliness requirement set forth in 20 C.F.R. §725.310(a) (2000) and, as the

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). The regulation at 20 C.F.R. §725.452 (2000) was revised to add subsection (d) which applies in cases where an administrative law judge believes that an oral hearing is not necessary for any reason other than on motion for summary judgment. This subsection is inapplicable in this case where the Director, Office of Workers' Compensation Programs, filed a Motion to Dismiss Claim based on his argument that the instant duplicate survivor's claim is subject to automatic denial under 20 C.F.R. §725.309(d) (2000) as a matter of law.

administrative law judge properly determined, claimant cannot establish a material change in conditions in connection with this claim as it constitutes a duplicate survivor's claim. 20 C.F.R. §725.309(d) (2000). Further, we hold that the administrative law judge properly found that the fact that claimant requests modification of the denial of the instant 1996 claim does not change the fact that it is a duplicate survivor's claim which is time-barred and subject to denial under 20 C.F.R. §725.309(d) (2000). *Id.* Moreover, the procedural history in this case provides claimant with no relief from the application of 20 C.F.R. §725.309(d) (2000).

Based on the foregoing, we affirm the administrative law judge's denial of the instant duplicate survivor's claim pursuant to 20 C.F.R. §725.309(d) (2000). *See Watts, supra; Mack, supra.*

Further, claimant's challenge to the administrative law judge's cancellation of the hearing lacks merit. In *Pukas v. Schuylkill Contracting Co.*, 22 BLR 1-69 (2000), the Board held that 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. In the instant case, the Director filed a Motion to Dismiss Claim on November 14, 2001, to which claimant's counsel filed no response. The administrative law judge granted the Director's Motion based on his determination that the instant duplicate survivor's claim is subject to automatic denial under 20 C.F.R. §725.309(d) (2000) as a matter of law. Consequently, the administrative law judge did not err when he cancelled the hearing in the instant case. 20 C.F.R. §725.452(c). We thus decline to grant claimant's request that we remand the case to the administrative law judge for a hearing.

Accordingly, the administrative law judge's Order Granting Motion to Dismiss (Denial) is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge