

BRB No. 04-0840 BLA

CLARA SHEPPARD)	
(Widow of EVERETT A. SHEPPARD))	
)	
Claimant-Petitioner)	
)	DATE ISSUED: 07/28/2005
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Order of Dismissal of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Clara Sheppard, Christiansburg, Virginia, *pro se*.

Sarah M. Hurley (Howard M. Radzely, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ representing herself, appeals the Order of Dismissal (04-BLA-5087) of Administrative Law Judge Mollie W. Neal dismissing a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

¹Claimant is the surviving spouse of the deceased miner who died on November 5, 1986. Director's Exhibit 1.

amended, 30 U.S.C. §901 *et seq.* (the Act).² This case involves a subsequent claim filed on March 10, 2003.

Claimant initially filed a claim for survivor's benefits on December 29, 1986. Director's Exhibit 1. In a Memorandum of Informal Conference dated January 3, 1990, the district director denied benefits. *Id.* On February 12, 1990, the district director denied claimant's request for modification. *Id.* Claimant subsequently submitted letters dated June 7, 1990, November 17, 1990 and February 5, 1991, evidencing an intent to pursue her 1986 claim. Director's Exhibit 1. By letter dated March 13, 1991, claimant requested that her 1986 claim be "re-opened." *Id.* By letter dated March 19, 1991, the district director provided claimant with the necessary forms to "re-open her claim." *Id.*

Claimant filed a second survivor's claim on April 23, 1991. Director's Exhibit 2. In a Memorandum of Informal Conference dated January 27, 1992, the district director denied benefits. *Id.* The district director found that the evidence was insufficient to establish (1) that the miner had pneumoconiosis; (2) that the disease was caused by coal mine employment; or (3) that the miner's death was due to pneumoconiosis. *Id.* The district director also found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.*

Claimant filed a third survivor's claim on March 10, 2003. Director's Exhibit 4. In a Proposed Decision and Order dated June 26, 2003, the district director denied benefits. Director's Exhibit 14. At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibits 15, 17. A formal hearing before the administrative law judge was scheduled for July 20, 2003. However, the Director filed a Motion to Dismiss, arguing that claimant's 2003 subsequent claim should be dismissed pursuant to 20 C.F.R. §725.309.

In an Order of Dismissal dated June 29, 2004, the administrative law judge noted that multiple claims by a survivor are barred because there can be no "change" in a deceased miner's condition. The administrative law judge further noted that while 20 C.F.R. §725.309 allows a miner to file subsequent claims if he can establish a change in his condition, survivors are barred from filing more than one claim. Because claimant's 2003 claim was filed more than one year after the final denial of her previous 1991 survivor's claim, the administrative law judge found that claimant's 2003 survivor's

²The 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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

claim could not be considered a request for modification pursuant to 20 C.F.R. §725.310. The administrative law judge, therefore, dismissed claimant's 2003 survivor's claim.³ On appeal, claimant generally contends that the administrative law judge erred in dismissing her claim. The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's dismissal of claimant's 2003 survivor's claim.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue 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 findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

Section 725.309(d) provides in pertinent part that:

If a claimant files a claim under this part more than one year after the effective date of a final order denying a claim previously filed by the claimant under this part (see §725.502(a)(2)), the later claim shall be considered a subsequent claim for benefits. A subsequent claim shall be processed and adjudicated in accordance with the provisions of subparts E and F of this part, except that the claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see §725.202(d) (miner), 725.212 (spouse), 725.218 (child), and 725.222 (parent, brother, or sister)) has changed since the date upon which the order denying the prior claim became final.

20 C.F.R. §725.309(d).

Section 725.309(d)(3) further provides: "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).

³On July 21, 2004, the administrative law judge issued an "Order Rescinding Dismissal of Claim." The purpose of the Order was to correct a procedural defect, namely, the administrative law judge's failure to advise the parties of their right to appeal. On this same date, the administrative law judge issued a corrected Order of Dismissal. The June 29, 2004 and July 21, 2004 Orders are identical except for the latter's inclusion of a paragraph advising the parties of their right to file an appeal with the Board.

Because claimant's 2003 survivor's claim was filed more than one year after the effective date of the final order denying her previous survivor's claim,⁴ claimant's 2003 survivor's claim constitutes a "subsequent claim" for benefits. In considering claimant's 2003 claim pursuant to Section 725.309, the administrative law judge did not address whether there was a change in an applicable condition of entitlement that was unrelated to the miner's physical condition at the time of his death. However, because the record contains no evidence of such a change, claimant is unable to satisfy the requirements of 20 C.F.R. §725.309(d). Consequently, we affirm the administrative law judge's dismissal of claimant's 2003 survivor's claim.⁵ See *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992)(applies previous regulation governing duplicate survivors' claims); *Mack v. Matoaka Kitchekan Fuel*, 12 BLR 1-197 (1989).

⁴The district director, in considering the merits of claimant's 1991 survivor's claim, erred in characterizing it as a duplicate claim since claimant had repeatedly requested review of her 1986 claim after it had been denied on January 3, 1990, thereby preserving the viability of her 1986 claim. See Director's Exhibit 1. Because claimant's 1991 survivor's claim was filed while claimant's 1986 claim remained viable, the 1991 survivor's claim constituted a timely request for modification pursuant to 20 C.F.R. §725.310 (2000). See *Stanley v. Betty B Coal Co.*, 13 BLR 1-72 (1990). However, the district director's error is harmless in light of her ultimate denial of claimant's 1991 survivor's claim on the merits. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Director's Exhibit 2.

⁵Under the facts of this case, we hold that the administrative law judge was not required to hold a hearing since there is no genuine issue as to any material fact and the Director, Office of Workers' Compensation Programs, was entitled to the relief requested as a matter of law. See 20 C.F.R. §725.452(c).

Accordingly, the administrative law judge's Order of Dismissal is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge