

BRB No. 99-1137 BLA

CLARA A. PENN	)	
(Widow of CLARENCE H. PENN)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED )	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Clara A. Penn, Akron, Ohio, *pro se*.

Barry H. Joyner (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, representing herself,<sup>1</sup> appeals the Decision and Order Denying Benefits (99-BLA-0111) of Administrative Law Judge Thomas F. Phalen, Jr. on a 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>2</sup> This case involves a duplicate survivor's claim filed in 1997. Because this claim was not filed within a year of the denial of claimant's 1994 survivor's claim, the administrative law judge dismissed the claim.<sup>3</sup> The administrative law judge also found that,

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<sup>1</sup>Claimant is the surviving spouse of the deceased miner who died in a house fire on November 8, 1986. Director's Exhibit 3; Hearing Transcript at 31-32.

<sup>2</sup>The miner filed a claim in 1970, which was finally denied by the district director on June 10, 1973. Director's Exhibit 7. The miner took no further action in pursuit of benefits.

<sup>3</sup>Claimant filed an initial survivor's claim on March 23, 1988. Director's Exhibit 8.

moreover, there was no evidence of record establishing that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). On appeal, claimant generally argues that the administrative law judge erred in denying survivor's benefits. The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's dismissal of claimant's 1997 survivor's claim pursuant to 20 C.F.R. §725.309.

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).

Benefits are payable on a survivor's claim filed on or after January 1, 1982 only where the miner's death was due to pneumoconiosis, where pneumoconiosis was a substantially contributing cause of death, where death was caused by complications of pneumoconiosis or where complicated pneumoconiosis is established. See 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). The United States Court of Appeals for the Fourth Circuit has held that, for purposes of Section 718.205(c)(2), pneumoconiosis is considered a substantial contributing cause of the miner's death "where pneumoconiosis actually hastens death."<sup>4</sup> *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

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Pursuant to claimant's later request that this claim be withdrawn, Administrative Law Judge Robert L. Hillyard dismissed the claim in an Order dated March 13, 1990. *Id.* The 1988 claim is thus considered not to have been filed. See 20 C.F.R. §725.306(b). Claimant filed a survivor's claim on September 30, 1994, which was finally denied by the district director on January 6, 1995. Director's Exhibit 9. Claimant did not take any further action in pursuit of benefits until filing the instant survivor's claim on December 16, 1997. Director's Exhibit 1.

<sup>4</sup>Because the miner's coal mine employment occurred in West Virginia, the instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Section 725.309(d) provides that a duplicate survivor's claim must be denied unless the later claim is a request for modification and the requirements of 20 C.F.R. §725.310 are met. 20 C.F.R. §725.309(d); *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992); *Mack v. Matoaka Kitchehan Fuel*, 12 BLR 1-197 (1989). In the instant case, claimant did not file her duplicate claim in accordance with the provisions of Section 725.310. Claimant's prior claim, filed on September 30, 1994, was finally denied by the district director on January 6, 1995. Director's Exhibit 9. Claimant took no further action with respect to this claim, but rather filed another claim on December 16, 1997, more than one year after the denial of her prior claim. Director's Exhibit 1. Thus, the later claim did not satisfy the timeliness requirement set forth in Section 725.310(a) and, according to the terms of Section 725.309(d), was properly denied as a duplicate survivor's claim. 20 C.F.R. §725.310(a); *see Watts, supra; Mack, supra*. Moreover, the administrative law judge properly found that the record is devoid of any evidence that supports claimant's burden under Section 718.205(c). 20 C.F.R. §718.205(c); *Schuff, supra*; Decision and Order at 5. We, therefore, affirm the administrative law judge's finding that the instant, duplicate survivor's claim fails to satisfy the procedural and substantive requirements to support an award of survivor's benefits pursuant to Sections 725.309 and 718.205(c).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge