

BRB No. 03-0755 BLA

MARY B. BRYANT)
(Widow of JAMES BRYANT))
)
 Claimant-Petitioner)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED: 06/08/2004
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and Order Denying Request for Reconsideration of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Mary B. Bryant, Fairfield, Alabama, *pro se*.

Timothy S. Williams (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel,² appeals the Decision and Order Denying

¹ Claimant, Mary B. Bryant, is the widow of the miner, James Bryant, who died on September 9, 1962. Director's Exhibits 1, 10. Subsequent to the miner's death, claimant filed her first survivor's claim for benefits on July 7, 1970 with the Social Security Administration, which was finally denied by the Social Security Administration Appeals Council on December 11, 1974. Director's Exhibit 1. Thereafter, claimant filed a duplicate survivor's claim with the Department of Labor on January 28, 1975, which was finally denied on June 24, 1980. Director's Exhibit 2. Subsequently, claimant filed a third application for benefits on January 11, 2002, which is the subject of the instant appeal. Director's Exhibit 4.

Benefits and Order Denying Request for Reconsideration (02-BLA-5358) of Administrative Law Judge Robert J. Lesnick 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).³ Initially, the administrative law judge discussed the procedural history of the case,⁴ found that the duplicate claims provisions set forth in Section 725.309(d)(3) applied, and concluded that the claim could be summarily denied pursuant to that regulation. The administrative law judge, nevertheless, addressed the merits of entitlement and, adjudicating the claim pursuant to 20 C.F.R. Part 718, found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied. Claimant timely requested reconsideration of the administrative law judge's Decision and Order with supporting documentation. The administrative law judge found that, even though claimant's lay representative conducted a thorough research of a variety of pulmonary medical conditions as demonstrated by her submission of relevant and informative materials from a multitude of sources, none of the information established additional medical evidence concerning the miner's condition. Accordingly, the administrative law judge denied reconsideration.

On appeal, claimant argues that the miner was exposed to silica and coal dust during his coal mine employment in excess of twenty-two years, which resulted in the miner contracting miner's asthma that ultimately caused his demise. Claimant's representative attached various documents to her Petition for Review regarding the definition of the condition of silicosis and birth certificates of two of the miner's children.⁵ The Director, Office of Workers' Compensation Programs, (the Director) has filed a response brief, contending that the administrative law judge properly found that 20 C.F.R. §725.309(d)(3)

² Doretha Bryant Williams, daughter of Mary B. Bryant, is representing claimant on appeal and requested on behalf of claimant that the Board review the administrative law judge's decision. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

³ 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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

⁴ The administrative law judge noted that claimant died on July 23, 2002 and that Mrs. Williams continues to pursue the case on her mother's behalf. Decision and Order at 3.

⁵ The Board is limited to review of the record that was filed and admitted before the administrative law judge. *See generally Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Berka v. North American Coal Corp.*, 8 BLR 1-183 (1985).

provides that the claim must be denied as a matter of law. Alternatively, the Director asserts that the administrative law judge properly found that no medical evidence supports the claim on the merits, and hence, urges affirmance of the denial of benefits. Claimant filed a reply brief, reiterating her challenge to the administrative law judge's findings that the evidence failed to establish the existence of pneumoconiosis and that the miner's death was due to pneumoconiosis.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Consistent with the requirements of Section 725.309(d)(3), the Board has held that if an earlier survivor's claim is finally denied, a subsequent survivor's claim must also be denied based on the prior denial, unless claimant's subsequent claim is considered a request for modification thereby satisfying the requirements of Section 725.310 (2000)⁶ or, claimant demonstrates a change in one of the applicable conditions of entitlement unrelated to the miner's physical condition at the time of his death, *e.g.*, change in claimant's marital status. *See* 20 C.F.R. §725.309(d); *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); *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).

In the instant case, the record demonstrates that claimant's third application for benefits, filed on January 11, 2002, fails to satisfy the requirements of Section 725.310 (2000) because it was filed nearly twenty-two years after the denial of her second survivor's application for benefits in June 1980. Director's Exhibits 2, 4. Consequently, because claimant failed to satisfy the requirements of Section 725.310 (2000) or to file evidence establishing a change in at least one condition of entitlement unrelated to the miner's physical condition at the time of death, the administrative law judge was required to deny the duplicate survivor's claim. *See* 20 C.F.R. §725.309(d)(3); *Watts*, 17 BLR at 1-70-71; *Mack*, 12 BLR at 1-199. Accordingly, the administrative law judge's denial of benefits based on his consideration of the claim on the merits is deemed to be harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

⁶ Pursuant to Section 725.310 (2000), upon his or her own initiative or upon the request of any party, 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 the claim, reconsider the terms of an award or denial of benefits. 20 C.F.R. §725.310 (2000).

Accordingly, the Decision and Order Denying Benefits and the Order Denying Request for Reconsideration of the administrative law judge are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge