

BRB No. 04-0871 BLA

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| JULIA M. LIPTAK |) | |
| (Widow of JOHN M. LIPTAK) |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | DATE ISSUED: 06/22/2005 |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Respondent |) | DECISION and ORDER |

Appeal of the Order of Dismissal of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Julia M. Liptak, Mayfield, Pennsylvania, *pro se*.

Jeffrey S. Goldberg (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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, the miner's widow,¹ appeals, without the assistance of counsel, the Order of Dismissal (04-BLA-6483) of Administrative Law Judge Robert D. Kaplan on a subsequent survivor's claim filed pursuant to the provisions of Title IV of the Federal

¹ The miner's death certificate indicates that he died on December 31, 1993 due to cardiopulmonary arrest, sepsis, and gangrene of the intestines. Director's Exhibit 6. Emphysema, gastric ulcer, and arteriosclerotic heart disease are listed as "other significant conditions." *Id.*

Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).² The administrative law judge dismissed the instant claim as a subsequent survivor's claim under 20 C.F.R. §725.309(d). In response to claimant's appeal, the Director, Office of Workers' Compensation Programs (the Director), urges the Board to affirm the decision below as it is supported by substantial evidence and is in accordance with law.

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. *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The regulation at 20 C.F.R. §725.309(d) provides in pertinent part:

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). 20 C.F.R. §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).

The procedural history of this case is as follows: On September 9, 1994, claimant filed a claim for survivor's benefits. Director's Exhibit 1. The district director denied the claim based on claimant's failure to establish the existence of pneumoconiosis arising out

² 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.

of coal mine employment at 20 C.F.R. §§718.202, 718.203 (2000), or death due to pneumoconiosis at 20 C.F.R. §718.205(c) (2000). *Id.* The district director also found that claimant failed to establish that the miner had any coal mine employment. *Id.* Claimant requested a hearing, which was held before the administrative law judge on June 26, 1996. *Id.* Claimant subsequently testified at a September 4, 1996 deposition. *Id.* By Decision and Order dated November 6, 1996, the administrative law judge denied benefits. *Id.* The administrative law judge initially found that the record did not establish that the miner worked in the coal mining industry, and, consequently, claimant failed to establish that the miner was a coal miner within the meaning of 20 C.F.R. §725.202(a) (2000). Administrative Law Judge's November 6, 1996 Decision and Order at 3, 4. Considering the evidence under 20 C.F.R. Part 718, the administrative law judge found that claimant failed to establish both the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4) (2000) and death due to pneumoconiosis at 20 C.F.R. §718.205(c) (2000). Accordingly, benefits were denied.

On December 11, 2003, claimant filed the instant survivor's claim. Director's Exhibit 3. On January 9, 2004, the district director issued an Order to Show Cause why the claim should not be denied as a subsequent survivor's claim under 20 C.F.R. §725.309(d). Director's Exhibit 9. Claimant responded to the Order to Show Cause. By Proposed Decision and Order dated March 17, 2004, the district director denied the claim under 20 C.F.R. §725.309(d) based on claimant's failure to establish a change in an applicable condition of entitlement unrelated to the miner's physical condition at the time of his death. Director's Exhibit 10. Claimant requested a hearing, and the case was transferred to the Office of Administrative Law Judges on June 29, 2004. Director's Exhibits 11-13.

While the case was pending before the administrative law judge, the Director filed, on July 9, 2004, a Motion to Dismiss Widow's Subsequent Claim. The Director argued that claimant could not establish a change in an applicable condition of entitlement unrelated to the miner's physical condition at the time of this death, as required under 20 C.F.R. §725.309(d). Specifically, the Director noted that the prior survivor's claim, filed in 1994, was denied because claimant failed to establish both the existence of pneumoconiosis at 20 C.F.R. §718.202(a) (2000) and death due to pneumoconiosis at 20 C.F.R. §718.205(c) (2000).

On July 15, 2004, the administrative law judge issued an Order to Show Cause why the instant claim should not be denied as a subsequent survivor's claim pursuant to 20 C.F.R. §725.309(d) for claimant's failure to satisfy the requirements of 20 C.F.R. §725.309(d). Specifically, the administrative law judge found that the instant claim, filed in 2003, was a subsequent claim for benefits under 20 C.F.R. §725.309(d) because it was filed more than one year after the effective date of the final decision denying the prior survivor's claim, filed in 1994. The administrative law judge noted that the prior claim

was denied based on claimant's failure to establish both the existence of pneumoconiosis and death due to pneumoconiosis, "which are conditions that are related to the miner's physical condition at the time of his death..." Order to Show Cause at 2. The administrative law judge found, therefore, that "the current ("subsequent") survivor's claim must be denied, pursuant to [20 C.F.R.] §725.309(d)(3)." *Id.* The administrative law judge indicated, in his August 10, 2004 Order of Dismissal from which claimant appeals, that claimant did not respond to the Order to Show Cause. Thus, the administrative law judge dismissed the claim under 20 C.F.R. §725.309(d).³

In considering the instant subsequent survivor's claim, the administrative law judge properly determined that it was subject to automatic denial under 20 C.F.R. §725.309(d)(3) because there was no change in an applicable condition of entitlement unrelated to the miner's physical condition at the time of his death.⁴ Because claimant is unable to satisfy the requirements of 20 C.F.R. §725.309(d), which include proving such a change, we affirm the administrative law judge's dismissal of the instant claim.⁵ *See Watts v. Peabody Coal Co.*, 17 BLR 1-68, 1-70 (1992)(applies previous regulation governing duplicate survivors' claims); *Mack v. Matoaka Kitchekan Fuel*, 12 BLR 1-197, 1-199 (1989) (same).

³ A review of the record supports the administrative law judge's finding that claimant did not appeal from the administrative law judge's 1996 denial of benefits or take any further action on the prior claim.

⁴ While the administrative law judge additionally found that claimant did not establish that "the miner" was, in fact, a coal miner, claimant did not allege, nor could there be, a change in the deceased's employment record since the effective date of the administrative law judge's denial of the prior survivor's claim. *See* 20 C.F.R. §725.309(d)(3).

⁵ We hold harmless the administrative law judge's failure to hold a hearing, as requested by claimant, given that he properly dismissed the claim, not based on any factual issue, but as a matter of law. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge