

BRB No. 07-0803 BLA

M.H.)
(Widow of D.H.))
)
Claimant-Petitioner)
)
v.) DATE ISSUED: 06/20/2008
)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Survivor's Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

M. H., Tower City, Pennsylvania, *pro se*.

Rita Roppolo (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order Denying Survivor's Benefits (2006-BLA-5867) of Administrative Law Judge Adele

¹ Claimant is the widow of the miner, D.H., who died on April 28, 1982. Director's Exhibit 9.

Higgins Odegard (the administrative law judge) on a claim filed on May 28, 2003 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). The administrative law judge found this case to be a request for modification of the denial of claimant's subsequent survivor's claim. Noting the extensive procedural history of this survivor's case, the administrative law judge considered the allegations presented by claimant and found that the record does not support a finding that there was a mistake in a determination of fact in claimant's current claim. In addition, the administrative law judge found that the record does not support a finding of a mistake in a determination of fact in the prior decisions crediting the miner with four years of coal mine employment or the finding that the medical evidence is insufficient to establish either the existence of pneumoconiosis or that the miner's death was due to pneumoconiosis. Consequently, the administrative law judge found that because claimant has not established a change in any of the conditions of entitlement since the prior denial, the current subsequent survivor's claim must be denied pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied claimant's request for modification and benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. In a letter to the Board, claimant contends that the administrative law judge erred in finding that she had not timely filed an appeal of the denial of her prior survivor's claim. In addition, claimant contends that the administrative law judge erred in finding that she had not done anything from 1999 to 2003 to preserve her prior appeal. In response, the Director, Office of Workers' Compensation Programs (the Director), urges affirmance of the administrative law judge's denial of benefits. The Director argues that because claimant's current application for benefits was filed more than one year after the denial of her prior survivor's claim, this claim was properly denied pursuant to Section 725.309(d). The Director also contends that claimant still would not be entitled to benefits because the medical evidence of record is insufficient to establish that the miner's death was due to pneumoconiosis.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider 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, 1-177 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.² 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359

² The Board will apply the law of the United States Court of Appeals for Third Circuit as the miner's coal mine employment was in Pennsylvania. *See Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 1, 4.

(1965).

This case presents an extensive procedural history, involving five applications for survivor's benefits. Claimant initially filed a claim on May 13, 1982. In a Decision and Order dated May 14, 1985, Administrative Law Judge Frank J. Marcellino initially credited the miner with four years of coal mine employment, finding that the miner's employment with American Briquette Company was not coal mine employment. Judge Marcellino then found that the medical evidence of record was insufficient to establish the existence of pneumoconiosis and also that there was insufficient evidence to establish that the miner's death was due to pneumoconiosis. Accordingly, Judge Marcellino denied benefits. The Board declined to address claimant's contention regarding the miner's employment with American Briquette Company because any error in Judge Marcellino's finding would be harmless. Rather, the Board affirmed, as unchallenged on appeal, Judge Marcellino's findings that the evidence was insufficient to establish the existence of pneumoconiosis and that the miner's death was due to pneumoconiosis. *[M.H.] v. Director, OWCP*, BRB No. 85-1422 BLA (Mar. 18, 1987) (unpub.). The Board, therefore, affirmed Judge Marcellino's denial of benefits.

Claimant filed a second survivor's claim on May 26, 1987, which was considered a timely request for modification of the 1982 claim because it was filed less than one year after the Board's March 18, 1987 Decision and Order. In a Decision and Order dated January 24, 1989, Administrative Law Judge Thomas W. Murrett denied claimant's request for modification. By Decision and Order dated June 29, 1990, the Board affirmed Judge Murrett's denial of benefits. *[M.H.] v. Director, OWCP*, BRB No. 89-0426 BLA (June 29, 1990) (unpub.).

Claimant filed her third survivor's claim on June 29, 1992. In a Summary Decision and Order dated May 28, 1993, Administrative Law Judge Ainsworth H. Brown found that because claimant's 1992 claim was filed more than one year after the prior denial of her 1982 claim, it could not be considered a request for modification pursuant to 20 C.F.R. §725.310 (1993).³ Judge Brown, therefore, denied claimant's duplicate survivor's claim pursuant to 20 C.F.R. §725.309(d) (1993). The Board affirmed Judge Brown's denial of benefits. *[M.H.] v. Director, OWCP*, BRB No. 93-1715 BLA (June 28, 1994) (unpub.). Claimant's motion for reconsideration, filed on October 27, 1995, was withdrawn. *[M.H.] v. Director, OWCP*, BRB No. 93-1715 BLA (Nov. 20, 1995)(Order) (unpub.).

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). The amendments to the regulations at 20 C.F.R. §§725.309 and 725.310 apply only to claims filed after January 19, 2001. *See* 20 C.F.R. §725.2.

Claimant subsequently submitted a letter on February 29, 1996. Because claimant's letter was filed within one year of the denial of her 1992 claim, it was considered to be a request for modification. In a Summary Decision and Order dated December 2, 1996, Judge Brown denied claimant's duplicate survivor's claim pursuant to Section 725.309(d) (1996). The Board affirmed Judge Brown's denial of benefits. *[M.H.] v. Director, OWCP*, BRB No. 97-0444 BLA (Sept. 25, 1997) (unpub.). The United States Court of Appeals for the Third Circuit subsequently denied claimant's Petition for Review of the Board's September 25, 1997 Decision and Order. *[M.H.] v. Director, OWCP*, No. 97-3529 (3d Cir. Feb. 23, 1998) (unpub.).

Claimant filed a fourth survivor's claim on March 1, 1999. On August 18, 1999, the Director filed a Motion for Summary Decision. In a Summary Decision and Order dated September 14, 1999, Judge Brown noted that claimant had not contested the Director's motion. Judge Brown also found that "more than a year had elapsed since the last decision in the record" and, therefore, granted the Director's motion, denied claimant's duplicate claim and cancelled the hearing. The Board affirmed Judge Brown's denial of claimant's 1999 duplicate survivor's claim pursuant to Section 725.309(d) (2000). *[M.H.] v. Director, OWCP*, BRB No. 99-1310 BLA (Oct. 25, 2000) (unpub.). The Board further held that Judge Brown had not committed any error in cancelling the hearing. *Id.* On February 27, 2002, the Third Circuit granted the Director's Motion for Summary Affirmance. *[M.H.] v. Director, OWCP*, No. 00-4303 (3d Cir. Feb. 27, 2002) (unpub.).

Claimant filed her fifth, and current, survivor's claim on May 28, 2003. Director's Exhibit 3. In a Decision and Order dated June 10, 2004, Administrative Law Judge Paul H. Teitler noted that claimant's 2003 survivor's claim is a subsequent claim and found that claimant was unable to satisfy the requirements of Section 725.309(d) because there was no change in an applicable condition of entitlement that was unrelated to the miner's physical condition at the time of his death. Judge Teitler also found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis and, accordingly, denied benefits. The Board affirmed the denial of benefits and subsequently denied claimant's motions for reconsideration. *[M.H.] v. Director, OWCP*, BRB No. 04-0763 BLA (May 26, 2005) (unpub.).

In October 2005, claimant wrote a letter to the district director stating that she appealed the Board's decision. This letter was considered a request for modification of the denial of her May 28, 2003 claim. Following processing of the request for modification by the district director, the claim was forwarded to the Office of Administrative Law Judges and assigned to the administrative law judge.

In addressing claimant's current request for modification, the administrative law judge found that the record does not support a finding that there has been a mistake in a determination of fact in the current claim such that any element of entitlement is established. Decision and Order at 10. In particular, the administrative law judge found that Judge Teitler, in the prior decision in this claim, referred to the current application for benefits as claimant's fourth claim, however, the administrative law judge found the May 28, 2003 application is claimant's fifth claim for benefits. Decision and Order at 7. While finding this mistake in Judge Teitler's decision, the administrative law judge nonetheless found that this mistake is harmless as it did not affect the adjudication of this subsequent survivor's claim. *Id.*

The administrative law judge then considered claimant's allegations of mistakes of fact, primarily concerning prior decisions in this case, and found that the record does not support any other finding of a mistake in a determination of fact. Further, the administrative law judge found that any error in Judge Brown's determination that claimant filed her fourth claim on March 1, 1999 and not February 20, 1999, as alleged by claimant, does not affect this case because it relates to claimant's prior claim and not her current claim. Decision and Order at 7-8. Because claimant's current claim, filed on May 28, 2003, was filed more than one year after the denial of her prior claim, on February 27, 2002, claimant has "permanently forfeited any opportunity to have that claim considered as a request for modification." Decision and Order at 8.

The administrative law judge further found that the record, including the exhibits submitted by claimant on modification, does not establish a mistake in Judge Marcellino's crediting of the miner with four years of coal mine employment. *Id.* Specifically, the administrative law judge found that the miner's employment with American Briquette Company was not coal mine employment, as defined by the regulations, because it did not constitute work performed in the extraction or preparation of coal at a coal mine or coal preparation facility. 20 C.F.R. §725.101(a)(12), (13), (19); Decision and Order at 9. In addition, the administrative law judge found that the record does not support a finding that there was a mistake in the determination that claimant did not establish the existence of pneumoconiosis or that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis. Decision and Order at 9.

Consequently, the administrative law judge found that, contrary to claimant's assertions, the record does not contain "any mistake in [a] determination of fact in the adjudication of her current claim, so as to establish any element of entitlement." Decision and Order at 10. Accordingly, the administrative law judge found that "where claimant has not shown any mistake in [a] determination of fact, and where the claimant has neither established any of the elements of entitlement nor established that any of the conditions of entitlement have changed since the final denial of the previous claim in 2002, [Section] 725.309(d) requires that I deny her current claim." *Id.*

Section 725.309(d)(3) 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).

In this case, claimant filed her fifth, and current, survivor’s claim on May 28, 2003, more than one year after the final denial of her previous survivor’s claim on February 27, 2002. Director’s Exhibits 1, 3. In considering the present claim under Section 725.309(d), the administrative law judge properly found that claimant failed to demonstrate that one of the applicable conditions of entitlement had changed since the prior denial of benefits on February 27, 2002. 20 C.F.R. §725.309(d); *Boden v. G.M. & W. Coal Company, Inc.*, 23 BLR 1-38 (2004); *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); Decision and Order at 10. Specifically, the administrative law judge found that the record does not contain any mistake in a determination of fact in the adjudication of claimant’s current claim for benefits that would establish any condition of entitlement. Decision and Order at 10. Consequently, we affirm the administrative law judge’s finding that Section 725.309(d) precludes entitlement in this subsequent survivor’s claim.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge