

BRB No. 97-1523 BLA

JULIA FAULKNER)	
(Widow of JOSHUA FAULKNER))	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ISLAND CREEK COAL COMPANY)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	DATE ISSUED: _____)
UNITED STATES DEPARTMENT OF)	
LABOR)	
)	DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order Granting Motion for Summary Judgment and Dismissing Claim of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Cecile Szucs (Lay Representative, West Virginia Black Lung and Disabled Workers' Association), Stollings, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order Granting Motion for Summary Judgment and Dismissing Claim (97-BLA-0841) of Administrative Law Judge Edward Terhune Miller (the administrative law judge) denying benefits on a claim filed pursuant to the

¹ Claimant is the widow of the miner, Joshua Faulkner, who died on May 3, 1986. Director's Exhibit 21.

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, noting the procedural history in this case, found that the instant claim failed to meet the requirements of 20 C.F.R. §725.310 and, therefore, constituted a duplicate survivor's claim pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits pursuant to Section 725.309(d). On appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, employer urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The procedural history of this case, in pertinent part, is as follows. The miner filed an application for benefits on March 28, 1986. Director's Exhibit 21. The miner died on May 3, 1986. Director's Exhibit 21. Claimant filed an application for survivor's benefits on May 12, 1986. Director's Exhibit 21. On October 23, 1986, the district director issued an Initial Finding awarding benefits on the miner's claim. Director's Exhibit 21. The district director also rendered an Initial Finding denying claimant's survivor's benefits. Director's Exhibit 21. On March 10, 1987, the district director issued an Initial Award in the miner's claim and provided claimant with a benefits statement. Director's Exhibit 21. The cases were thereafter transferred to the Office of Administrative Law Judges and assigned to Administrative Law Judge Jeffrey Tureck, who consolidated the miner's claim and the survivor's claim. On September 29, 1989, Judge Tureck issued a Decision and Order denying benefits in both the miner's claim and in the survivor's claim. Director's Exhibit 21. On appeal, the Board affirmed Judge Tureck's finding that the evidence of record was insufficient to establish that the miner's death was due to pneumoconiosis and thus affirmed the denial of benefits in survivor's claim. *Faulkner v. Island Creek Coal Co.*, BRB No. 89-3584 BLA (Apr. 9, 1991)(unpub.). However, the Board vacated the denial of benefits in the miner's claim and remanded the case to Judge Tureck for further consideration of the evidence pursuant to 20 C.F.R. §718.202(a)(4). *Id.* On remand, Judge Tureck found the evidence insufficient to establish the existence of pneumoconiosis and again denied benefits. Director's Exhibit 21. The Board affirmed this denial of benefits. *Faulkner v. Island Creek Coal Co.*, BRB No. 91-2170 BLA (Apr. 28, 1993). In addition, the Board denied claimant's motion for reconsideration. *Faulkner v. Island Creek Coal Co.*, BRB No. 91-2170 BLA (Jan. 11, 1994)(Order)(unpub.).

Claimant filed a second application for survivor's benefits on June 28, 1996. Director's Exhibit 1. On July 19, 1996, the district director denied benefits on the basis that

it was a duplicate survivor's claim pursuant to 20 C.F.R. §725.309. Director's Exhibit 8. The district director again denied the claim on November 14, 1996, following an informal conference, because the duplicate survivor's claim was a refiled claim not filed within one year so as to constitute a request for modification. Director's Exhibit 18. The claim thereafter was transferred to the Office of Administrative Law Judges. Director's Exhibit 22. On June 12, 1997, employer filed a Motion for Summary Judgment on the grounds that the claim was a duplicate survivor's claim subject to mandatory dismissal pursuant to Section 725.309(d). On June 17, 1997, the administrative law judge issued an Order to Show Cause, by June 30, 1997, why this duplicate survivor's claim should not be dismissed. The administrative law judge, noting that no response had been received, granted the motion and dismissed the claim by Decision and Order issued July 21, 1997.

In challenging the administrative law judge's decision, claimant contends initially that the medical evidence of record is sufficient to establish entitlement to benefits. In addition, claimant contends that the administrative law judge erred in stating that she had not filed a response to his June 17, 1997 Order to Show Cause, contending that she filed a response which was received by the Department of Labor on July 17, 1997. Claimant's Brief at 2. Regardless of whether the administrative law judge erred in finding that claimant failed to file a response to this Show Cause Order, we must affirm the administrative law judge's Decision and Order Granting Motion for Summary Judgment and Dismissing Claim inasmuch as Section 725.309(d) mandates the denial of this duplicate survivor's claim. 20 C.F.R. §725.309(d).

Section 725.309(d) requires that a duplicate survivor's claim be denied unless the later claim is a request for modification and the requirements of Section 725.310 are met. 20 C.F.R. §725.309(d); *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1993), *aff'd*, 9 F.3d 111 (6th Cir. 1993)(table); *Mack v. Matoaka Kitchenkan Fuel*, 12 BLR 1-197 (1989). In the present case, claimant did not file her second claim in accordance with the provisions of Section 725.310. Inasmuch as claimant's second claim was filed more than one year after the issuance of the Board's 1991 Decision and Order affirming Judge Tureck's denial of benefits on the initial survivor's claim, claimant's second claim does not meet the timeliness requirement set forth in Section 725.310(a). The administrative law judge, therefore, properly denied this claim as a duplicate survivor's claim. *See* 20 C.F.R. §§725.309(d), 725.310; *Watts, supra*; *Mack, supra*. We, therefore, affirm the administrative law judge's decision to dismiss the instant claim.

Accordingly, the administrative law judge's Decision and Order Granting Motion for Summary Judgment and Dismissing Claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge