

BRB No. 11-0525 BLA

IMOGENE PHIPPS)
(Widow of GEORGE PHIPPS))
)
Claimant-Petitioner)
)
v.)
)
PEABODY COAL COMPANY)
) DATE ISSUED: 03/09/2012
Employer-Respondent)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Imogene Phipps, Drakesboro, Kentucky, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals, without the assistance of counsel, the Decision and Order (10-BLA-5823) of Administrative Law Judge Alice M. Craft dismissing a survivor's subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). The administrative law

¹ Claimant is the surviving spouse of the deceased miner, who died on November 21, 1984. Director's Exhibit 12.

judge dismissed claimant's subsequent claim in accordance with 20 C.F.R. §725.309(d)(3), because she found that claimant could not establish a change in an applicable condition of entitlement since the final denial of her first survivor's claim.

On appeal, claimant generally challenges the administrative law judge's dismissal of her claim. Employer responds, urging the Board to affirm the administrative law judge's dismissal of this claim. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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. *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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

A survivor's claim filed more than one year after the effective date of a final order denying a previous survivor's claim "shall be denied unless the applicable conditions of entitlement in such a 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); *see Boden v. G.M. & W. Coal Co.*, 23 BLR 1-39, 1-40 (2004); *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992).

The record reflects that claimant filed her initial claim for survivor's benefits on May 13, 1985. Director's Exhibit 1. On October 11, 1985, the district director found that the evidence did not establish that the miner suffered from pneumoconiosis, or that the miner's death was due to pneumoconiosis. *Id.* The district director, therefore, denied benefits. *Id.*

Claimant filed the current survivor's claim, her second, on March 5, 2010. Director's Exhibit 3. The district director denied benefits on June 16, 2010, on the ground that claimant failed to establish that an applicable condition of entitlement had changed since the date upon which the order denying her prior survivor's claim became final. 20 C.F.R. §725.309; Director's Exhibit 24. At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a hearing. Director's Exhibit 29.

In an Order to Show Cause dated February 16, 2011, the administrative law judge found that the conditions of entitlement that claimant failed to demonstrate in her initial survivor's claim related solely to the miner's physical condition at the time of his death, *i.e.*, whether he had pneumoconiosis, and whether his death was due to pneumoconiosis,

at 20 C.F.R. §§718.202(a), 718.205(c). Therefore, the administrative law judge ordered claimant to show cause, within fifteen days, why her 2010 subsequent claim should not be dismissed. In a letter dated February 22, 2011, claimant informed the administrative law judge that the miner put his work before his health, and never missed a day of work in the mines.

In a Decision and Order dated March 28, 2011, the administrative law judge found that claimant's response did not offer sufficient grounds to proceed to a hearing, because claimant's response failed to address whether there had been a change in an applicable condition of entitlement that was unrelated to the miner's physical condition at the time of his death, as required by 20 C.F.R. §725.309(d)(3). Therefore, the administrative law judge dismissed claimant's subsequent claim.

In this case, the administrative law judge properly found that the conditions of entitlement that claimant failed to demonstrate in her first survivor's claim related solely to the miner's physical condition at the time of his death. Director's Exhibit 1. The administrative law judge further found, correctly, that claimant's response to the administrative law judge's February 16, 2011 Order to Show Cause did not address any condition of entitlement unrelated to the miner's physical condition. Therefore, the administrative law judge properly found that entitlement was precluded, and properly dismissed claimant's subsequent claim.² 20 C.F.R. §725.309(d)(3); *see Boden*, 23 BLR at 1-41; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (*en banc*).

² On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, were enacted. The amendments, in pertinent part, revive Section 932(l) of the Act, which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. Pub. L. No. 111-148, §1556(b),(c), 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §932(l)). Claimant cannot benefit from this provision, however, as the miner never filed a claim for benefits. Director's Exhibit 3.

Accordingly, the administrative law judge's Decision and Order dismissing claimant's subsequent claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge