BRB No. 01-0810 BLA

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| ANNIE COLEMAN<br>(Widow of ROBERT COLEMAN, Jr.)<br><br>Claimant-<br>Petitioner<br><br>v.<br><br>DIRECTOR, OFFICE OF<br>WORKERS'<br>COMPENSATION PROGRAMS,<br>UNITED STATES DEPARTMENT<br>OF LABOR<br><br>Respondent | ) | DATE ISSUED:<br><br>DECISION AND ORDER |

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Wendy Phillips, Elmont, New York, for claimant.

Jennifer U. Toth (Eugene Scalia, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (2000-BLA-1074) of

[1] Claimant is the widow of the miner, Robert Coleman, Jr., who died on August 28, 1990. Director's Exhibit 4. The miner originally filed an application for benefits with the Social Security Administration (SSA) on April 5, 1973, which was

Administrative Law Judge Ralph A. Romano granting the Motion for Summary

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denied by SSA on September 5, 1973 and September 7, 1978. Director's Exhibits 7-1, 7-5, 7-6. The miner filed an Election Card seeking SSA review of his claim. Director's Exhibit 7-15. SSA again denied the miner's claim on February 7, 1979. Director's Exhibit 7-7. The case was then transferred to the Department of Labor. In a decision dated October 15, 1981, the district director denied benefits. Director's Exhibit 7-14. No further action was taken on the miner's claim.

Judgment filed by the Director, Office of Workers' Compensation Programs (the Director), and denying benefits on a 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).[2] The administrative law judge, noting

[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 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the

the procedural history in this case, found that the instant claim failed to meet the requirements of 20 C.F.R. §725.310 (2000) and, therefore, constituted a duplicate survivor's claim pursuant to 20 C.F.R. §725.309(d) (2000).[3] Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in granting the Director's Motion for Summary Judgment, arguing that her previous claims had not been finally denied and, therefore, the instant claim was a request for modification and thus merged into the previous claims. In addition, claimant contends that her due process rights were violated, arguing that the district director's August 2, 2000 denial notice did not provide sufficient notice of the reasons for the denial of her July 2000 claim. In response, the Director urges affirmance of the administrative law judge's Decision and Order.

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

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outcome of the case. *National Mining Ass'n v. Chao*, 145 F.Supp.2d 1 (D.D.C., Feb 09, 2001)(order granting preliminary injunction). The Board subsequently issued an Order on April 9, 2001 requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. Aug. 9, 2001).

[3] The amendments to the regulations at 20 C.F.R. §§725.309, 725.310, 725.409 and 725.410 do not apply to claims, such as this, which were pending on January 19, 2001; rather, the version of these regulations as published in the 2000 Code of Federal Regulations is applicable. *See* 20 C.F.R. §725.2(c).

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

Section 725.309(d) (2000) provides that a duplicate survivor's claim must be denied on the basis of the denial of the earlier claim unless the latter claim is a request for modification and the requirements of Section 725.310 (2000) are met, *i.e.*, the subsequent claim is filed within one year of the last denial of the earlier claim. *See* 20 C.F.R. §§725.309(d), 725.310 (2000); *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1993), *aff'd*, 9 F.3d 111 (6th Cir. 1993) (table); *Mack v. Matoaka Kitchekan Fuel*, 12 BLR 1-197 (1989); *see also 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).

The procedural history of this case, in pertinent part, is as follows. Claimant filed her initial application for survivor's benefits on July 20, 1992. Director's Exhibit 8-1. On November 19, 1992, the district director denied the survivor's claim because the evidence failed to establish that the miner's death was due to pneumoconiosis. Director's Exhibit 8-13. No further action was taken on this claim.

Claimant filed a second application for benefits on March 7, 1994. Director's Exhibit 9-1. The district director denied benefits on March 14, 1994 again finding that claimant failed to establish that the miner's death was due to pneumoconiosis. Director's Exhibit 9-5. In addition, the district director found that claimant filed a prior survivor's claim which was denied more than one year prior to the current claim and, therefore, stated that the current claim is not a timely request for modification and must be denied pursuant to Section 725.309(d) (2000). *Id*. No further action was taken on this claim.

Claimant filed her third and the current application for survivor's benefits on July 14, 2000. Director's Exhibit 1. On August 2, 2000, the district director denied this claim, finding that claimant failed to establish that the miner's death was due to pneumoconiosis and that the current claim is not a timely request for modification. *See* 20 C.F.R. §725.309(d) (2000); Director's Exhibit 5. On August 14, 2000, claimant submitted a letter stating her intention to appeal the district director's denial of benefits. Director's Exhibit 6. Thereafter, the case was transferred to the Office of Administrative Law Judges for a formal hearing on the issues of whether the miner's death was due to pneumoconiosis and whether this case, which involves a refiled claim, should be considered a request for modification. Director's Exhibit 10.

While the case was pending before the Office of Administrative Law Judges, the Director filed a Motion for Summary Judgment, contending that this case is not a timely request for modification but rather a duplicate survivor's claim which must be denied in accordance with Section 725.309(d) (2000). In her response to the Director's motion, claimant contends that her prior claims had not been finally denied as abandoned and, therefore, were still pending. Thus, claimant contends that the instant claim is not a duplicate survivor's claim, but rather is a timely request for modification which merges with the two prior claims.[4] The Director filed a Reply brief in support of his motion.

The administrative law judge found that the 1992 and 1994 survivor's claims had been finally denied as claimant did not respond to the district director's denials within the time frame provided for response and the claims were therefore considered abandoned. Decision and Order at 3. Since the instant claim was filed more than one year after the denials of these claims, the administrative law judge found that it is a duplicate survivor's claim pursuant to Section 725.309(d) (2000) and not a timely request for modification pursuant to Section 725.310 (2000). *Id*. Therefore, the administrative law judge found that claimant, as a survivor, is barred from filing a duplicate claim. *Id.*

On appeal, claimant contends that the administrative law judge erred in granting the Director's Motion for Summary Judgment based on his determination that the instant claim was a duplicate survivor's claim pursuant to Section 725.309(d) (2000). Specifically, claimant contends that the prior claims were still viable because the district director did not provide claimant with a separate notice pursuant to 20 C.F.R. §725.409 (2000), that the July 1992 and March 1994 claims would be considered denied by reason of abandonment if claimant did not respond within thirty days indicating an intention to pursue the claim. In addition, claimant argues that the administrative law judge erred in granting the Motion for Summary Judgment because he did not determine whether a genuine issue of

[4] Accompanying her Response to Director's Motion for Summary Judgment, claimant submitted the new medical report of Dr. Peter Smith. Within his Reply brief, the Director objects to the admission of this report pursuant to 20 C.F.R. §725.456(b)(1) (2000).

material fact existed with respect to the issue of whether the miner's death was due to pneumoconiosis. Claimant further contends that her due process rights were violated because the August 2, 2000 denial did not provide an adequate explanation of the reasons for the denial of the claim and, therefore, she did not have adequate notice of the issues to be adjudicated. These contentions are not meritorious.

Contrary to claimant's contention, Section 725.409 (2000) does not require that the district director provide any additional notice to claimant of the intent to deny a claim by reason of abandonment beyond the sixty day notice mandated by Section 725.410(c) (2000). 20 C.F.R. §§725.409, 725.410(c); *see Garcia v. Director, OWCP*, 12 BLR 1-24 (1988); *Fetter v. Peabody Coal Co.*, 6 BLR 1-1173 (1984). Herein, the district director provided claimant with adequate notice in both the 1992 and 1994 denials that the claim would be denied by reason of abandonment if she did not either request a hearing or submit additional evidence within sixty days of the notice.[5] Director's Exhibits 8-13, 9-5. Consequently, the

[5] The 1992 and 1994 denial letters also contain the following notation, in pertinent part, to claimant:

> NOTE: If you do not take any action within 60 days, your claim will be considered abandoned and the denial will become final. However, you have the right to ask for reconsideration of your claim if you write to this office within one year from the date the denial becomes final, but only if your condition has changed, or a mistake was made when your claim was denied.

Director's Exhibit 8-13; *see also* Director's Exhibit 9-5.

administrative law judge properly found that the 1992 and 1994 claims had been finally denied and were no longer viable claims. Decision and Order at 3; 20 C.F.R. §§725.409, 725.410(c) (2000); *see Garcia, supra; Fetter, supra*.

Furthermore, the August 2, 2000 denial letter provided claimant with adequate notice of the reasons for the denial and, thus, did not deny claimant her due process rights. As claimant acknowledges, the denial letter states that the claim was denied because the evidence did not establish that the miner's death was due to pneumoconiosis and, on page two, that claimant "filed a prior claim which was denied over one year ago and administratively closed" and, thus, the instant claim is a refiled claim which must be denied pursuant to Section 725.309 (2000). Director's Exhibit 5. Therefore, contrary to claimant's contention, the August 2, 2000 denial letter adequately set forth notice of the two reasons for the denial of the July 2000 claim. Director's Exhibit 5; *Jordan v. Benefits Review Board*, 876 F.2d 1455, 12 BLR 2-371 (11th Cir. 1989) [the question is not whether a particular individual failed to understand the notice but whether the notice is reasonably calculated to apprise intended recipients, as a whole, of their rights]. Moreover, the September 2000 letter from the district director transmitting the case to the Office of Administrative Law Judges, also clearly stated that the issues to be determined were the cause of the miner's death and whether the instant claim was a request for modification that satisfied the requirements of Section 725.310 (2000) or whether the refiled claim must be denied on the grounds of the previous denial. Director's Exhibit 10. Therefore, we hold that claimant was given adequate notice of the issues to be adjudicated and, thus, her due process rights were not violated for lack of notice. *Id*.

Finally, we affirm the administrative law judge's denial of the instant claim as it is rational, supported by substantial evidence and in accordance with law. In setting forth the procedural history of this claim, the administrative law judge properly found that the prior claims, filed in July 1992 and March 1994, had been finally denied on November 19, 1992 and March 14, 1994, respectively. Decision and Order at 3; 20 C.F.R. §§725.409, 725.410 (2000); *Garcia, supra*. Therefore, the administrative law judge properly determined that the instant claim must be denied as a duplicate survivor's claim as it does not meet the requirements for modification pursuant to Section 725.310 (2000). We, therefore, affirm the administrative law judge's denial of the instant claim as a duplicate survivor's claim barred, as a matter-of-law, under Section 725.309(d) (2000).[6] 20 C.F.R.

[6] The administrative law judge, in issuing his Decision and Order granting the Director's Motion for Summary Judgment, accepted a reply brief from the Director in support of his Motion for Summary Judgment. As claimant correctly

§§725.309(d), 725.310 (2000); *see Watts, supra*; *Mack*, *supra; Clark, supra*.

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contends, 20 C.F.R. §725.452 does not explicitly provide for the submission of reply briefs in a Motion for Summary Judgment. However, in light of our disposition of the merits of this case, we hold that any error is harmless, as claimant has not been prejudiced by the submission of the reply brief inasmuch as the duplicate survivor's claim is barred as a matter-of-law. *See generally Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); 20 C.F.R. §725.309(d) (2000).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge