

BRB No. 04-0763 BLA

MARIAN L. HAND)	
(Widow of DALLAS HAND))	
)	
Claimant-Petitioner)	
)	DATE ISSUED: 05/26/2005
v.)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Marian L. Hand, Tower City, Pennsylvania, *pro se*.

Sarah M. Hurley (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, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ representing herself, appeals the Decision and Order (04-BLA-5289) of Administrative Law Judge Paul H. Teitler denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

¹Claimant is the surviving spouse of the deceased miner who died on April 28, 1982. Director's Exhibit 9.

amended, 30 U.S.C. §901 *et seq.* (the Act).² This case, involving a survivor's claim filed on May 28, 2003, has a protracted procedural history.

Claimant initially filed a claim for survivor's benefits on May 13, 1982. In a Decision and Order dated May 14, 1985, Administrative Law Judge Frank J. Marcellino found that the evidence was insufficient to establish the existence of pneumoconiosis. Judge Marcellino further found that there was insufficient evidence to establish that the miner's death was due to pneumoconiosis. Accordingly, Judge Marcellino denied benefits.

By Decision and Order dated March 18, 1987, 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. *Hand v. Director, OWCP*, BRB No. 85-1422 BLA (Mar. 18, 1987) (unpublished). The Board, therefore, affirmed Judge Marcellino's denial of benefits. *Id.*

Claimant filed a second survivor's claim on May 26, 1987. Because claimant's 1987 claim was filed within one year of the issuance of the last denial of her 1982 claim, the 1987 claim constituted a timely request for modification of the 1982 claim. *See Stanley v. Betty B Coal Co.*, 13 BLR 1-72 (1990). 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. *Hand v. Director, OWCP*, BRB No. 89-0426 BLA (June 29, 1990) (unpublished).

Claimant filed a 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 (2000). Judge Brown, therefore, denied claimant's duplicate survivor's claim pursuant to 20 C.F.R. §725.309(d) (2000).³ By Decision and Order dated June 28,

²The 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.

³Section 725.309(d) (2000) provides that a duplicate survivor's claim must be denied unless the later claim is a request for modification and the requirements of 20 C.F.R. §725.310 (2000) are met. 20 C.F.R. §725.309(d) (2000); *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992); *Mack v. Matoaka Kitchikan Fuel*, 12 BLR 1-197 (1989).

1994, the Board affirmed Judge Brown's denial of benefits. *Hand v. Director, OWCP*, BRB No. 93-1715 BLA (June 28, 1994) (unpublished). Claimant subsequently filed a motion for reconsideration of the Board's Decision and Order.⁴ However, on October 27, 1995, claimant requested that her motion for reconsideration be withdrawn. By Order dated November 20, 1995, the Board granted claimant's motion to withdraw her request for reconsideration. *Hand v. Director, OWCP*, BRB No. 93-1715 BLA (Nov. 20, 1995) (Order) (unpublished).

Claimant subsequently submitted correspondence on February 29, 1996. Because claimant's correspondence was filed within one year of the denial of her 1992 claim, it was considered to be a request for modification pursuant to 20 C.F.R. §725.310 (2000). In a Summary Decision and Order dated December 2, 1996, Judge Brown denied claimant's duplicate survivor's claim pursuant to 20 C.F.R. §725.309(d) (2000). By Decision and Order dated September 25, 1997, the Board affirmed Judge Brown's denial of benefits. *Hand v. Director, OWCP*, BRB No. 97-0444 BLA (Sept. 25, 1997) (unpublished). 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. *Hand v. Director, OWCP*, No. 97-3529 (3d Cir. Feb. 23, 1998).

Claimant filed a fourth survivor's claim on March 1, 1999. On August 18, 1999, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Summary Decision based on 20 C.F.R. §725.309(d) (2000). 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." Judge Brown, therefore, granted the Director's motion, denied claimant's claim and cancelled the hearing. By Decision and Order dated October 25, 2000, the Board affirmed Judge Brown's denial of claimant's 1999 duplicate survivor's claim pursuant to 20 C.F.R. §725.309(d) (2000). *Hand v. Director, OWCP*, BRB No. 99-1310 BLA (Oct. 25, 2000) (unpublished). The Board further held that Judge Brown had not committed any error in canceling the hearing. *Id.* On February 27,

⁴On July 7, 1994, claimant filed a request for modification with the district director's office. By letter dated July 14, 1994, the Director, Office of Workers' Compensation Programs (the Director), notified the Board that claimant had filed a request for modification with the district director. By Order dated April 12, 1995, the Board noted that the Director had forwarded an undated letter from claimant requesting reconsideration of the Board's Decision and Order. *Hand v. Director, OWCP*, BRB No. 93-1715 BLA (Apr. 12, 1995) (Order) (unpublished). The Board further noted that the Director had also subsequently referred a second letter from claimant indicating that she was seeking modification pursuant to 20 C.F.R. §725.310 (2000). *Id.* The Board held that it would consider claimant's letters as a request for reconsideration of its decision. *Id.*

2002, the United States Court of Appeals for the Third Circuit granted the Director's Motion for Summary Affirmance. *Hand v. Director, OWCP*, No. 00-4303 (3d Cir. Feb. 27, 2002).

Claimant filed a fifth survivor's claim on May 28, 2003. *See* Director's Exhibit 3. In a Decision and Order dated June 10, 2004, Administrative Law Judge Paul H. Teitler (the administrative law judge) noted that claimant's 2003 survivor's claim is a subsequent claim. The administrative law judge further found that claimant was unable to satisfy the requirements of 20 C.F.R. §725.309(d) because there was not a change in an applicable condition of entitlement that was unrelated to the miner's physical condition at the time of his death. The administrative law judge also found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis. Accordingly the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. The Director responds in support of the administrative law judge's denial of benefits.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 725.309(d) provides in pertinent part that:

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).

Section 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).

Because claimant's 2003 survivor's claim was filed more than one year after the effective date of the final order denying her previous 1999 survivor's claim, her 2003 survivor's claim constitutes a "subsequent claim" for benefits. In considering claimant's 2003 claim pursuant to Section 725.309(d), the administrative law judge found that there was not a change in an applicable condition of entitlement that was unrelated to the miner's physical condition at the time of his death. Decision and Order at 4. Because the record is devoid of any evidence of such a change, claimant is unable to satisfy the requirements of 20 C.F.R. §725.309(d). Consequently, we affirm the administrative law judge's denial of benefits. *See 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).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge