

BRB No. 98-0233 BLA

WILMA COMBS)	
(Widow of ROBERT COMBS))	
)	
Claimant-Petitioner))
)	
v.)	
)	
INTERSTATE COAL COMPANY,)	DATE ISSUED:
INCORPORATED)	
)	
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 Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Kenneth S. Stepp, Manchester, Kentucky, for claimant.

Timothy J. Walker, London, Kentucky, for employer.

Edward Waldman (Marvin Krislov, Deputy Solicitor for National Operations; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order (97-BLA-0241) of Administrative Law Judge Donald W. Mosser (the administrative law judge) 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). The administrative law judge denied claimant's duplicate survivor's claim in accordance with 20 C.F.R. §725.309. Alternatively, the administrative law judge considered all of the evidence of record and found the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge found the evidence insufficient to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, and thus, he denied benefits. On appeal, claimant contends that the administrative law judge erred in finding that she did not file a timely request for modification at 20 C.F.R. §725.310. Employer and the Director, Office of Workers' Compensation Programs, (the Director) respond, urging affirmance of the administrative law judge's Decision and Order.

¹Claimant is the widow of the deceased miner, Robert Combs, who died on December 1, 1988. Director's Exhibits 1, 6, 18. The miner filed his initial claim on August 15, 1983. Director's Exhibit 18. On August 3, 1987, Administrative Law Judge Eric Feirtag issued a Decision and Order denying benefits on the miner's claim. *Id.* The Board dismissed the miner's claim as abandoned on January 29, 1988. *Combs v. Interstate Coal Co., Inc.*, BRB No. 87-2479 BLA (Jan. 29, 1988)(Order)(unpub.). The miner filed another claim on May 26, 1988 which was construed by the Department of Labor as a request for modification. *Id.* On June 19, 1991, Administrative Law Judge Richard E. Huddleston issued a Decision and Order awarding benefits on the miner's claim. *Id.* Claimant filed her survivor's claims on January 18, 1989, June 22, 1992 and August 28, 1995. Director's Exhibits 1, 18.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Claimant contends that the administrative law judge erred in finding that she did not file a timely request for modification at 20 C.F.R. §725.310. We disagree. The administrative law judge stated that “the claimant in this case did not file her second application for benefits within one year of the denial of her previous claim so that the claim could be considered a timely request for modification under Section 725.310.” Decision and Order at 8. Pursuant to 20 C.F.R. §725.309(c) and (d), if an earlier survivor's claim is finally denied, a subsequent survivor's claim must also be denied based on the prior denial unless claimant's subsequent survivor's claim is considered a petition for modification, thereby satisfying the requirement of 20 C.F.R. §725.310. See *Mack v. Matoaka Kitchekan Fuel*, 12 BLR 1-197 (1989).

The pertinent procedural history of this case is as follows: Claimant filed her initial survivor's claim on January 18, 1989. Director's Exhibit 18. This survivor's claim was denied by the Department of Labor (DOL) on June 28, 1989 and November 17, 1989. *Id.* On January 31, 1991, Administrative Law Judge Richard E. Huddleston granted claimant's request to withdraw her January 18, 1989 survivor's claim.² *Id.* Claimant filed another survivor's claim on June 22, 1992. *Id.* On August 12, 1994, Administrative Law Judge Robert L. Hillyard issued a Decision and Order denying benefits based on claimant's failure to establish that the miner's death was due to pneumoconiosis. *Id.* Judge Hillyard's Decision and Order was filed with the office of the district director on August 17, 1994. *Id.* Inasmuch as claimant did not pursue this survivor's claim any further, the denial became final. Claimant filed her most recent survivor's claim on August 28, 1995. Director's Exhibit 1. The DOL denied this survivor's claim on January 29, 1996. Director's Exhibit 8. During a conference on August 7, 1996, the Director contested the proposition that 20 C.F.R. §725.309(d) does not mandate denial of this refiled survivor's claim. Director's

²Judge Huddleston stated that “Section 725.306 of the regulations provides that a claim may be withdrawn; and when withdrawn, has the same effect as if the claim had never been filed, which leaves an individual in a position to, if subsequent additional evidence is discovered,...file a new claim without any penalty for having filed this original claim.” Director's Exhibit 18.

Exhibit 17. On August 15, 1996, the district director issued a Proposed Decision and Order Memorandum of Conference denying benefits. *Id.* The district director's denial was based on the fact that claimant's August 28, 1995 application for survivor's benefits was a duplicate survivor's claim. *Id.*

Claimant, citing *Director, OWCP v. Seals*, 942 F.2d 986, 15 BLR 2-193 (6th Cir. 1991), asserts that the date that the decision and order becomes final, rather than the date that the decision and order was filed with the district director, is the date which triggers the period for filing a request for modification. Specifically, claimant asserts that the period for claimant to file a request for modification was triggered on September 17, 1994, thirty days after the decision and order was filed with the office of the district director. In *Seals*, the United States Court of Appeals for the Sixth Circuit held that the appeal of an administrative law judge's decision and order must be filed within thirty days of the date when the decision and order is filed with the office of the district director. *Seals, supra.* We are not persuaded that *Seals* applies to the filing of a petition for modification. The Board has held that the time within which to seek modification is one year from the date on which a decision and order is filed in office of the district director. See *Wooten v. Eastern Associated Coal Corp.*, 20 BLR 1-20 (1996); 20 C.F.R. §725.479(a). Thus, we reject claimant's assertion that the denial in the instant case did not actually occur until September 17, 1994.

Claimant also asserts that her request for modification was timely because the period for filing a request for modification was extended by the provisions of 20 C.F.R. §725.311 which allow seven additional days for mailing time, an additional day after the filing of the decision and order, and a day after a Saturday, Sunday, or legal holiday if the last day of the period is on such a day. As noted by the Director, even if the period to file a petition for modification was extended seven days from August 17, 1995, the last day to file a petition for modification would have been Thursday, August 24, 1995. Therefore, we hold, contrary to claimant's assertion, that the administrative law judge properly found that claimant's request for modification was untimely because it "was filed one year and eleven days following the filing date of the decision and order with the district director." Decision and Order at 7.

Further, claimant asserts that the administrative law judge should have granted her leniency in meeting the deadline for filing a request for modification because her former attorney was ill and died during the crucial time that she needed to file her request for modification. Contrary to claimant's assertion, the administrative law judge permissibly rejected claimant's request for leniency because he found that "claimant's credible testimony establishes that her former

attorney never intended to file a motion for modification on her behalf, but was only willing to represent her in the event the law was changed.” *Id.*; see *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Therefore, since claimant's subsequent 1995 survivor's claim, which was previously challenged by the Director, was filed more than one year after the final denial of claimant's earlier 1992 survivor's claim, thereby not meeting the requirement of 20 C.F.R. §725.310, the administrative law judge properly denied benefits. See *Jordan v. Director, OWCP*, 892 F.2d 482, 13 BLR 2-184 (6th Cir. 1989); *Clark v. Director, OWCP*, 838 F.2d 197, 11 BLR 2-46 (6th Cir. 1988), *rev'ng on other grounds*, 9 BLR 1-205 (1986); *Mack, supra*.

Finally, we affirm the administrative law judge's denial of benefits on this survivor's claim on the merits inasmuch as claimant does not challenge the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).³

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

³The administrative law judge's finding at 20 C.F.R. §718.205(c) is supported by substantial evidence since there is no credible evidence that the miner's death was due to pneumoconiosis. See *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

JAMES F. BROWN
Administrative Appeals Judge