

BRB No. 99-0238 BLA

BETTY LOU LOWER	)	
(Widow of ERNEST LOWER)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WOLVERINE MINING CO./DANTE COAL	)	
CO. & PITTSTON COAL CO.	)	
	)	DATE ISSUED:
Employers-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Samuel J. Smith, Administrative Law Judge, United States Department of Labor.

Betty Lou Lower, Paramount, California, *pro se*.

Douglas A. Smoot (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel<sup>1</sup>, appeals the Decision and Order (98-BLA-601) of Administrative Law Judge Samuel J. Smith 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 amended, 30 U.S.C. §901 *et seq.* (the Act). This case involves a duplicate survivor's claim. After a hearing was scheduled, employer filed a Motion for Summary Judgment on October 9, 1998. On October 14, 1998, the administrative law judge issued an Order to Show Cause why claimant's claim for survivor's benefits should not be dismissed pursuant to 20 C.F.R. §725.309(d). Claimant responded to the Order to Show Cause on October 15, 1998, asserting that as her husband received benefits for seven months, just cause exists for her claim. Claimant's representative also responded to the administrative law judge's Order on October 22, 1998, stating that claimant had additional evidence demonstrating the presence of black lung disease. The administrative law judge found that claimant's statement that just cause exists for her current claim as her husband received benefits and that she had additional medical evidence showing entitlement is non-responsive to the issue of whether the claim was timely filed and that, because claimant's second claim cannot be considered a petition for modification pursuant to 20 C.F.R. §725.310, the claim must be denied as a duplicate claim pursuant 20 C.F.R. §725.309(d). Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond in this appeal.

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 into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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<sup>1</sup>This appeal was filed on claimant's behalf by a representative, Mr. William Trinkle. We note that the Board acknowledged the instant appeal on November 19, 1998, stating that the case would be reviewed under the general standard of review but incorrectly indicated that Mr. Trinkle was the claimant.

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence and contain no reversible error therein. Section 725.309(d) provides that a duplicate survivor's claim must be denied on the basis of the earlier denial unless the latter claim is a request for modification and the requirements of Section 725.310 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; *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992), *aff'd*, 9 F.3d 111 (6th Cir. 1993)(table); *Mack v. Matoaka Kitchikan Fuel*, 12 BLR 1-197 (1989); *Clark v. Director, OWCP*, 838 F.2d 197, 200, 11 BLR 2-46, 2-50 (6th Cir. 1988); *see also Jordan v. Director, OWCP*, 892 F.2d 482, 489, 13 BLR 2-184, 2-194 (6th Cir. 1989).<sup>2</sup> Claimant's initial survivor's claim was ultimately denied on March 10, 1994. Director's Exhibit 14. Claimant took no further action until she filed her second survivor's claim on November 26, 1997. Director's Exhibit 1. Because the second claim was filed over one year after the denial of the first survivor's claim, the administrative law judge properly found that the second survivor's claim did not constitute a petition for modification pursuant to Section 725.310 and that the second survivor's claim must be denied

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<sup>2</sup>In *Jordan v. Director, OWCP*, 892 F.2d 482, 489, 13 BLR 2-184, 2-194 (6th Cir. 1989), the United States Court of Appeals for the Sixth Circuit reversed the Board's holding that the administrative law judge was barred from considering a duplicate survivor's claim due to the claimant's failure to act within one year of the earlier denied survivor's claim because the Director, Office of Workers' Compensation Programs, had not relied upon the duplicate claims regulations at any stage of the proceedings. The instant case is distinguishable from *Jordan*, inasmuch as this claim arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit and employer defended the claim before the administrative law judge on the basis that it is a duplicate survivor's claim. See Employer's Motion for Summary Judgment at 2-3; Decision and Order at 2.

as a duplicate claim pursuant to Section 725.309(d). *See Watts, supra; Mack, supra; Clark, supra; see also Jordan, supra.* Thus, we affirm the administrative law judge's denial of benefits on claimant's second survivor's claim.

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

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge