

BRB No. 99-0606 BLA

BETTY PERSIN)	
(On behalf of FRANK PERSIN))	
)	
Claimant-)	
Petitioner)	DATE ISSUED:
)	
v.)	
)	
DIRECTOR, OFFICE OF)	
WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	DECISION AND ORDER

Party-in-Interest

Appeal of the Order Denying Motion for Reconsideration and Decision and Order - Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Betty Persin, Bulger, Pennsylvania, *pro se*.

Helen H. Cox (Henry L. Solano, Solicitor of Labor; 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appears without the assistance of counsel and appeals the Order Denying Motion for Reconsideration and Decision and Order - Awarding Benefits (98-BLA-0755) of Administrative Law Judge Daniel L. Leland with respect to 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).¹ The relevant procedural history of this case is as follows: The miner filed an application for benefits on July 14, 1980, which was denied by the district director on January 5, 1981 on the grounds that the miner did not establish any of the elements of entitlement. Director's Exhibit 19. The miner filed a second application for benefits on February 5, 1987. *Id.* For reasons that are not clear from the record, Administrative Law Judge Gerald M. Tierney considered the claim filed in 1980 based upon a weighing of all of the evidence and denied benefits in a Decision and Order on Reconsideration issued on February 9, 1990. Judge Tierney found that the miner established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), but did not establish that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Accordingly, benefits were denied. *Id.*

The miner filed a third claim on December 4, 1992. Director's Exhibit 1. The district director denied this application for benefits on October 19, 1994. Director's Exhibit 17. The case was transferred to the Office of Administrative Law Judges (OALJ) for a hearing, but while it was pending before Administrative Law Judge Michael P. Lesniak, the miner requested that his claim be withdrawn. Director's Exhibit 34. In an Order dated September 22, 1995, Judge Lesniak granted the miner's request. Director's Exhibit 35. The miner subsequently filed another claim on March 16, 1996. Director's Exhibit 36.

The district director treated this claim as a request for modification, apparently because it was filed within one year of Judge Lesniak's Order granting withdrawal of the 1992 claim, and denied it. Director's Exhibits 37, 42, 56. Following the miner's death, his widow pursued his claim on his behalf by filing a timely request for modification of the district director's denial. Director's Exhibit 57. At the informal conference, held on March 3, 1998, the district director

¹Betty Persin, herein designated as claimant, is the surviving spouse of the miner, Frank Persin, who died on June 27, 1996. She is continuing to pursue the miner's claim, filed on March 16, 1996, on his behalf. The district director granted claimant's separate application for survivor's benefits on November 5, 1996. Director's Exhibit 60.

identified proof of a change in conditions pursuant to both 20 C.F.R. §§725.309(d) and 725.310(a) as issues for decision. The district director indicated that the 1996 claim could not be treated as a request for modification, as it was not filed within one year of the denial of claimant's 1987 claim. The district director found that the newly submitted evidence was insufficient to establish a material change in conditions under Section 725.309(d) and denied benefits. Director's Exhibit 58.

The case was transferred to the OALJ for a hearing, which was held before Administrative Law Judge Daniel L. Leland (the administrative law judge). The list of contested issues included references to both Sections 725.309 and 725.310. Director's Exhibit 61. At the hearing, the administrative law judge indicated that modification under Section 725.310 was not an issue, as the miner had withdrawn his 1992 claim. The administrative law judge reasoned that inasmuch as Judge Lesniak's Order granting the miner's request to withdraw his claim did not constitute a denial, the 1996 claim was a duplicate claim, as it was filed more than one year after the denial of the 1987 claim by Judge Tierney in February of 1990. Hearing Transcript at 9. The administrative law judge invited the parties to stipulate that the 1992 claim was still viable based upon the filing of a new claim within one year of Judge Lesniak's Order, but the Director did not concur with this position.² *Id.* at 15.

In a Decision and Order issued on December 22, 1998, the administrative law judge held that the 1996 claim was a duplicate claim. The administrative law judge determined that the evidence submitted subsequent to the denial of the miner's 1987 claim in February of 1990 was sufficient to establish a material change in conditions under Section 725.309(d), as it supported a finding that the miner was totally disabled due to pneumoconiosis pursuant to Section 718.204(b) and (c). The administrative law judge also found that claimant established entitlement to benefits on the merits. Accordingly, benefits were awarded. The administrative law judge further determined that because the exact date of the onset of the miner's total disability due to pneumoconiosis could not be ascertained from the record, the award of benefits was effective beginning March 1, 1996 - the first day of the month in which the miner filed his most recent claim - and ending on June 30, 1996 - the last day of the month in which the miner died. Claimant requested reconsideration of the administrative law judge's determination that the provisions of Section 725.310 were not applicable. The

²Claimant was represented by counsel at the hearing before the administrative law judge. Hearing Transcript at 4.

administrative law judge denied claimant's Motion for Reconsideration in an Order dated February 9, 1999.

The present appeal followed. The Director has responded and asserts that the administrative law judge's finding that the 1996 filing was a duplicate claim is correct and that the administrative law judge rationally determined that March 1, 1996 is the appropriate date from which benefits are payable. In the alternative, the Director concedes that the district director erred in initially treating the 1996 claim as a request for modification, but notes that this error was corrected in the Proposed Decision and Order Memorandum of Conference. Nevertheless, the Director indicates that if the Board treats the district director's mistake as a concession that the 1992 claim was still viable, the case should be remanded for additional fact-finding regarding the onset issue.³

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Upon review of the record below and the administrative law judge's findings, we hereby affirm the administrative law judge's determination that the 1996 application for benefits was a duplicate claim and his finding that the award of benefits in the miner's claim is effective March 1, 1996, as they are rational and supported by substantial evidence. With respect to claimant's assertion that she requested reinstatement of the 1992 claim, claimant's request for reinstatement occurred in 1999 after her attorney had filed a motion to withdraw

³We affirm the administrative law judge's finding that entitlement to benefits has been established in the miner's claim under 20 C.F.R. Part 718, as it is not adverse to claimant and has not been challenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

the present appeal. No action was taken subsequent to the withdrawal of the miner's 1992 claim until the miner filed his third claim in 1996. Thus, the administrative law judge determined correctly that based upon the withdrawal of the miner's 1992 claim, he was required to treat that claim as if it had never been filed. Decision and Order at 5; 20 C.F.R. §725.306(b). The administrative law judge also correctly found, therefore, that Judge Lesniak's Order granting the miner's request to withdraw his 1992 claim did not constitute a denial of a claim for benefits. *Id.* Accordingly, the administrative law judge properly determined that the application for benefits filed on March 16, 1996, was a duplicate claim, as it was filed more than one year after Judge Tierney's 1990 Decision and Order on Reconsideration denying benefits. Decision and Order at 5; 20 C.F.R. §725.309(d).

In addition, the administrative law judge rationally found that the district director's error did not constitute a concession that the 1996 filing was a request for modification, as it was his duty as fact-finder "to determine if the miner's most recent claim meets the requirements of a request for modification...." Order Denying Motion for Reconsideration at 1; see *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Moreover, the administrative law judge acted within his discretion in concluding that claimant was not prejudiced by the inaccurate characterization of the miner's 1996 claim, inasmuch as the error was corrected in the district director's Proposed Decision and Order Memorandum of Conference and the evidence submitted by the miner was equally probative of the issue of a material change in conditions under Section 725.309(d) and the issue of a change in conditions under Section 725.310(a). *Id.*; see *Clark v. Karst Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Kincell v. Consolidation Coal Co.*, 9 BLR 1-221 (1986).

With respect to the issue of the date of onset of total disability, the administrative law judge rationally determined that the evidence submitted with the miner's earlier claims did not support a finding of total disability due to pneumoconiosis. Decision and Order at 6; Order Denying Motion for Reconsideration at 1; see *Clark, supra*. The administrative law judge also acted within his discretion in finding that the evidence concerning the miner's final hospitalization established that he was totally disabled due to pneumoconiosis at the time of his death, and thus, established a material change in conditions pursuant to Section 725.309(d), see *LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), and the administrative law judge also correctly determined that the evidence did not establish the date on which this event occurred. *Id.*; 20 C.F.R. §725.503(b); see *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Williams v. Director, OWCP*, 13 BLR 1-28

(1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989); see generally *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989). Thus, the administrative law judge properly determined that the miner's entitlement to benefits commenced on March 1, 1996 - the first day of the month in which the miner's most recent viable claim was filed - and ceased on June 30, 1996 - the last day of the month in which the miner died. *Id.*

Accordingly, the administrative law judge's Order Denying Reconsideration and Decision and Order - Awarding Benefits are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge