

HATTIE PAULINE NANCE)
(Widow of HUBERT NANCE))
)
Claimant-Petitioner))
)
v.)
)
JOC COAL MINING,) DATE ISSUED: _____
INCORPORATED)
)
and)
)
OLD REPUBLIC INSURANCE)
COMPANY)
)
Employer/Carrier-)
Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS,)
UNITED STATES DEPARTMENT OF)
LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Order of Dismissal of Robert L. Hillyard,
Administrative Law Judge, United States Department of Labor.

John Hunt Morgan and Edmond Collett, Hyden, Kentucky, for
claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington,
D.C., for employer and carrier.

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

PER CURIAM:

Claimant, the miner's widow, appeals the Order of Dismissal (00-BLA-0837) of Administrative Law Judge Robert L. Hillyard on a duplicate 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). This case is before the Board for the second time. The Board affirmed, in its Decision and Order in *Nance v. JOC Mining, Inc.*, BRB No. 98-0833 BLA (Apr. 7, 1999) (unpublished), Administrative Law Judge Thomas F. Phalen, Jr.'s denial of the instant claim under 20 C.F.R. §725.309(d) (2000) based on his finding that the claim was a duplicate survivor's claim which did not meet the requirements for modification under 20 C.F.R. §725.310 (2000). Director's Exhibit 56; see Director's Exhibit 46. The Board further indicated that it declined to affirm Judge Phalen's denial of benefits based on his substantive evaluation of the record because the evaluation was not in accordance with law. *Id.* The Board subsequently denied claimant's motion for reconsideration on August 19, 1999. Director's Exhibit 61. By letter dated January 19, 2000, claimant sought further review of the Board's Decision and Order, Director's Exhibit 62, and thereafter submitted check stubs and employment forms relating to the deceased miner's work with employer. Director's Exhibit 65. The district director construed claimant's request as a request for modification under 20 C.F.R. §725.310 (2000), Director's Exhibit 64, and referred the claim to the Office of Administrative Law Judges for hearing, Director's Exhibit 66.

On September 5, 2000, employer and carrier (employer) filed a Motion for Summary Decision, seeking dismissal of the instant claim as a duplicate survivor's claim under 20 C.F.R. §725.309(d) (2000) and requesting cancellation of the hearing scheduled for October 4, 2000. On September 12, 2000, Administrative Law Judge Robert L. Hillyard (the administrative law judge) issued an order requiring claimant to show cause, on or before September 21, 2000, why the claim should not be dismissed for the reasons stated in employer's Motion for Summary Decision. In his September 25, 2000 Order of Dismissal, which is the subject of the instant appeal, the administrative law judge indicated that claimant had not filed a response to the show cause order. The administrative law judge found that because claimant filed the instant claim more than one year after the denial of the prior claim, the claim constituted a duplicate survivor's claim under

¹The amendments to the regulations at 20 C.F.R. §725.309 (2000) and 20 C.F.R. §725.310 (2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. See 20 C.F.R. §725.2, 65 Fed. Reg. 80, 057.

²The procedural history of this case is fully set forth in the Board's Decision and Order in *Nance v. JOC Mining, Inc.*, BRB No. 98-0833 BLA (Apr. 7, 1999) (unpublished).

20 C.F.R. §725.309(d) (2000). The administrative law judge held that based upon the decision of the United States Court of Appeals for the Sixth Circuit in *Jordan v. Director, OWCP*, 892 F.2d 482, 13 BLR 2-184 (6th Cir. 1989) and the decisions of the Board in *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992), *Mack v. Matoaka Kitchekan Fuel*, 12 BLR 1-197 (1989) and *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):

[A] survivor is barred from filing a second claim (or subsequent claims) if more than one year has elapsed following a denial of an earlier claim. Consequently, where the record contains two or more survivor's claims filed by the same claimant, the subsequent claim must be denied on the same basis as the earlier claim. Duplicate survivor's claims may only be considered if the subsequent claim satisfies §725.310.

Order of Dismissal at 2. The administrative law judge thus dismissed the claim and cancelled the hearing. *Id.*

On appeal, claimant contends that the administrative law judge erred in dismissing the instant claim without first examining the documents she submitted in support of her request for further review of the Board's Decision and Order in *Nance*. Claimant also asserts that, contrary to the administrative law judge's indication in his Order of Dismissal, claimant filed a response to the administrative law judge's show cause order on September 21, 2000. Employer responds, seeking affirmance of the

³ The regulation at 20 C.F.R. §725.309(d) (2000) provides in pertinent part:

If an earlier survivor's claim filed under this part has been finally denied, the new claim filed under this part shall also be denied unless the [district director] determines that the later claim is a request for modification and the requirements of §725.310 are met.

20 C.F.R. §725.309(d) (2000).

⁴On January 18, 2001, the Board received a copy of "Claimant's Response to Order to Show Cause" dated September 21, 2000. Therein claimant states, *inter alia*:

In response the claimant states that she has submitted new and material evidence, in the form of check stubs and W-2 forms submitted by cover letter dated March 13, 2000, and that therefore a hearing must be held in the instant claim.

Claimant's Response to Order to Show Cause at 1. Claimant thus requested that employer's Motion for Summary Judgment be denied and the hearing be held as scheduled. *Id.* at 2.

administrative law judge's dismissal of the claim. The Director, Office of Workers' Compensation Programs, has not filed a brief in the appeal.

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. Survivors are barred from filing duplicate claims beyond the one year period provided for modification. Specifically, under 20 C.F.R. §725.309(c) and (d) (2000) 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 claim is considered to be a motion for modification which satisfies the requirements of 20 C.F.R. §725.310 (2000). *Watts, supra; Mack, supra; Clark, supra*. In the instant case, the administrative law judge properly determined that the claim must be denied as a duplicate survivor's claim as it does not meet the requirements for modification. Specifically, claimant filed the instant survivor's claim on June 20, 1995, more than one year after the district director's May 26, 1989 denial of claimant's prior claim. Director's Exhibits 1, 42-23. Moreover, inasmuch as the instant claim is barred under 20 C.F.R. §725.309(d) (2000) any error on the administrative law judge's part in not considering claimant's response to his Order to Show Cause dated September 12, 2000 is harmless, as it cannot affect the outcome of the case. See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). We, therefore, affirm the administrative law judge's order dismissing the instant claim and cancelling the scheduled hearing.

⁵We note that the copy of "Claimant's Response to Order to Show Cause" submitted by claimant to the Board does not reflect its receipt by the Office of Administrative Law Judges.

Accordingly, the administrative law judge's Order of Dismissal is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge