

BRB No. 09-0157 BLA

N.P.)
(Widow of R.P.))
)
Claimant-Petitioner)
)
v.)
)
R.L. POTTER TRUCKING,)
INCORPORATED)
)
and)
) DATE ISSUED: 10/14/2009
METLIFE INSURANCE COMPANY OF)
CONNECTICUT)
)
Employer/Carrier-)
Respondents)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Canceling Hearing and Dismissing Claim of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

J. Logan Griffith (Porter, Schmitt, Banks & Baldwin), Paintsville, Kentucky, for employer and carrier.

Michael J. Rutledge and Jeffrey S. Goldberg (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order Canceling Hearing and Dismissing Claim (2008-BLA-5370) of Administrative Law Judge Alice M. Craft rendered 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).² This case involves a survivor's claim filed on March 25, 1997, and a second survivor's claim filed on August 3, 2000. After reviewing the procedural history of this case, the administrative law judge determined that claimant's second claim, filed on August 3, 2000, was a duplicate survivor's claim subject to the provisions at 20 C.F.R. §725.309(d) (1999),³ and that claimant had not been deprived of due process when the district director failed to refer her 1997 claim for a formal hearing. Accordingly, the scheduled hearing before the administrative law judge was canceled, and claimant's 2000 claim was dismissed.

On appeal, claimant contends that she was denied due process, as her initial request for a formal hearing in 1997 was not honored. Employer responds, urging

¹ Claimant is the widow of the miner, who died on January 21, 1997. Director's Exhibit 6. The miner filed his first claim for benefits on April 4, 1995, which was denied on September 14, 1995. Director's Exhibit 16. The miner filed a second claim on September 25, 1996, which was pending at the time of his death. Claimant pursued the miner's claim, which was denied by the district director on January 22, 1997. On March 25, 1997, claimant appealed the denial of benefits in the miner's second claim, and filed her first application for survivor's benefits. Director's Exhibits 17, 18. On July 18, 1997, the district director denied both claims. *Id.* On July 30, 1997, claimant requested a hearing. Director's Exhibit 18.

² The 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 (2009). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³ The amendments to the regulations at 20 C.F.R. §§725.309 and 725.310 do not apply to claims, such as this, that were pending on January 19, 2001; rather, the version of these regulations as published in the 1999 Code of Federal Regulations is applicable. *See* 20 C.F.R. §725.2(c), 65 Fed. Reg. 80,057 (2000).

affirmance of the dismissal of the 2000 claim as a duplicate survivor's claim. The Director responds, urging the Board to reverse the administrative law judge's dismissal of the claim as a duplicate survivor's claim, and to remand this case for a hearing and a decision on the merits of her 1997 claim.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The pertinent procedural history of this case is as follows. Claimant's first claim, filed on March 25, 1997, was denied by the district director on July 18, 1997, on the ground that claimant failed to establish that pneumoconiosis had contributed to the miner's death. Director's Exhibits 17-9, 18-217. On July 30, 1997, claimant, acting without the assistance of counsel, disagreed with the decision and timely requested a hearing before an administrative law judge.⁵ Director's Exhibit 18-216. The district director did not refer the case to the Office of Administrative Law Judges, but held an informal conference and denied both the miner's claim and the survivor's claim on February 4, 1998, and again on March 24, 1998.⁶ Director's Exhibit 18 at 19-34.

Claimant filed a request for modification on March 9, 1999, which was denied by the district director on April 26, 1999. Director's Exhibit 18-13. The Proposed Decision and Order informed claimant that she could request a formal hearing within thirty days. Director's Exhibit 18-3. Claimant took no further action until June 27, 2000, fourteen months after the denial, when she again requested a hearing before an administrative law judge. Director's Exhibit 18-2. Claimant was notified that her request for a hearing was untimely and that her only recourse was to file a new claim. Director's Exhibit 18-1.

⁴ The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 4.

⁵ On September 24, 1997, claimant elected to be represented by Susie Davis of the Kentucky Black Lung Association. Director's Exhibit 18-215.

⁶ The district director stated in his Proposed Decision and Order Memo of Conference that "[Claimant] then requested a formal hearing, but the district director decided an informal conference would be useful to narrow the issues in the claim." Director's Exhibit 18-21.

Claimant filed her second survivor's claim on August 3, 2000. Director's Exhibit 1. After a hearing, Administrative Law Judge Rudolph L. Jansen denied benefits on February 20, 2002, on the ground that the claim must be denied as a duplicate survivor's claim pursuant to Section 725.309(d) (1999).⁷ Director's Exhibits 9, 31, 65. On claimant's *pro se* appeal, the Board affirmed the denial of benefits, Director's Exhibit 32, and subsequently denied claimant's Motion for Reconsideration on March 14, 2003. Director's Exhibit 33.

Claimant, through counsel, filed a modification request on August 27, 2003. Director's Exhibits 36. In a Decision and Order dated April 26, 2007, Administrative Law Judge Pamela Lakes Wood denied the modification request on the ground that the claim was a duplicate survivor's claim subject to automatic denial under the regulations. Director's Exhibit 66; *see* 20 C.F.R. §§725.309(d) (1999), 725.310 (1999).

Claimant again requested modification on September 24, 2007. Director's Exhibit 67. Because no new evidence was presented, the district director transferred the case to the Office of Administrative Law Judges, and on September 3, 2008, Administrative Law Judge Alice M. Craft (the administrative law judge) issued an order for claimant to show cause why the claim should not be dismissed pursuant to the regulations as a duplicate survivor's claim. Director's Exhibit 71. Claimant responded, arguing that she was denied procedural due process when she was denied a formal hearing on her first claim. Claimant also argued that due to the ineffective assistance of a lay representative and claimant's lack of knowledge regarding the rules of procedure, she refiled her claim in the hopes of obtaining a formal hearing. In rejecting claimant's argument that she should be allowed to pursue her case, the administrative law judge determined that:

The record . . . discloses that the Claimant continued to participate in the proceedings on her initial claim, including the filing of a request for modification (by her representative) on March 9, 1999. When the request for modification was denied, the Claimant was personally notified that she could request a hearing within 30 days, but failed to do so. Under the circumstances of this case, I cannot find that the Claimant has been deprived of due process based upon the District Director's failure to refer the claim for hearing in 1997. Nor can I find that the failure to file a timely

⁷ Section 725.309(d) (1999) provides, in pertinent part, that 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 deputy commissioner determines that the later claim is a request for modification and the requirements of Section 725.310 are met. 20 C.F.R. §725.309(d) (1999). To meet the requirements of Section 725.310, the claim must be filed before one year after the denial of a previous claim. 20 C.F.R. §725.310 (1999).

request for hearing was solely the fault of the Claimant's representative and, in any event, the Claimant is bound by the acts or omissions of her chosen representative.

Decision and Order at 3.

In the present appeal, claimant again contends, and the Director agrees, that claimant's due process rights have been violated because her initial request for a formal hearing was not honored. Claimant argues that the informal conference afforded to claimant before the district director is not an appropriate substitution for a hearing before an administrative law judge. Claimant thus maintains that her request for a formal hearing, made prior to the issuance of a Proposed Decision and Order, must be honored, absent an express waiver from claimant pursuant to 20 C.F.R. §725.418. Claimant's Brief at 5-10. Claimant's arguments have merit.

Section 19(c) of the Longshore and Harbor Workers' Compensation Act provides, in pertinent part, that the district director "shall make or cause to be made such investigation as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon." 33 U.S.C. §919(c), as incorporated into the Act by 30 U.S.C. §932(a). The current version of the implementing regulations at 20 C.F.R. §§725.450 and 725.421(a) is essentially unchanged from that in effect at the time claimant requested a hearing, and provides that "[a]ny party to a claim . . . shall have a right to a hearing concerning any contested issue of fact or law unresolved by the district director . . . [after] the processing and adjudication of the claim by the district director has been completed . . .," 20 C.F.R. §725.450, and that:

In any claim for which a formal hearing is requested or ordered, and with respect to which the [district director] has completed development and adjudication without having resolved all contested issues in the claim, the [district director] shall refer the claim to the Office of Administrative Law Judges for a hearing.

20 C.F.R. §725.421(a). Additionally, the regulation at 20 C.F.R. §725.418 was revised to include the provision that:

[i]f the proposed decision and order [of the district director] is a denial of benefits, and the claimant has previously filed a request for a hearing, the proposed decision and order shall notify the claimant that the case will be referred for a hearing pursuant to the previous request unless the claimant notifies the district director that he no longer desires a hearing.

20 C.F.R. §725.418(c).

Under the facts of this case, we agree with claimant and the Director that claimant's timely request for a formal hearing required that the district director forward the 1997 claim to the Office of Administrative Law Judges, and that an informal conference before the district director was not an appropriate substitution. Claimant's request for a formal hearing, albeit filed prior to the completion of the district director's processing, *i.e.* the informal conference and subsequent decision, was sufficient and must be honored, absent an express waiver from claimant. *See* 20 C.F.R. §§725.450, 725.418(c). While Section 725.418(c) did not become effective until January 20, 2001, and does not apply to claimant's 1997 claim, *see* 20 C.F.R. 725.2(c), we find its provisions persuasive under the facts of this case, and indicative of the Director's interpretation of the Act. Thus, claimant was not required to file a second request after the district director issued his final order. *See Plesh v. Director, OWCP*, 71 F.3d 103, 20 BLR 2-30 (3d Cir. 1995). Because the district director did not honor claimant's request for a formal hearing, her original survivor's claim remains viable, and claimant is entitled to a hearing and adjudication on the merits of that claim.⁸ Consequently, we reverse the administrative law judge's dismissal of the claim herein as a duplicate survivor's claim, and remand this case for a hearing and decision on the merits of claimant's 1997 claim.

⁸ While claimant received a formal hearing on September 11, 2001, Administrative Law Judge Rudolf L. Jansen denied the claim as a duplicate survivor's claim without considering the merits of the claim. Director's Exhibits 31, 65.

Accordingly, the administrative law judge's Decision and Order Canceling Hearing and Dismissing Claim is vacated, and this case is remanded for a hearing and decision on the merits of claimant's 1997 claim.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge