

BRB No. 09-0347 BLA

D.K. o/b/o )  
K.H. )  
(Disabled daughter of E.H., deceased) )  
 )  
Claimant-Petitioner )  
 )  
v. ) DATE ISSUED: 10/30/2009  
 )  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
 )  
Respondent ) DECISION and ORDER

Appeal of the Order of Dismissal of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

D.K., Ashley, Pennsylvania, *pro se*.

Sarah M. Hurley (Deborah Greenfield, Acting 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:

Claimant<sup>1</sup> appeals, without the assistance of counsel, the Order of Dismissal (09-BLA-5179) of Administrative Law Judge Ralph A. Romano (the administrative law judge), rendered on a subsequent 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 dismissed claimant's subsequent

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<sup>1</sup> Claimant is appealing on behalf of her sister, who is the miner's disabled adult child. The miner, who died on January 18, 1997, was receiving black lung benefits at the time of his death. Director's Exhibit 1.

survivor's claim in accordance with 20 C.F.R. §725.309(d)(3), as he found that claimant failed to establish a change in an applicable condition of entitlement.

On appeal, claimant generally challenges the administrative law judge's dismissal of her claim. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to affirm the administrative law judge's dismissal of this claim.

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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law. 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).

A subsequent survivor's claim, filed more than one year after the effective date of a final order denying survivor's benefits, must be denied unless the applicable conditions of entitlement in such a claim include at least one condition unrelated to the miner's physical condition at the time of his death. 20 C.F.R. §725.309(d)(3); *Boden v. G.M. & W. Coal Co.*, 23 BLR 1-39, 1-40 (2004); *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992).

The record reflects that claimant filed her initial claim for survivor's benefits on January 22, 1997. Director's Exhibit 1. In a Decision and Order dated September 16, 1998, Administrative Law Judge Ainsworth H. Brown credited the miner with twelve and one-half years of coal mine employment,<sup>2</sup> as stipulated by the parties, and found that claimant established the existence of pneumoconiosis, arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203. Judge Brown further found, however, that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Director's Exhibit 1. Accordingly, the administrative law judge denied benefits. Following a series of appeals, claimant's claim was finally denied by the United States Court of Appeals for the Third Circuit on June 26, 2002. Claimant took no further action on her initial claim.

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<sup>2</sup> The record indicates that the miner's coal mine employment was in Pennsylvania. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

Claimant filed her second claim January 12, 2004. Director's Exhibit 2. The district director denied the claim on February 20, 2004, on the ground that claimant failed to establish that an applicable condition of entitlement, unrelated to the miner's physical condition at the time of his death, had changed since the date upon which the order denying her prior survivor's claim became final. 20 C.F.R. §725.309; Director's Exhibit 2. At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. However, on June 3, 2004, the Director moved to dismiss the claim, contending that the claim was a subsequent survivor's claim and, therefore, had to be dismissed based upon the denial of the earlier claim. By letter dated June 14, 2004, claimant responded to the Director's motion, indicating she still desired a hearing on her claim.

In a decision dated July 7, 2004, Administrative Law Judge Robert D. Kaplan found that the denial of claimant's prior claim related solely to the miner's physical condition at the time of his death, *i.e.*, claimant failed to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Therefore, as claimant could not establish that there had been a change in an applicable condition of entitlement unrelated to the miner's physical condition at the time of his death, as required by 20 C.F.R. §725.309(d)(3), Judge Kaplan dismissed the claim and cancelled the scheduled hearing, pursuant to 20 C.F.R. §725.452(c).

Claimant filed the current claim, her third, on October 7, 2008. Director's Exhibit 2. The district director denied the claim on November 7, 2008 on the grounds that claimant failed to establish that an applicable condition of entitlement, unrelated to the miner's physical condition at the time of his death, had changed since the date upon which the order denying her prior survivor's claim became final. 20 C.F.R. §725.309; Director's Exhibit 5. At claimant's request, the case was forwarded to the Office of Administrative Law Judges for a formal hearing. However, on December 16, 2008, the Director moved to dismiss the claim, contending that the claim was a subsequent survivor's claim and, therefore, had to be dismissed based upon the denial of the earlier claim. Claimant was served with a copy of the Director's motion, but did not file a response.

In an Order of Dismissal dated January 20, 2009, the administrative law judge found that claimant failed to establish that there had been a change in an applicable condition of entitlement unrelated to the miner's physical condition at the time of his death, as required by 20 C.F.R. §725.309(d)(3). Therefore, the administrative law judge dismissed the claim and cancelled the scheduled hearing, pursuant to 20 C.F.R. §725.452(c).

In this case, the administrative law judge properly found that the condition of entitlement that claimant failed to demonstrate in her initial claim related solely to the

miner's physical condition at the time of his death, *i.e.*, whether his death was due to pneumoconiosis at 20 C.F.R. §718.205(c). The administrative law judge further found, correctly, that claimant did not raise any elements of entitlement unrelated to the miner's physical condition, but instead asserted that she had requested a letter from her congressman.<sup>3</sup> Therefore, the administrative law judge properly found that claimant was precluded from entitlement to survivor's benefits, and properly dismissed her 2008 claim.<sup>4</sup> 20 C.F.R. §725.309(d)(3); *see Boden*, 23 BLR at 1-41; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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<sup>3</sup> As the administrative law judge noted, and the record reflects, no letter from claimant's congressman was ever received. Order of Dismissal at 2 n.4.

<sup>4</sup> Under the facts of this case, we hold that the administrative law judge was not required to hold a hearing, since there is no genuine issue as to any material fact and the Director, Office of Workers' Compensation Programs, was entitled to the relief requested, as a matter of law. *See* 20 C.F.R. §725.452(c).