

BRB No. 03-0150 BLA

ELLA ATWELL)
(Widow of HOWARD ATWELL))
)
 Claimant-Petitioner)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS=) DATE ISSUED: 09/23/2003
)
)
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Daniel J. Roketenetz,
Administrative Law Judge, United States Department of Labor.

Ella Atwell, Grove City, Ohio, *pro se*.

Richard A. Seid (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Decision and Order - Denial

¹ Claimant, Ella Atwell, is the widow of the miner, Howard Atwell, who died on June 29, 1992. Director=s Exhibits 8, 9. The miner had filed an application for benefits on May 24, 1976, which was finally denied on May 16, 1980. Director=s Exhibit 10. Subsequent to the miner=s death, claimant filed her first survivor=s claim for benefits on September 21, 1993, which was finally denied on April 4, 1995. Director=s Exhibit 9. Thereafter, claimant filed a duplicate survivor=s claim on July 30, 1998, which was finally denied on September 3, 1998. Director=s Exhibit 8. Subsequently, claimant filed a third application for benefits on August 1, 2000, which is the subject of the instant case. Director=s Exhibit 1.

of Benefits (01-BLA-0210) of Administrative Law Judge Daniel J. Roketenetz 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).² Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that the miner worked in qualifying coal mine employment for five years, but found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. ' 718.202(a) and that the miner=s death was due to pneumoconiosis pursuant to 20 C.F.R. ' 718.205(c). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge=s findings that the evidence failed to establish the existence of pneumoconiosis and that the miner=s death was due to pneumoconiosis. The Director, Office of Workers= Compensation Programs, (the Director) has filed a response brief, contending that, although the administrative law judge neither considered the Director=s defense set forth in 20 C.F.R. ' 725.309(d)(2000) to consideration of this duplicate survivor=s claim nor cited Section 725.309(d)(2000) as a basis for denying the claim, remand is unnecessary because the regulation provides that the claim must be denied as a matter of law. Alternatively, the Director asserts that the administrative law judge properly found that no medical evidence supports the claim on the merits, and hence, urges affirmance of the denial.

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. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge=s Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with 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).

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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Consistent with the requirements of Section 725.309(d)(2000), the Board has held that 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 a request for modification thereby satisfying the requirements of Section 725.310 (2000).³ See 20 C.F.R. ' 725.309(c), (d)(2000); *Watts v. Peabody Coal Co.*, 17 BLR 1-68, 1-70-71 (1992); *Mack v. Matoaka Kitchekan Fuel*, 12 BLR 1-197, 1-199 (1989); *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).

In the instant case, the record demonstrates that claimant=s third application for benefits, filed on August 1, 2000, fails to satisfy the requirements of Section 725.310 (2000) because it was filed nearly two years after the denial of her second survivor=s application for benefits in 1998. Director=s Exhibits 1, 8. Consequently, because claimant failed to satisfy the requirements of Section 725.310 (2000), the administrative law judge was required to deny the duplicate survivor=s claim. See 20 C.F.R. ' 725.309(c), (d) (2000); *Watts*, 17 BLR at 1-70-71; *Mack*, 12 BLR at 1-199. Accordingly, the administrative law judge=s denial of benefits based on his consideration of the claim on the merits is deemed to be harmless error.

³ Pursuant to 20 C.F.R. ' 725.310 (2000), upon his or her own initiative or upon the request of any party, the district director may, at any time before one year from the date of the last payment of benefits, or at any time before one year after the denial of the claim, reconsider the terms of an award or denial of benefits. 20 C.F.R. ' 725.310 (2000).

See Larioni v. Director, OWCP, 6 BLR 1-1276 (1984).⁴

⁴ Application of the duplicate survivor=s claims provisions has been rejected in cases where the party opposing entitlement has either waived reliance on it or has failed to raise it at any stage in the proceedings. *See Jordan v. Director, OWCP*, 892 F.2d 482, 13 BLR 2-184 (6th Cir. 1989); *Clark v. Director, OWCP*, 838 F.2d 197, 11 BLR 2-46 (6th Cir. 1988), *rev'g on other grounds*, 9 BLR 1-205 (1986); *Watts*, 17 BLR at 1-71. A review of the record in this case, however, reveals that when the case was referred to the Office of Administrative Law Judge for a formal hearing, the issue of whether the claim should be denied pursuant to Section 725.309 (2000) was listed as a contested issue by the Director, Office of Workers= Compensation Programs. Director=s Exhibit 12. Accordingly, because he contested this claim on the basis that it was a duplicate survivor=s claim and should have been subject to an automatic denial pursuant to Section 725.309 (2000), the Director neither waived reliance on Section 725.309(d)(2000) nor failed to raise it during the proceedings on this claim. *See Director=s Exhibit 12; see also Director=s Letter at 4.*

Accordingly, the Decision and Order - Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge