

BRB No. 04-0279 BLA

CATHERINE M. WILCE)
(Widow of FRANCIS WILCE))
)
 Claimant-Petitioner)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED: 09/30/2004
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Administrative Law Judge Ralph A. Romano, United States Department of Labor.

George E. Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania for claimant.

Michelle S. Gerdano (Howard M. Radzely, 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 HALL, Administrative Appeals Judges.

PER CURIAM

Claimant appeals the Decision and Order Denying Benefits (03-BLA-0170) of Administrative Law Judge Ralph A. Romano issued on a request for modification of the denial of her 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).¹ This claim is before the Board for the second time.² The Board previously

¹ 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

affirmed an Order Granting Motion to Dismiss issued by Administrative Law Judge Ainsworth Brown, holding that claimant's duplicate survivor's claim was time-barred under 20 C.F.R. §725.309(d) (2000).³ Claimant subsequently filed a request for modification on December 3, 2002. Director's Exhibit 61. While the case was pending a hearing before the Office of Administrative Law Judges, claimant submitted Interrogatories, seeking to obtain information from the Department of Labor as to the exact number of miners' and survivors' claims filed between the years of 1974 through 2003, and the gender of the applicants. When the Director, Office of Workers' Compensation Programs (the Director), refused to comply with claimant's discovery request, claimant filed a Motion to Compel Answers to Discovery with the administrative

(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations. The amendments to the regulation at 20 C.F.R. §§725.309 and 725.310, 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.

² Claimant initially filed a claim for survivor's benefits on February 19, 1992. The district director determined that claimant failed to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), and therefore denied benefits on April 21, 1992. Director's Exhibit 10. Claimant filed a request for modification on October 8, 1992, which was also denied by the district director on November 13, 1992. *Id.* Claimant next filed a duplicate claim on July 25, 1996. Director's Exhibit 1. The district director denied benefits and claimant requested a hearing, which was held on July 30, 1997. Director's Exhibit 14. In a Decision and Order dated November 18, 1997, Administrative Law Judge Robert D. Kaplan denied claimant's duplicate survivor's claim pursuant to 20 C.F.R. §725.309(d) (2000). Director's Exhibit 17. On November 9, 1998, claimant filed a request for modification, which was denied by Judge Kaplan on July 26, 1999. Director's Exhibit 26. Claimant filed an appeal with the Board, but the appeal was subsequently dismissed as abandoned. Director's Exhibit 34. Claimant filed another request for modification on March 8, 2001, which was denied by the district director. Director's Exhibit 35. Claimant requested a hearing, and the case was assigned to Administrative Law Judge Ainsworth H. Brown. Director's Exhibit 40. The Director, Office of Workers' Compensation Programs (the Director) filed a Motion to Dismiss the claim, citing the automatic denial provisions of Section 725.309(d) (2000) with respect to duplicate survivor's claims. Director's Exhibit 48. By Order dated November 29, 2001, Judge Brown granted the Director's Motion to Dismiss Claim and cancelled the scheduled hearing. Director's Exhibit 49. Claimant appealed.

³ *See Wilce v. Director, OWCP*, BRB No. 02-0267 BLA (July 30, 2002) (unpub.); Director's Exhibit 56.

law judge on September 15, 2003. Claimant's Exhibit 3. The Director objected to the motion, citing Rule 26(b) of the Federal Rules of Civil Procedure and 20 C.F.R. §725.458, arguing that the information claimant sought to obtain was overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. At a hearing held on October 6, 2003, the administrative law judge held that because he did not have the authority to determine the constitutionality of Department of Labor regulations, he therefore was without authority to compel the Director to answer claimant's interrogatories, particularly since the information sought by claimant was not relevant to the issue of claimant's entitlement to benefits. The administrative law judge therefore denied the Motion to Compel. After the hearing, the parties stipulated that, historically, men file most miners' claims while women file most survivors' claims. In an undated decision, Judge Romano denied the duplicate survivor's claim pursuant to 20 C.F.R. §725.309(d) (2000).

Claimant argues on appeal that the administrative law judge erred in denying benefits in accordance with 20 C.F.R. §725.309(d)(3).⁴ Specifically, claimant contends that the automatic denial provision of Section 725.309(d)(3) violates the equal protection clause set forth in the Fourteenth Amendment to the United States Constitution. Claimant asks the Board to hold that the administrative law judge committed reversible error in denying the Motion to Compel Answers to Interrogatories, and to "take the unusual step and permit discovery while this matter is pending before the Board" with instructions to the Director to respond to the interrogatories in full. Claimant's Brief at 6. In the alternative, claimant requests that the case be remanded to the administrative law judge for the purpose of compelling the Director to answer the interrogatories.

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. 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).

Claimant argues that 20 C.F.R. §725.309(d) (2000) violates the Fourteenth Amendment of the United States Constitution because the regulation creates a distinction between duplicate miners' claims, which are typically filed by men, and duplicate survivors' claims, which are typically filed by women.⁵ Claimant's Brief at 4-5.

⁴ We consider claimant's arguments as they pertain to 20 C.F.R. §725.309(d) (2000) since the revised regulation at 20 C.F.R. §725.309(d)(3) is not applicable to the instant claim.

⁵ The equal protection clause of the Fifth Amendment of the United States Constitution is applicable to federal law while the Fourteenth Amendment applies only to

Claimant contends that it is a violation of her right to equal protection to be precluded from pursuing a duplicate survivor's claim under Section 725.309(d) (2000) when living male miners are permitted to file duplicate claims. *Id.* She therefore maintains that the administrative law judge erred by not granting her Motion to Compel Interrogatories and by precluding her from further pursuing her constitutional challenge to Section 725.309(d) (2000).

Claimant's arguments are without merit. The administrative law judge is without the authority to decide questions regarding the constitutionality of the Act. *Kosh v Director, OWCP*, 8 BLR 1-168 (1985); Decision and Order at 5. Insofar as the administrative law judge correctly determined that he lacked jurisdiction to consider claimant's constitutional arguments and thereby the information claimant sought to obtain through her Interrogatories, we affirm the administrative law judge's decision to deny claimant's Motion to Compel.

The Board recognizes that it has the authority to consider questions of constitutionality arising with respect to the Acts and regulations under its jurisdiction. *McCluseky v. Zeigler Coal Co.*, 2 BLR 1-1248, 1-1250-62 (1981); *see Carrozza v. United States Steel Corp.*, 727 F.2d 74, 6 BLR 2-15 (3d Cir. 1984). As the Director correctly contends, the equal protection clause is not violated merely because a statute creates distinctions between classes of claimants, as long as the reasons for such distinctions are reasonable. *See Schweiter v. Wilson*, 45 U.S. 221, 210 (1981); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1004-1005, 13 BLR 2-100, 2-105-106 (3d Cir. 1989); *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 727-728, 13 BLR 2-23, 2-25-26 (3d Cir. 1989); *see also Gabbard v. Director, OWCP*, 12 BLR 1-35 (1988); *Henson v. United States Steel Corp.*, 6 BLR 1-1245 (1984). The regulation at issue here, Section 725.309(d), does not burden a fundamental right or create a "suspect classification" based on the gender of the miner's survivor. Thus, the regulation need only have a rational basis in order to withstand claimant's constitutional challenge. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993); *Schweiker v. Wilson*, 450 U.S. 221 (1981); *United States Railroad Retirement Board v. Fritz*, 449 U.S. 156 (1980); *Turner Elkhorn Mining v. Uery*, 428 U.S. 1 (1976); *Gabbard v. Director, OWCP*, 12 BLR 1-35 (1988); *Henson*, 6 BLR at 1247.

state law. U.S. Const. amend. V, IV. The applicable legal standard, a rational relations test, is nonetheless the same. At the minimum level of equal protection analysis, it is required that legislation classify the person(s) it affects in a manner rationally related to legitimate governmental objectives. *See Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

While Section 725.309 (2000) allows a miner to file a duplicate claim wherein the miner can establish a material change in his or her condition, a survivor is barred from filing more than one claim. 20 C.F.R. §725.309 (2000). Specifically, the provisions at subsections 725.309(c) and (d) provide that, if an earlier survivor's claim has been denied, then any subsequent claim shall also be denied unless the later claim is a request for modification that (1) is based only upon an allegation of a “mistake in a determination of fact” and (2) meets the one-year time requirements of 20 C.F.R. §725.310 (2000). *Id*; see also *Keating v. Director, OWCP*, 71 F.3d 118, 1123 (3d Cir. 1995); *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992). Because there can be no “change” in a deceased miner’s condition, we hold that it is rational to bar duplicate claims filed by a survivor. See *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *Clark v. Director, OWCP*, 9 BLR 1-205 (1986), *rev'd on other grounds*, 838 F.2d 2197 (6th Cir. 1988); *Mack v. Matoaka Kitchekan Fuel*, 12 BLR 1-197 (1989).⁶

Notwithstanding claimant’s December 3, 2002 request for modification, the status of claimant’s case has not changed since it was previously before this Board. Claimant’s first survivor’s claim, filed on February 19, 1992, was finally denied on April 21, 1992. Director’s Exhibit 10. Claimant took no further action with respect to that denial, but rather filed a subsequent claim on July 25, 1996. Director’s Exhibits 1, 8. Because the later claim was not filed within one year of the denial of the initial survivor’s claim, claimant did not satisfy the timeliness requirement set forth in Section 725.310 (2000) and her duplicate claim of July 25, 1996 may not be considered a request for modification. Accordingly, under the terms of Section 725.309(d) (2000), we hold that the instant duplicate claim must be automatically denied.⁷ See 20 C.F.R. §725.309(d) (2000); *Watts*, 17 BLR at 1-70; *Mack*, 12 BLR at 1-199 (1989). Because the administrative law judge properly applied 20 C.F.R. §725.309(d) (2000) in this case, we affirm his denial of claimant’s duplicate survivor’s claim.

⁶ This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner’s last coal mine employment occurred in Pennsylvania. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director’s Exhibit 2.

⁷ Pursuant to Section 22 of the Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310 (2000), see 20 C.F.R. §725.2(c), a party may request modification of a prior denial on the grounds of a change in conditions or because of a mistake in a determination of fact. However, the sole ground for modification in a survivor’s claim is that a mistake in a determination of fact was made in the prior denial, since there cannot be a change in the deceased miner’s condition. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). There was no mistake in fact in this case as Section 725.309(d) specifically provides for the automatic denial of a duplicate survivor’s claim.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge