



BRB No. 18-0491 BLA

VERNA J. KENDRICK)
(Widow of EDWARD LEE KENDRICK))

Claimant-Petitioner)

v.)

ISLAND CREEK COAL COMPANY c/o)
CONSOL ENERGY, INCORPORATED)

and)

HEALTHSMART CASUALTY CLAIMS)
SOLUTIONS)

Employer/Carrier-)
Respondents)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 09/24/2019

DECISION and ORDER

Appeal of the Decision and Order Granting Employer's Motion for Summary Judgment, Dismissing Claim and Cancelling the Hearing of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

Verna Kendrick, Bypro, Kentucky.

Joseph D. Halbert (Shelton, Branham & Halbert, PLLC), Lexington, Kentucky, for employer/carrier.

Before: BUZZARD, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals, without the assistance of counsel, the Decision and Order Granting Employer's Motion for Summary Judgment, Dismissing Claim and Cancelling the Hearing (2017-BLA-06136) of Administrative Law Judge Larry A. Temin, issued pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).² The administrative law judge dismissed claimant's subsequent survivor's claim because he found that she did not establish a change in an applicable condition of entitlement since the denial of her first survivor's claim. 20 C.F.R. §725.309(c)(4).

On appeal, claimant generally challenges the administrative law judge's dismissal of her claim. Employer responds, urging affirmance of the Decision and Order. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's findings if they are 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).

The grounds for establishing entitlement to benefits in a subsequent survivor's claim such as this one are limited. The claimant must show that one of the "applicable conditions of entitlement" has changed since her prior survivor's claim was denied. Those conditions of entitlement must include at least one issue "unrelated to the miner's physical condition at the time of his death." 20 C.F.R. §725.309(c)(4); *Boden v. G.M. & W. Coal Co.*, 23 BLR 1-39, 1-40 (2004); *Watts v. Peabody Coal Co.*, 17 BLR 1-68, 1-70-71 (1992).

Claimant filed an initial claim for survivor's benefits on July 6, 2010, which was denied by the district director on October 7, 2011, because she did not establish that the

¹ Claimant is the widow of the miner, who died on March 25, 2010. Director's Exhibit 7.

² On July 25, 2019, the Board sent a letter to claimant giving her the opportunity to have her case reviewed to determine whether it should be remanded for a new hearing before a new administrative law judge. See *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018). Claimant was directed to make her request for *Lucia* review by August, 4, 2019. Having not received a reply from claimant to the Board's letter, we will review only the merits of claimant's appeal.

miner was totally disabled and invoke a presumption that he died due to pneumoconiosis³ or otherwise establish his death was due to pneumoconiosis. Director's Exhibit 1 at 1, 210; *see* 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §§718.202(a); 718.204(b)(2); 718.205(b); 718.305. She took no action on the denial until she filed her subsequent survivor's claim on December 20, 2013. Director's Exhibit 3.

The district director issued a Proposed Decision and Order denying benefits. Claimant requested a hearing, which the administrative law judge scheduled for June 21, 2018.⁴ Director's Exhibit 23. Employer moved for summary judgement on May 7, 2018, asserting this subsequent survivor's claim should be dismissed because no genuine issue of material fact regarding claimant's entitlement to survivor's benefits exists. Employer argued claimant's subsequent survivor's claim must be denied because she had not shown a change in a condition of entitlement unrelated to the miner's physical condition at the time of his death. 20 C.F.R. §725.309(c)(4). On May 9, 2019, the administrative law judge issued an Order to Show Cause why the claim should not be dismissed, providing claimant with an opportunity to respond to employer's motion. 29 C.F.R. §18.72. In response, she submitted additional medical evidence.

In considering employer's motion, the administrative law judge accurately found that claimant's initial survivor's claim was denied for reasons related solely to the miner's physical condition at the time of his death. Decision and Order at 4. Because the administrative law judge properly found no genuine issue of material fact concerning claimant's entitlement to benefits exists in this subsequent survivor's claim,⁵ he

³ Under Section 411(c)(4), claimant is entitled to a rebuttable presumption that the miner's death was due to pneumoconiosis if she establishes he had at least fifteen years of underground, or substantially similar surface coal mine employment, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. The district director found claimant did not invoke the presumption because she did not establish the miner's total respiratory disability. Director's Exhibit 1.

⁴ On May 2, 2018, claimant requested her hearing be cancelled and that the administrative law judge issue a decision on the record.

⁵ Section 422(l) of the Act, provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l) (2012). We affirm the administrative law judge's finding that claimant cannot benefit from this provision, as there is no indication in the record that the miner was awarded benefits during his lifetime. Decision and Order at 3.

permissibly granted employer's motion for summary judgment. 20 C.F.R. §§725.309(c)(4), 725.452(c); *Boden*, 23 BLR at 1-40; Decision and Order at 4-5.

Accordingly, the administrative law judge's Decision and Order Granting Employer's Motion for Summary Judgment, Dismissing Claim and Cancelling the Hearing is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge