

BRB No. 96-0186 BLA

JACQUELINE CORNETT)
(Widow of CHARLES RAY CORNETT))

)
Claimant-Petitioner)

)
v.)

)
GOLDEN OAK MINING COMPANY)

)
Employer-Respondent)

)
DIRECTOR, OFFICE OF WORKERS')

COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

)
Respondent)

DATE ISSUED:

DECISION and ORDER

Appeal of the Order of Dismissal and Order Denying Motion for Reconsideration of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Jacqueline Cornett, Whitesburg, Kentucky, pro se.

A. Stuart Bennett (Jackson & Kelly), Lexington, Kentucky, for employer.

Jennifer U. Toth (J. Davitt McAteer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of counsel, appeals the Order of Dismissal and Order Denying Motion for Reconsideration (94-BLA-1673) of Administrative Law Judge Daniel L. Leland on a claim filed pursuant to the provisions of Title IV of the Federal

¹Claimant is Jacqueline Cornett, the miner's widow. The miner, Charles Ray Cornett, died on September 2, 1990. Director's Exhibit 40.

Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The miner initially filed a claim for benefits on January 31, 1970, which was ultimately denied on March 5, 1980. Director's Exhibit 42. The miner filed a second claim for benefits on December 12, 1987, which was denied on May 27, 1988 and April 10, 1990. Director's Exhibit 41 at 201, 202. The miner requested a formal hearing on May 2, 1990 and died on September 2, 1990. Director's Exhibit 40, 41 at 187.

Claimant filed a survivor's claim on October 3, 1990 which was ultimately denied on November 7, 1991. Director's Exhibit 40 at 36. Claimant filed a second claim for benefits on April 19, 1993. Director's Exhibit 1. In an Order of Dismissal dated July 7, 1995, the administrative law judge dismissed claimant's second survivor's claim because claimant did not file a request for modification within one year from the denial of her original claim. In an Order dated September 7, 1995, the administrative law judge denied claimant's Motion for Reconsideration of the prior Order.

On appeal, claimant generally challenges the denial. Employer and the Director, Office of Workers' Compensation Programs (the Director), respond urging affirmance of the dismissal of the survivor's claim and the Director requests that the case be remanded to the administrative law judge for a hearing on the miner's claim.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue 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 findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance 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).

In the Order Denying Motion for Reconsideration, the administrative law judge stated:

In an Order of Dismissal dated July 7, 1995, the undersigned dismissed the case because claimant, Jacqueline Cornett, failed to file a request for modification within the one year period as required by 20 C.F.R. §725.310. On August 9, 1995, claimant filed a motion for reconsideration of the July 7, 1995 order. As grounds for the motion, claimant cited her husband's long illness and suffering.

Unfortunately, claimant did not file a second claim until April 19, 1993, more than one year after the final denial of her original claim on November 7, 1991. Claimant's failure to file a request for modification within one year from the final denial of her original claim necessitates the dismissal of her second claim pursuant to 20 C.F.R. §725.310.

Order Denying Motion for Reconsideration at 1.

Where the record contains two survivors' claims filed by the same claimant, and the previous claim has been denied, the subsequent claim must be denied on the basis of the earlier claim unless the subsequent claim is filed within one year of the last denial of the earlier claim. 20 C.F.R. §725.309(d). Thus, the "material change in conditions" language of Section 725.309 is not applicable to duplicate survivors' claims; duplicate survivors' claims may only be considered if the subsequent claim satisfies Section 725.310, *i.e.*, the duplicate claim is filed within one year of the previous denial, thus constituting a request for modification. See *Watts v. Peabody Coal Co.*, 17 BLR 1-68 (1992); *Jordan v. Director, OWCP*, 892 F.2d 482, 489, 13 BLR 2-184, 2-194 (6th Cir. 1989); *Mack v. Matoaka Kitchikan Fuel*, 12 BLR 1-197 (1989); *Clark v. Director, OWCP*, 838 F.2d 197, 200, 11 BLR 2-46, 2-50-51 (6th Cir. 1988).

In this case, the first survivor's claim was finally denied on November 7, 1991 and no action was taken until claimant filed the second survivor's claim on April 19, 1993. Director's Exhibits 1, 40. Because the second claim was filed seventeen months after the denial of the first claim, the administrative law judge properly found that the second survivor's claim did not constitute a petition for modification pursuant to Section 725.310 and that the second survivor's claim must be denied as a duplicate claim pursuant to Section 725.309(d). See *Watts, supra*; *Jordan, supra*; *Mack, supra*; *Clark, supra*. Thus, we affirm the administrative law judge's dismissal of claimant's second survivor's claim and the denial of claimant's motion for reconsideration as they are supported by substantial evidence and in accordance with law.

The Director, in its response brief, requests that the case be remanded to the administrative law judge for a formal hearing on the miner's second claim. Director's Response Brief at 6. We agree. The miner's second claim was last denied on April 10, 1990 and the miner requested a formal hearing on May 2, 1990. Director's Exhibit 41 at 187, 201. The miner's claim was referred to the Office of Administrative Law Judges for a hearing on July 3, 1990, but was remanded to the district director on October 4, 1990 due to the miner's death. Director's Exhibit 42 at 1, 23. The administrative law judge, in the instant case, dismissed the survivor's claim but did not address the miner's claim. Order of Dismissal at 1. Consequently, as the miner

requested a hearing on his second claim and the administrative law judge did not address the merits of this claim, 20 C.F.R. §725.451, we remand this case to the administrative law judge for consideration of the miner's duplicate claim. 20 C.F.R. §802.405.

Accordingly, the administrative law judge's Order of Dismissal and Order Denying Motion for Reconsideration dismissing the survivor's claim are affirmed and the case is remanded to the administrative law judge for further findings on the miner's claim consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge