U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 21-0323 BLA

DONALD SIZEMORE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LEFT FORK MINING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 12/09/2022
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul C. Johnson, Jr., District Chief Administrative Law Judge, United States Department of Labor.

Sidney B. Douglass and Johnnie L. Turner (Johnnie L. Turner, P.S.C.), Harlan, Kentucky, for Claimant.

Lee Jones and Denise Hall Scarberry (Jones & Jones Law Office, PLLC), Pikeville, Kentucky, for Employer and its Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE, and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal District Chief Administrative Law Judge (ALJ) Paul C. Johnson, Jr.'s Decision and Order Awarding Benefits (2018-BLA-05795) rendered on a claim filed on February 29, 2016, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with at least thirty years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). Thus, he determined Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.[1] 30 U.S.C. §921(c)(4) (2018). He further found Employer did not rebut the presumption and awarded benefits. In addition, he found Claimant's adult son, Eric Cody Sizemore, qualifies as a dependent for purposes of the augmentation of benefits.

On appeal, Employer does not contest Claimant's entitlement or contend his son does not meet the relationship and dependency requirements for augmented benefits. Rather, it argues Claimant waived his right to augmented benefits for his son because he failed to list his son, from the outset, as a dependent on his claim form and did not identify him as a dependent child in a deposition.[2] Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response in this appeal.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in

[1] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged, the ALJ's finding that Claimant established entitlement to benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 711 (1983).

accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

A miner's benefits may be augmented on behalf of a child if relationship and dependency standards are met. *See* 20 C.F.R. §§725.201(c), 725.208, 725.209. An adult child may meet the dependency standard if he or she is unmarried and is under a disability as defined in section 223(d) of the Social Security Act, 42 U.S.C. 423(d). 20 C.F.R. §725.209(a)(1), (2)(ii).

Some history is helpful in understanding the context of Claimant's son's entitlement to augmented benefits. On February 29, 2016, Claimant filed for Black Lung Act benefits. Director's Exhibit 2. Although he did not list his son as a dependent at that time, on September 14, 2016, in response to interrogatories from Employer, he listed his son, born on November 30, 1994, and stated he was still a dependent. Director's Exhibit 39. The district director issued a Proposed Decision and Order on February 14, 2018, awarding benefits to Claimant and including his wife as a dependent. Director's Exhibit 51. Claimant's son was not mentioned in this Proposed Decision and Order.

Following issuance of the Proposed Decision and Order, Employer requested a hearing before the Office of Administrative Law Judges (OALJ). Also, Nancy Collins, the mother of Claimant's son, contacted the district director requesting benefits for Claimant's son as Claimant's dependent. She was advised to submit documentation including a birth certificate, a copy of Claimant's son's SSA [Social Security Administration] Disability Award Letter, and Representative Payee papers. Director's Exhibits 17,18.

On April 30, 2018, the district director transmitted the record for the appealed case to the OALJ. The Form CM-1025 transmitting the record and identifying issues for the hearing listed Claimant as having *two* dependents and identified the dependents' entitlement as an issue. Director's Exhibit 62. On August 8, 2018, the district director issued an amended Proposed Decision and Order amending the Proposed Decision and Order in Claimant's case to augment the award by including Claimant's son as Claimant's dependent. But the district director did not transmit the amended Proposed Decision and Order nor the documentation on which it was based to the OALJ to be associated with Employer's appeal. Decision and Order at 6.

At the June 13, 2019 hearing before ALJ Loranzo M. Fleming, Employer's counsel identified Claimant's son's entitlement to augmented benefits as an issue, Hearing

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

Transcript at 8, and Claimant testified Eric Cody Sizemore is his adult disabled son. Hearing Transcript at 31-32. On June 24, 2019, Judge Fleming allowed Claimant to submit documentation supporting his son's entitlement to augmented benefits: his son's birth certificate indicating he was born on November 30, 1994, and listing Claimant as his father; a Physician's /Medical Officer's Statement by "FNP Courtney Lankford," dated November 29, 2018, reflecting Claimant's son was diagnosed with cerebral palsy and an intellectual disability; a letter from the Social Security Administration, dated April 30, 2018, reflecting Claimant's son had been receiving adult disabled child Social Security benefits since November 2012 for a disability that began November 30, 2012. Decision and Order at 6; *see* Director's Exhibits 43-45.

Judge Fleming retired before rendering a decision, and the case was transferred to Judge Johnson, who offered the parties the opportunity to have a new hearing. The parties did not respond, and the ALJ issued a Decision and Order based on the record as developed before Judge Fleming.

Employer argues ALJ Fleming erred in allowing Claimant to submit, post-hearing, the birth certificate of Claimant's son, the statement from the nurse practitioner, and the SSA letter. Employer's Brief at 4-5 (unpaginated). We disagree. Because an ALJ exercises broad discretion in resolving procedural and evidentiary matters, *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-63 (2004) (en banc), a party seeking to overturn the disposition of a procedural or evidentiary issue must establish the ALJ's action represented an abuse of discretion. *V.B.* [*Blake*] *v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009). Employer has not met that burden.

The regulations allow an ALJ to admit documentary evidence not timely exchanged by the parties before the hearing in accordance with 20 C.F.R. § 725.456(b)(2) upon a showing of good cause. 20 C.F.R. § 725.456(b)(3).

At the hearing, Claimant testified under oath that Eric Cody Sizemore is his son, and that his son received SSA benefits as Claimant's disabled dependent. Hearing Transcript at 30-31. The ALJ held that the absence of documentary evidence establishing these facts from the record "is a clerical error that does not justify penalizing" Claimant's son. Decision and Order at 7; *see Blake*, 24 BLR at 1-113; *Dempsey*, 23 BLR at 1-63; 20 C.F.R. § 725.456(b)(2). Employer's brief acknowledges that, prior to the hearing, the district director issued an amended Proposed Decision and Order providing augmented benefits for Claimant's son. The record also contains a letter from the district director to the mother of Claimant's son, prior to issuance of the amended Proposed Decision and Order, requesting copies of Claimant's son's birth certificate and SSA Award as evidence needed in order to find Claimant's son entitled to augmented benefits. At the hearing, Employer acknowledged Claimant's son's entitlement to augmented benefits was an issue

to be decided. Hearing Transcript at 8. Further, Employer does not contest the validity of the documentation Claimant submitted. Under the circumstances, we cannot say admitting the documentation into the record, which the ALJ found was to "correct[] a clerical error" (i.e., admitting into the record documentation which the district director should have forwarded to the OALJ) was an abuse of discretion. *Blake*, 24 BLR at 1-113.

Employer next argues the ALJ erred in crediting Claimant's testimony. Employer's Brief at 6-8 (unpaginated). We disagree. The ALJ evaluates the credibility and weight of the evidence, including witness testimony. *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983) (ALJ is granted broad discretion in evaluating the credibility of the evidence, including witness testimony); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017) (declining to reweigh witness testimony on smoking history in spite of alleged inconsistencies that the employer identified); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989). The Board will not disturb an ALJ's credibility findings unless they are inherently unreasonable. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc).

The ALJ acknowledged Employer's contention that Claimant's hearing testimony is not credible because he testified at a prior deposition that he only has daughters and has no dependent children. Decision and Order at 6-7.[4] He found, however, this inconsistency does not detract from the weight of Claimant's testimony because Claimant "is a layman with a seventh grade education [and] would [not] understand that, for legal purposes, Eric [Cody] Sizemore [is] his 'dependent' by application of a regulatory definition and that he was required to list him on his application." *Id*. The ALJ also found Claimant listed Eric Cody Sizemore as his dependent child on his answers to Employer's interrogatories. *Id*., citing Director's Exhibit 38. Given the wide latitude afforded the ALJ in making credibility determinations, Claimant's explanation that, at the deposition, he "wasn't thinking," and his interrogatory response listing his son as his still dependent child, the ALJ permissibly found Claimant's hearing testimony credible. *Rowe*, 710 F.2d at 255; *Stallard*, 876 F.3d at 670; *Lafferty*, 12 BLR at 1-192.

[4] At the hearing, Claimant stated Eric Cody Sizemore is his adult son, he is disabled because of scoliosis and has never worked, and he is receiving Social Security Administration (SSA) disability benefits. Hearing Transcript at 30-31. Claimant further testified he was never married to the mother of his son and paid child support to her when his son was growing up. *Id*. at 35. When asked by Employer's counsel why he did not mention his son as a dependent in an earlier deposition, Claimant stated he was "[j]ust not thinking." *Id*. at 34-35.

Finally, Employer argues Claimant forfeited his right to augment benefits on behalf of his son by not identifying this issue to the district director. Employer's Brief at 6-8 (unpaginated). We disagree. In any case referred to the OALJ for a hearing, the district director is required to provide a "statement . . . of contested and uncontested issues in the claim." 20 C.F.R. §725.421(b)(7). The "hearing shall be confined to those contested issues which have been identified by the district director . . . or any other issue raised in writing before the district director." 20 C.F.R. §725.463(a).

The ALJ correctly observed that, before the district director, Claimant listed Eric Cody Sizemore as his son in his answers to Employer's interrogatories and specifically indicated his son is "still dependent." Decision and Order at 6; *see* Director's Exhibit 38. Further, the ALJ noted that when transferring this case to the OALJ, the district director indicated on Form CM-1025 that Claimant has two dependents for purpose of augmentation and this issue is contested. Decision and Order at 6 n.2, *citing* Director's Exhibit 64. Thus, contrary to Employer's argument, Claimant did not forfeit this issue. *See Forrester Trucking v. Director, OWCP* [*Davis*], 987 F.3d 581, 588 (6th Cir. 2021); 20 C.F.R. §§725.421(b)(7), 725.463(a).

As Employer raises no additional argument, we affirm the ALJ's finding that Claimant established the relationship and dependency standards met for his son for purposes of the augmentation of benefits. 20 C.F.R. §§725.201(c), 725.208, 725.209(a)(1), (2)(ii); Decision and Order at 6.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge