U.S. Department of Labor

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

BRB No. 19-0392 BLA

KENNETH PARSLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EXCEL MINING, LLC	)	
	)	DATE ISSUED: 09/28/2020
Employer-Petitioner	)	
	)	
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 Steven D. Bell, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for Claimant.

Paul E. Jones and Denise Hall Scarberry (Jones and Walters, PLLC), Pikeville, Kentucky, for Employer.

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

GRESH, Administrative Appeals Judge:

Employer appeals Administrative Law Judge Steven D. Bell's Decision and Order Awarding Benefits (2019-BLA-05992) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). Employer conceded Claimant's entitlement to benefits. The issue in this case involves whether Claimant is

entitled to augmented benefits because of his daughter, Valerie Parsley. The administrative law judge found Claimant established his daughter is an unmarried adult child who is under a disability as defined by the Social Security Act. Accordingly, the

administrative law judge awarded Claimant augmented benefits commencing July 2010, the month in which Claimant filed his claim.[1]

On appeal, Employer asserts Claimant waived his right to augmented benefits by failing to timely submit supporting documentation for his daughter's dependency when the case was first before the district director. Employer also asserts the administrative law judge erred in refusing to independently determine whether Claimant's daughter is disabled and denying Employer's motion to compel an examination. Employer further argues it has been denied due process to the extent the administrative law judge relied on the Social Security Administration's (SSA's) determination of Claimant's daughter's disability. Alternatively, Employer argues augmented benefits should not commence before June 2017, when Claimant first provided his documentation to show his daughter is disabled and the district director amended the award of benefits to reflect her as his dependent. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[2] 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).

Relevant Procedural History as Jointly Stipulated by the Parties

On Claimant's application form for benefits, he listed his spouse as a dependent. Director's Exhibit 3. He also checked-marked a box on the form indicating that he had a daughter, Valerie, who was over the age of eighteen and disabled. *Id*. On December 30, 2010, the district director issued a Schedule for the Submission of Additional Evidence (SSAE) indicating the medical evidence submitted supported a finding that Claimant is entitled to benefits. Director's Exhibit 25. However, under the heading of Relationship/Dependency, the district director stated: "the marriage certificate was never submitted to verify their marriage. Therefore, the requirements of 20 [C.F.R. §§] 725.204 and 725.205 which relate to relationship and dependency are not met." *Id*. The SSAE gave

[1] The parties stipulated Claimant filed his claim on July 19, 2010. February 13, 2019 Joint Stipulations at 1.

[2] Because Claimant's last coal mine employment occurred in Kentucky, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

Claimant until February 28, 2011, to submit evidence, but it did not mention Claimant's disabled daughter. *Id.*

The district director issued a Proposed Decision and Order on July 1, 2020, finding Claimant established complicated pneumoconiosis and was entitled to benefits. Director's Exhibit 42. On August 2, 2011, the district director calculated Claimant's monthly benefits based on a primary beneficiary with no dependents. Director's Exhibit 46. On August 16, 2011, Claimant submitted a copy of his marriage certificate but did not provide any documentation relating to his disabled daughter. Director's Exhibit 49. On August 26, 2011, the district director issued an Amended Award of Benefits to include Claimant's spouse as a dependent.

Employer requested a hearing and the case was sent to the Office of Administrative Law Judges (OALJ). Employer later conceded Claimant's entitlement and filed a motion to remand the case to the district director for payment of benefits. On November 7, 2012, Administrative Law Judge Larry S. Merck granted Employer's motion. *See* Order of Remand for Payment of Benefits. Thereafter, Employer paid monthly benefits to Claimant augmented for his wife.

On October 19, 2015, Claimant's wife died. Director's Exhibit 56. Because Claimant apparently did not timely inform the district director of his wife's' death, he incurred an overpayment of benefits.[3] On April 28, 2017, the district director wrote a letter to Claimant noting that it had come to the district director's attention that Claimant's wife had died and that he has a dependent daughter.[4] Director's Exhibit 57. In order "to correct the amount of benefits being paid" to Claimant, the district director, for the first time, asked Claimant for supporting documentation regarding his daughter's disability.[5] *Id.* Claimant submitted a copy of his daughter's birth certificate and a SSA Benefits Planning Query Sheet indicating his daughter had been disabled since September 15, 2004. The SSA documentation did not disclose the nature of the disability. Director's Exhibits 58, 59, 60.

[3] A review of the record does not indicate when or how the district director learned of the death of Claimant's wife.

[4] Again, there is no indication as to how the district director learned or was aware in 2017 that Claimant's wife had died in 2015.

[5] We note that although Claimant indicated on his original application form for benefits he filed in July 2010 that he had a dependent daughter who was over the age of eighteen and disabled, the district director apparently did not ask Claimant for supporting documentation regarding his daughter's disability at that time, but only did so for the first time in the district director's April 2017 letter. *See* Director's Exhibits 3, 57.

On June 30, 2017, the district director issued an Amended Award of Benefits, which revised Claimant's future monthly benefits to include his disabled daughter as his dependent, retroactive to May 2010. Director's Exhibit 63. Employer requested a hearing and the case was sent to the OALJ. Director's Exhibits 64, 90.

Employer deposed Claimant's daughter on two occasions, but she declined to undergo physical examinations Employer scheduled with a psychiatrist and a psychologist/vocational rehabilitation specialist. Joint Exhibits 8, 10, 11; Director's Exhibits 81, 82, 83.

Waiver

Employer contends the administrative law judge erred in not finding Claimant waived his right to augmented benefits by failing to timely raise the issue when the case was first before the district director. Employer's Brief at 7. Employer notes Claimant did not timely contest the district director's determination that he had only one dependent, his wife, and did not submit dependency documentation for his daughter until six years after the issuance of the August 26, 2011 Amended Award of Benefits. *Id*. at 10-11. Employer maintains that the regulation at 20 C.F.R. §419(d) and the facts of this case require a finding that Claimant waived his right to claim his daughter as a dependent for augmentation of benefits. *Id*. at 11-12. We disagree.

Employer's reliance on 20 C.F.R. §725.419(d) is misplaced, as that regulation does not preclude modification of an award to reflect changes in dependency status. A proposed decision and order by the district director becomes final thirty days after issuance of the order, and all rights to further proceedings are waived, except as provided in the modification procedures set forth at 20 C.F.R. §725.310. 20 C.F.R. §725.419(d). The regulation at 20 C.F.R. §725.310 provides that the district director has authority "at any time before one year from the date of the last payment of benefits" to reconsider the terms of an award of benefits on the ground of a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310(a); *see also* 20 C.F.R. §725.533. Thus, contrary to Employer's contention, even though Claimant did not specifically challenge the district director's dependency findings in the 2011 Amended Award of Benefits, the waiver provisions of 20 C.F.R. §725.419(d) are not applicable as the district director had authority to modify the terms of Claimant's award of benefits based on a mistake in a determination of fact to reflect his disabled daughter as a dependent. 20 C.F.R. §725.310(a).

Further, we see no error in the administrative law judge's determination that Employer failed to show why the facts of the case warrant finding Claimant waived his right to augmented benefits for his daughter. An administrative law judge exercises broad discretion in resolving procedural and evidentiary matters. *See Dempsey v. Sewell Coal*

Corp., 23 BLR 1-47, 1-63 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989) (en banc). Thus, a party seeking to overturn an administrative law judge's disposition of a procedural or evidentiary issue must establish that the administrative law judge's action represented an abuse of discretion. *See V.B. [Blake] v. Elm Grove Coal Co.*, 24 BLR 1-109, 1-113 (2009).

The administrative law judge permissibly found Claimant's application for black lung benefits was sufficient to put Employer on notice that he had a disabled child. *See Dempsey*, 23 BLR at 1-63; Decision and Order at 12; Claimant's Exhibit 3. Although Employer generally contends that a check-mark on Claimant's application form "does not amount to notice," it does not explain how this action was insufficient to inform Employer of its potential liability for augmented benefits or the district director that he had a disabled daughter. Employer's Brief at 7. The administrative law judge also found no evidence to show "that [Claimant] ever intended to abandon his claim for augmented benefits, or that [he] engaged in any kind of deceptive conduct in order to mislead Employer about his intentions with regard to Valerie." Decision and Order at 12. Because we discern no abuse of discretion, we affirm the administrative law judge's finding that Claimant did not waive his right to pursue augmented benefits on behalf of his disabled daughter. *See Blake*, 24 BLR at 1-113.

Establishing Entitlement to Augmented Benefits

A miner may qualify for augmented benefits on behalf of a child if the requisite standards of relationship and dependency are met. *See* 20 C.F.R. §§725.201(c), 725.208, 725.209. A miner's unmarried child is dependent on the beneficiary miner if the child has "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)(2)(ii). Section 223(d) of the Social Security Act defines disability as an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. §423(d)(1)(A).

The administrative law judge found Valerie Parsley is disabled under section 223(d) of the Social Security Act. Decision and Order at 7. An SSA document captioned "Benefits Planning Query" indicates she was awarded SSA disability benefits beginning September 15, 2004. *Id*. n.5. After outlining in great detail the SSA administrative process for determining disability awards, the administrative law judge concluded that "[b]ased upon the record in this case," it was "inappropriate for [him] to perform an independent

assessment of whether Valerie Parsley is disabled under section 223(d) . . .."[6] *Id*. at 9. Relying on the SSA award which he considered the most credible evidence of Ms. Parsley's disability, the administrative law judge found Claimant entitled to augmented because of his dependent daughter. *Id*. at 12.

Employer asserts the administrative law judge erred in relying on the SSA award as opposed to independently assessing whether Valerie Parsley is disabled.[7] Employer's Brief at 5. Employer maintains the administrative law judge's actions in refusing to compel her to attend an examination and relying instead on the SSA award violated its due process rights. *Id*. We disagree.

Although a SSA disability determination is not automatically determinative on the issue of an adult child's dependency for purposes of augmentation, it is "highly probative" as it constitutes a "determination by an agency with specialized expertise, applying the definition of disability which must be applied to this controversy[.]" *See Scalzov. Director, OWCP*, 6 BLR 1-1016, 1-1019 (1984). Moreover, an employer "likely has no defense to augmentation on the merits" where a claimant's dependent child's "eligibility for and receipt of social security disability benefits is *of record*, and the regulations use the social security definition . . . to determine eligibility for augmented black lung benefits." *Betty B. Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 503, (4th Cir. 1999) (emphasis added). Employer does not contend that the SSA award of disability benefits to claimant's daughter was erroneous or is no longer valid. Because Claimant's daughter's SSA award is of record, the administrative law judge's finding that Claimant's adult daughter met the disability requirement is consistent with the language of 20 C.F.R. §725.209 and is supported by substantial evidence. *See Id.*; *Scalzo*, 6 BLR at 1-1019-20. Thus, the administrative law judge reasonably found the SSA award establishes that Claimant's

[6] The administrative law judge gave five reasons for this determination: 1) the Board permits reliance on Social Security Administration (SSA) disability determinations; 2) the regulation at 20 C.F.R. §725.209(a)(2)(ii)) requires the adjudicator to use the disability standard of the Social Security Act in deciding whether Valerie is entitled to benefits and the SSA "has substantial expertise in deciding whether an individual is disabled for Social Security purposes"; 3) the SSA determination should not be subject to collateral attack; 4) the record is insufficient to make an SSA disability determination; and 5) Employer presented no basis for questioning the correctness of the SSA disability determination. Decision and Order at 10. As discussed herein, we see no error in the administrative law judge's analysis.

[7] Employer does not dispute that Claimant's daughter is unmarried and satisfies the relationship requirement. Decision and Order at 7 n. 5; 10 n.9.

daughter is disabled within the meaning of section 223(d) of the Social Security Act. Decision and Order at 11; *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

In addition, the administrative law judge noted the record contains no other evidence that would allow him to make an independent assessment of Ms. Parsley's disability in accordance with section 223(d), such as her medical records,[8] tax records, work history and vocational information. Decision and Order at 10. Consequently, we reject Employer's contention that the administrative law judge erred in finding that the evidence in this case is insufficient to overcome the probative value of the SSA award in determining whether Claimant's daughter is disabled within the meaning of section 223(d) of the Social Security Act. Because the administrative law judge rationally explained his ruling, we affirm it. *See Blake*, 24 BLR at 1-113; *Dempsey*, 23 BLR at 1-63; *Clark*, 12 BLR at 1-152.

Next, the administrative law judge reviewed the record evidence and found it did not support Employer's assertion that Ms. Parsley has engaged in substantial gainful activity or is capable of performing substantial gainful activity. Decision and Order at 11. He noted Valerie testified that she held a job for approximately two weeks at a gas station and one week at a fast food restaurant. *Id.;* Joint Exhibit 10 at 8. He also noted her SSA earnings records show she earned $208.58 in 2002 and $253.33 in 2005. Decision and Order at 11. He found under the SSA regulations, "Valerie could have earned as much as $780 per month in 2002 and remained below the threshold of engaging in substantial gainful activity [and]. . . . [in] 2005, that amount was $830 per month." *Id*. As Employer does not dispute these findings, they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[8] We affirm, as unchallenged on appeal, the administrative law judge's exclusion of Employer's Exhibit 14, which contained Claimant's medical records Employer submitted to show his daughter did not live with him. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 1-2, n.1; February 27, 2019 Order Denying Admission of Employer's Exhibit 14. Although Employer also alleges the administrative law judge did not allow it to submit medical records pertaining to Ms. Parsley, it does not cite to anywhere in the record that indicates when the administrative law judge did so for the Board to review. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 446 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987).

The administrative law judge considered all the relevant evidence and explained, in accordance with the Administrative Procedure Act,[9] why he found Claimant's daughter is disabled under section 223(d) of the Social Security Act. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §725.201(c); *Stanley*, 194 F.3d at 503; *Scalzo*, 6 BLR at 1-1019-20; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 11. We see no error by the administrative law judge in refusing Employer's request to compel Ms. Parsley to be examined, as he explained the type of examination Employer sought would not generate the information needed to overcome the credibility of the SSA award. *See Blake*, 24 BLR at 1-113. Moreover, because Employer has not shown how it was deprived of notice and a fair opportunity to mount a meaningful defense in this case, we reject its assertion of a due process violation. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 883-84 (6th Cir. 2000); *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-49 (1990); Decision and Order at 11. We therefore affirm the administrative law judge's determination that Claimant is entitled to augmented benefits on behalf of his daughter. 20 C.F.R. §725.201(c).

Commencement Date for Benefits

Employer asserts Claimant is not entitled to augmented benefits prior to June 2017, the month in which he first produced evidence of his daughter's disability. Employer does not cite to any legal authority to support this assertion.

Pursuant to 20 C.F.R. §725.310(d), an order increasing the amount of benefits payable based on a mistake in a determination of fact may be made effective on the date from which benefits were determined payable by the terms of an earlier award. 20 C.F.R. § 725.31(d). Claimant was awarded benefits commencing July 2010, the month and year in which he filed his claim. Director's Exhibit 42. The administrative law judge correctly found the SSA award shows Valerie became disabled before Claimant filed his claim. Decision and Order at 13. Claimant is therefore entitled to augmented benefits because of daughter, as a dependent, as of July 2010, in the absence of evidence establishing she has married or ceased to be disabled after that date. 20 C.F.R. §§725.208, 725.209, 725.219; Decision and Order at 7 n.4. We therefore affirm the administrative law judge's finding that Claimant's augmented benefits are payable beginning July 2010. Decision and Order at 13.

[9] The Administrative Procedure Act, 5 U.S.C. §§500-591, provides that every adjudicatory decision must include "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

DANIEL T. GRESH
Administrative Appeals Judge

I concur.

MELISSA LIN JONES
Administrative Appeals Judge

I concur in result only.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge