BRB No. 05-0440 BLA

SAMANTHA VARNEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STEVEN LEE ENTERPRISES, INCORPORATED	)	DATE ISSUED: 01/31/2006
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 on Remand Granting Benefits and the Order Denial of Motion for Reconsideration of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

W. William Prochot (Greenburg Traurig, LLP), Washington, D.C., for employer/carrier.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the July 9, 2004 Decision and Order on Remand Granting Benefits and the February 2, 2005 Order Denial of Motion for Reconsideration of Administrative Law Judge Daniel F. Solomon (00-BLA-1067) in a 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 case involves claimant's eligibility for previously awarded benefits as a "child" of the miner, Danny Varney, and has been before the Board before.[2] In *Varney v. Steven Lee Enterprises, Inc.*, BRB No. 02-0186 BLA (Jan. 17, 2003)(Dolder, J., concurring)(unpub.), the majority initially indicated that it was not persuaded that the administrative law judge abused his discretion in denying employer's request for the imposition of sanctions against the Director, Office of Workers' Compensation Programs (the Director), for the Director's change of opinion regarding claimant's eligibility for benefits.[3] *Varney*, slip op. at 3-4. The majority thus affirmed the administrative law judge's decision not to sanction the Director. Regarding the eligibility issue, the majority vacated the administrative law judge's finding that claimant is the child of the miner, Danny Varney, pursuant to the laws of the Commonwealth of Kentucky because it had not been established that claimant is the daughter of the miner. The majority remanded the case to the administrative law judge for factual findings, in light of the Director's contention, raised for the first time in his

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[1] By Order dated March 3, 2005, the Board dismissed employer's appeal in BRB No. 05-0386 BLA, filed on January 14, 2005, as it was premature.

[2] Tressa, claimant's mother, was married to the miner's son, Darrell Varney, from September 12, 1992 until August 23, 1993 when they divorced. Director's Exhibits 22-4, 52; Hearing Transcript at 11, 13. Claimant was born prematurely on December 29, 1993. Director's Exhibits 6A, 20-43, 59. Tressa was then married to the miner, Danny Varney, from January 12, 1994 until July 12, 1995 when they divorced. Director's Exhibits 1, 8, 20-42, 22-38. The miner passed away on December 10, 1996. Director's Exhibit 7.

[3] The majority noted, in *Varney v. Steven Lee Enterprises, Inc.*, BRB No. 02-0186 BLA (Jan. 17, 2003)(Dolder, J., concurring)(unpub.):

> The Director initially argued that claimant was entitled to benefits as the stepchild of the miner, but subsequently determined that claimant would be eligible for benefits only if she were actually the miner's child, thus necessitating the filing of his Motion to Remand with the Board.

Varney, slip op. at 3 n.4.

response brief, that Part A of the Act provides that the determination of whether a claimant is the surviving child of a deceased miner must be made in accordance with subsections 216(h)(2) or (3) of the Social Security Act, 42 U.S.C. §416(h)(2), (3), as incorporated into the Act by 30 U.S.C. §902(g).[4] *Id.* at 5. The majority vacated the administrative law judge's finding that claimant is a child of the miner pursuant to the laws of Kentucky, because the administrative law judge did not discuss state law relevant to intestacy issues applicable under subsection 416(h)(2)(A) and because it was not clear how the administrative law judge concluded that claimant would inherit as a child of the miner, Danny Varney, when it had not been established that claimant is the daughter of the miner. *Id.* at 6. The majority further remanded the case for the administrative law judge to discuss the provisions of Section 416(h)(3) of the Social Security Act.[5] *Id*.

In a concurring opinion, Judge Dolder agreed with the majority's decision to remand the case. Judge Dolder agreed with employer's argument that, as the miner was domiciled in Kentucky, the administrative law judge erred in applying West Virginia law, and, moreover, that the administrative law judge had not sufficiently supported his conclusion that the presumption of paternity under Kentucky law, had been rebutted.[6]

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[4] The majority in *Varney* indicated that under those subsections, there are two applicable ways for claimant to establish that she is the child of "the insured individual;" either by proof that claimant would inherit as a "child" under the relevant state law, 42 U.S.C. §416(h)(2)(A), or by proof that claimant is the "natural son or daughter" and certain enumerated conditions are met, 42 U.S.C. §416(h)(3). *Varney*, slip op. at 5-6.

[5] The majority opinion in *Varney* explains:

> Those subsections provide three ways to establish that claimant is the child of the insured individual: (1) by proof that the claimant would inherit as a "child" under the relevant state law, 42 U.S.C. §416(h)(2)(a); (2) by proof that claimant is the product of a purported but invalid marriage, 42 U.S.C. §416(h)(2)(B)[]; and (3) by proof that claimant is the "natural son or daughter and certain enumerated conditions are met, 42 U.S.C. §416(h)(3).

Varney, slip op. at 5-6.

[6] Judge Dolder indicated, in her concurring opinion:

> As the administrative law judge observed, under Kentucky law a child born during lawful wedlock, or within ten (10) months thereafter, is presumed to be the child of the husband and wife.

On remand, the administrative law judge granted employer's motion to compel DNA testing of claimant and her mother. In his Decision and Order on Remand, the administrative law judge discussed the resulting report from DNA testing conducted on claimant, her mother Tressa, and Darrell Varney, the miner's son.[7] Decision and Order on Remand at 9-10. The October 14, 2003 Genetic Test Report of Debra L. Davis, Ph.D., shows that the probability that Darrell Varney, the miner's son, is the father of claimant, Samantha Varney, is 99.99% when compared to an untested, random man. Employer's Exhibit 1. This report also shows that the likelihood that Darrell Varney, the miner's son, rather than an untested relative of Darrell Varney, is Samantha Varney's father, is 106 to 1, with Darrell Varney at 99.06% and his untested relative at 0.94%. *Id.* Nonetheless, after reviewing the new evidence and applying the mandate of the Board in *Varney*, the administrative law judge found that claimant would be able to inherit as a child of the miner under Kentucky law, based upon evidence in the record, including: claimant's birth certificate and other acknowledgements of paternity by the miner at the time of claimant's birth, and the divorce decree which ended the marriage between the miner and claimant's mother and which incorporated the separation agreement in which the parties refer to claimant as their minor child. The administrative law judge thus found that claimant was the child of the miner in accordance with the Act and regulations, *see* 30 U.S.C. §902(g); 42 U.S.C. §416(h)(2)(A); 20 C.F.R. §§725.208(a), 725.220(a). The administrative law judge also denied employer's request for sanctions against the Director. Accordingly, survivor's benefits were awarded.

By Order dated February 2, 2005, the administrative law judge denied employer's motion for reconsideration, in which employer asserted error in the administrative law judge's determination that claimant would inherit as a child of the miner under Kentucky

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KRS § 406.011; *see also Vanover Steele*, 190 S.W. 667 (Ky. 1917); *Sergent v. North Cumberland Mfg Co.*, 66 S.W. 1036 (Ky. 1902).

Varney, slip op. at 7.

[7] The Board's January 17, 2003 decision in *Varney* indicates that the administrative law judge had granted employer's motion to compel DNA testing of claimant and her mother. *Varney*, slip op. at 4. The October 14, 2003 Genetic Test Report reflects that specimens were collected from claimant and her mother in March of 2001, and from Darrell Varney in September of 2003, after the January 2003 issuance of *Varney*, wherein the Board remanded the case. *See* Employer's Exhibit 1.

law.[8] The administrative law judge relied upon the divorce decree as a final judgment to find that it established a valid acknowledgement of paternity under Kentucky law; for that reason he declined employer's request that he "grant presumptive effect to the DNA testing." Order Denial of Motion for Reconsideration dated February 2, 2005 at 2. The administrative law judge indicated that the proper place to bring an action for paternity would be the Kentucky state paternity court and employer had admitted that it had no standing to do so. The administrative law judge also denied employer's request to reopen the record to allow it an opportunity to discover and submit evidence of an alleged Kentucky state paternity suit.

On appeal, employer alleges reversible error in the administrative law judge's determination that claimant is eligible for benefits based on his findings that claimant would take an intestate share of the miner's estate under Kentucky law, *see* KRS §391.105(1) and that legal presumptions under Kentucky law support a finding that claimant is a "child" of the miner. Employer argues that the administrative law judge's award of benefits cannot stand where the uncontroverted DNA evidence of record shows that the miner was not claimant's father. Employer also notes its disagreement with the Board's affirmance in *Varney* of the administrative law judge's decision not to impose sanctions on the Director, and preserves the issue for purposes of appeal. Employer's Brief at 7 n.4. The Director has filed a response brief limited to opposing employer's position on the propriety of sanctions against the Director. In reply, employer clarifies that it is not currently seeking redress from the Board on this issue, but rather, merely seeks to preserve the issue for appeal. Claimant has not filed a brief in the appeal.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order on Remand Granting Benefits and Order Denial of Motion for Reconsideration, the arguments raised by the parties on appeal and the relevant evidence of record, we reverse the administrative law judge's Decision and Order on Remand Granting Benefits and vacate his Order Denial of Motion for Reconsideration. The administrative law judge's

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[8] The administrative law judge originally denied employer's motion for reconsideration by Order dated October 18, 2004. The administrative law judge subsequently vacated that Order due to incomplete service of process, and reissued the Order. Order Vacating Prior Order Denying Reconsideration dated February 2, 2005.

finding that claimant is eligible for survivor's benefits under the Act as a "child" of the miner, cannot stand as it is neither supported by substantial evidence nor in accordance with applicable law. Specifically, the October 14, 2003 Genetic Test Report of Debra L. Davis, Ph.D., shows that the probability that Darrell Varney, the miner's son, is the father of claimant, Samantha Varney, is 99.99% when compared to an untested, random man. Employer's Exhibit 1. This report also shows that the probability that Darrell Varney, the miner's son, rather than an untested relative of Darrell Varney, is Samantha Varney's father, is 106 to 1, with Darrell Varney at 99.06% and his untested relative at 0.94% of probability. *Id.* This genetic testing report is uncontroverted and thus establishes that the miner's son, Darrell Varney, is claimant's natural father, with a statistical probability of paternity equaling 99.99%. Finding merit in employer's argument, we hold, therefore, that the uncontroverted evidence of record establishes that the deceased miner, Danny Varney, was not claimant's father.

Kentucky law controls how such DNA evidence is to be considered. Kentucky's Uniform Act on Paternity in the Kentucky Revised Statues, KRS § 406.111, provides a rebuttable presumption of paternity and determines the effect of genetic test results on the burden of proof *vis a vis* this rebuttable presumption. It specifically provides as follows:

> If the court finds that the conclusions of all the experts, as disclosed by the evidence based upon the tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly. If the court finds that the statistical probability of paternity equals or exceeds ninety-nine percent (99%), as calculated by the experts qualified as examiners of genetic markers, and that the paternity index, as calculated by the experts qualified as examiners of genetic markers, is one hundred (100) to one (1) or greater, there is a rebuttable presumption affecting the burden of proof, of paternity. This presumption shall only be rebutted by a preponderance of the evidence. If the presumption is not rebutted, the court may enter a summary judgment of paternity, pursuant to Rule 56 of the Rules of Civil Procedure.

KRS § 406.111. The Court of Appeals of Kentucky, in *Crowder v. Commonwealth of Kentucky ex rel. Gregory*, 745 S.W.2d 149 (Ky. App. Feb. 19, 1988), held that the trial court abused its discretion in not setting aside a default judgment of paternity against a putative father after human leukocyte antigen blood tests unequivocally excluded the putative father as the father of the child at issue. Addressing the statutory provision at KRS § 406.111, the Court of Appeals of Kentucky explained:

> Where the statutory diction is "shall," a court's use of discretion becomes abuse of discretion. Thus, it was an abuse of discretion not to vacate the default judgment prospectively because, if for no other reason, the courts have no discretion to exercise in these instances.

Crowder, 745 S.W.2d at 151. The Court further stated:

> Justice is the court's constant destination, relentlessly pursued. It is not arrived at where a court in a paternity action adjudicates a man to be the father of a child knowing full well that the biological relationship has been clearly disestablished.

Id. Applicable Kentucky statutory law and precedent thus establish that genetic testing with a statistical probability equal to or exceeding 99% for paternity, which is present here, *see* Employer's Exhibit 1, is dispositive of the paternity issue where, as in the instant case, claimant has proffered no evidence tending to rebut the presumption of paternity in favor of the miner's son, Darrell Varney. KRS § 406.111; *Crowder*, 745 S.W.2d at 151. Consequently, the administrative law judge erred in finding that claimant is a "child" of the deceased miner, Danny Varney, notwithstanding the uncontroverted genetic testing evidence of record showing Darrell Varney to be claimant's father, because "the courts have no discretion in these instances." *Id*.

Based on the foregoing, we reverse the administrative law judge's finding that claimant is eligible for benefits and further reverse the award of benefits. In light of our disposition, we need not address employer's other allegations of error.

Accordingly, the administrative law judge's Decision and Order on Remand Granting Benefits is reversed and his Order Denial of Motion for Reconsideration is vacated.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge