BRB No. 98-1513 BLA

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| RICKY D. ADLER, Representative Payee o/b/o KATHY DARLENE ADLER (Surviving Child of BOBBIE STOBAUGH) | ) | |
| Claimant-Respondent | ) | |
| v. | ) | |
| PEABODY COAL COMPANY | ) | DATE ISSUED: |
| 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 - Awarding Benefits of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

Ronald K. Bruce, Greenville, Kentucky, for claimant.

Richard A. Dean (Arter & Hadden), Washington, D.C., for employer and carrier.

Rodger Pitcairn (Henry L. Solano, 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, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative

Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (96-BLA-1654) of Administrative Law Judge J. Michael O'Neill awarding augmented benefits on a miner's and his widow's claims and benefits on 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). This case has a lengthy procedural history. In a Decision and Order issued on August 16, 1988, Administrative Law Judge Robert E. Kendrick credited the miner with fifteen years and four months of qualifying coal mine employment, and determined that Kathy Adler, the miner's stepdaughter and the claimant herein, did not qualify as a dependent under 20 C.F.R. §725.209(a) for purposes of augmentation. The administrative law judge adjudicated the miner's claim, filed on July 6, 1981, and the widow's claim, filed on September 3, 1985, pursuant to the provisions at 20 C.F.R. Part 718, and found that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), 718.203(b), but insufficient to establish that the miner's total respiratory disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), or that his death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were denied on both the miner's claim and the widow's survivor's claim. Director's Exhibit 20.

On appeal, the Board affirmed the administrative law judge's findings pursuant to Section 718.205(c) and his denial of the widow's claim, but vacated his denial of the miner's claim and remanded the case for further consideration thereof, noting that if, on remand, benefits were awarded on the miner's claim, the miner's widow, Gladys L. Stobaugh, could derive a survivor's award pursuant to Section 401 of the Act, 30 U.S.C. §901. *Stobaugh v. Peabody Coal Co.*, BRB No. 88-3133 BLA (July 30, 1990)(unpub.); Director's Exhibit 25.

In a Decision and Order on Remand issued on June 27, 1991, Administrative Law Judge Rudolf L. Jansen found that the presumption contained in Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, was invoked and not rebutted. Judge Jansen awarded benefits payable on the miner's claim commencing with the month during which the claim was filed, augmented by reason of his dependent spouse, and terminating the month before the month of the miner's death. Director's Exhibit 26.

Following the widow's request for modification, Administrative Law Judge George P. Morin issued a Decision and Order on September 23, 1993, granting

modification pursuant to 20 C.F.R. §725.310 based on a mistake in a determination of fact, and finding that the miner's widow was automatically entitled to survivor's benefits by operation of law. Director's Exhibit 30. On appeal, the Board affirmed Judge Morin's Decision and Order on Modification. *Stobaugh v. Peabody Coal Co.*, BRB No. 94-0160 BLA (May 25, 1995)(unpub.); Director's Exhibit 32.

On April 1, 1996, the district director issued an amended award of benefits to reflect that claimant was the dependent disabled adult child of the miner's widow and that augmentation of the survivor's benefits was appropriate. Director's Exhibit 38. Employer controverted claimant's eligibility for benefits, Director's Exhibits 40, 43, and on May 28, 1996, the district director issued an order to show cause why modification should not be granted. Director's Exhibit 44. The miner's widow died on May 24, 1996, and her son, Ricky D. Adler, applied for survivor's benefits on behalf of his sister, claimant herein. Director's Exhibits 46, 48. Following issuance on July 5, 1996, of the district director's Award Modification Survivor's Conversion, Director's Exhibit 49, employer requested a hearing, Director's Exhibit 51, and the case was assigned to Administrative Law Judge J. Michael O'Neill.

In a Decision and Order issued on July 29, 1998, the administrative law judge found a mistake of fact in Judge Kendrick's determination that claimant did not qualify as a dependent disabled child of the miner and his widow, and thus found that modification was appropriate pursuant to Section 725.310. Consequently, the administrative law judge awarded benefits to claimant as an augmentee and then as a survivor.

In the present appeal, employer challenges the administrative law judge's award of benefits to claimant as an augmentee and as a survivor, contending that modification pursuant to Section 725.310 was not appropriate. Employer argues that the doctrines of *res judicata* and collateral estoppel are applicable, and that the administrative law judge erred in finding that claimant was disabled and qualified as a dependent. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the award of benefits.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with 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).

Employer initially contends that the administrative law judge erred in failing to give *res judicata* effect to Judge Kendrick's 1988 determination that claimant's

marriage on April 4, 1980 forever terminated her right to claim dependency on the miner or his widow for purposes of augmentation of benefits. Employer also maintains that the administrative law judge improperly found that modification pursuant to Section 725.310 was appropriate to allow augmentation of benefits based on a mistake in a determination of fact, as employer asserts that the request for modification was not timely and that there was no mistake of fact. Claimant and the Director counter that the administrative law judge properly found that this case presents a mixed question of law and fact; that modification procedures were timely instituted; and that traditional principles of *res judicata* generally are not applicable to modification procedures, which are aimed toward reviewing factual errors in an effort to render justice. *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

At any time before one year after the denial of a claim, or before one year after the last payment of benefits, the district director may institute modification proceedings upon his own initiative or upon the request of any party on grounds of a change in conditions or a mistake in a determination of fact. 33 U.S.C. §922, incorporated by Section 422(a) of the Act, 30 U.S.C. §932(a); 20 C.F.R. §725.310. The modification procedure vests a deputy commissioner with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted, *see O'Keeffe*, 404 U.S. at 256, and Congress intended that this discretion be exercised whenever desirable in order to render justice under the Act. *See Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968). In *Worrell, supra*, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that a claimant is not required to plead a specific ground as the basis for a request for modification, and cited with approval *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). In *Jessee*, the Fourth Circuit rejected employer's argument that an error purely of law was involved which could not be corrected on modification, as a "dubious assertion [which] is irrelevant," and concluded that any mistake of fact may be corrected, including the ultimate fact. *Jessee*, 5 F.3d at 725, 18 BLR at 2-29; *see The Youghiogheny & Ohio Coal Co. v. Milliken,*___ F.3d ___, ___BLR 2-___(6th Cir. 1999)(Wellford, J., dissenting). Consequently, employer's argument that the instant case presents no valid ground for modification lacks merit.

We note initially that Judge Kendrick denied benefits in both the miner's claim and the survivor's claim, Director's Exhibit 20, and therefore his findings regarding claimant's status as a dependent constituted *dicta* which were not entitled to any *res judicata* effect. Moreover, because the Board vacated Judge Kendrick's denial of benefits in the miner's claim, *see* Director's Exhibit 25, the 1988 judgment was not

final, thus we reject employer's argument that modification had to be sought within one year therefrom. When benefits ultimately were awarded in the miner's claim, his widow automatically became entitled to benefits as the primary beneficiary pursuant to 20 C.F.R. §725.212, and claimant became a potential augmentee of the widow, her mother. Inasmuch as the widow was receiving monthly benefit payments at the time the district director, in accordance with the provisions at Section §725.310(a), instituted modification proceedings to augment the widow's benefits by reason of claimant's dependency, *see* Director's Exhibit 38, we affirm the administrative law judge's finding that modification was timely sought and appropriate under the facts of this case.

Similarly, we reject employer's argument that the doctrine of collateral estoppel is applicable to preclude claimant from relitigating the issue of her dependency in her survivor's claim.[1] Notwithstanding the fact that several of the requisite criteria for application of the doctrine are not satisfied under the facts of this case, the pertinent regulation explicitly provides that:

> [t]he determination as to whether an individual purporting to be an entitled survivor of a miner or beneficiary was

[1]Under the doctrine of collateral estoppel, relitigation of an issue actually litigated and necessarily decided in a prior adjudication is only precluded in a subsequent case where the parties or their privies had a full and fair opportunity to litigate the issue. *See Gargallo v. Merrill Lynch, Pierce, Fenner & Smith*, 918 F.2d 658 (6th Cir. 1990); *Detroit Police Officers Ass'n v. Young*, 824 F.2d 512 (6th Cir. 1987). In the present case, claimant was not a party to the litigation in the miner's claim or her mother's survivor's claim, and inasmuch as Judge Kendrick denied benefits in the miner's and survivor's claims, his finding that claimant did not qualify as a dependent was not necessary to the outcome of the adverse judgment. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*).

> related to, or dependent upon, the miner is made after such individual files a claim for benefits as a survivor. Such determination is based on the facts and circumstances with respect to a reasonable period of time ending with the miner's death. A prior determination that such individual was, or was not, a dependent for the purposes of augmenting the miner's benefits for a certain period, is not determinative of the issue of whether the individual is a dependent survivor of such miner.

20 C.F.R. §725.227. Thus, the administrative law judge's *de novo* adjudication of the issue of claimant's dependency, both for purposes of augmentation of the miner's and widow's benefits and for claimant's entitlement to benefits as a survivor, was proper.

Employer next contends that the administrative law judge erred in finding that claimant qualifies as a dependent, specifically challenging his findings that claimant is disabled and that claimant's marriage did not forever bar her entitlement to benefits as an augmentee and survivor.

The regulations provide that a child of a deceased miner is entitled to benefits if the standards of relationship and dependency are met. 20 C.F.R. §725.218(a). An unmarried adult child satisfies the dependency requirement if such child is 18 years of age or older and is under a disability as defined in Section 223(d) of the Social Security Act, 42 U.S.C. §423(d), provided that the disability began before the child reached age 18. 20 C.F.R. §§725.221, 725.209(a)(2)(ii). Benefits commence with the first month in which all of the conditions of entitlement are met, and continue until the month before the month in which such child dies, marries, or the disability ceases. 20 C.F.R. §725.219. For purposes of augmenting the benefits of a miner or surviving spouse, the primary beneficiary's adult child must be unmarried and 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. Augmented benefits are payable commencing with the first month in which the dependent satisfies the conditions of relationship and dependency, continuing through the month before the month in which the dependent ceases to satisfy such conditions. 20 C.F.R. §725.210.

In the present case, while it is undisputed that claimant meets the relationship test, employer asserts that claimant is not disabled. Specifically, employer maintains that the administrative law judge mechanistically credited the opinion of claimant's family physician, Dr. Givens, over the contrary opinion of employer's expert, Dr. Dill, and failed to give valid reasons for his credibility determinations. Employer also

argues that the administrative law judge discussed the evidence in general terms without explicit reference to the applicable statutory provisions, and that rather than determining *de novo* whether claimant is under a disability as defined in Section 223(d) of the Social Security Act, 42 U.S.C. §423(d), the administrative law judge merely assumed that claimant was disabled based on the findings of the Social Security Administration (SSA), which employer maintains are not binding on it inasmuch as employer did not have the opportunity to present evidence or participate in the SSA proceedings. Employer's arguments are without merit.

Under the Social Security Act, "disability" means 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); 20 C.F.R §404.1505(a). Additionally, "a disabling impairment is an impairment (or combination of impairments) which, of itself, is so severe that it meets or equals a set of criteria in the Listing of Impairments [in 20 C.F.R. Part 404, Appendix 1 to Subpart P]...." 20 C.F.R. §404.1511(a). Where, as here, mental retardation is alleged, applicable criteria which meet the requisite level of severity include:

> A. Mental incapacity evidenced by dependence upon others for personal needs (e.g., toileting, eating, dressing, or bathing) and inability to follow directions, such that the use of standardized measures of intellectual functioning is precluded; OR
> B. A valid verbal, performance, or full scale IQ of 59 or less....

20 C.F.R. Part 404, Subpart P, Appendix 1, Listing of Impairments, 12.00 Mental Disorders at 12.05.A, B.

In the present case, claimant's eligibility for and receipt of Social Security disability benefits is of record, and the regulations use the Social Security definition, *see* 20 C.F.R. §§725.209(a)(2)(ii), 725.221, to determine eligibility for black lung benefits. *See Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, ___ BLR ___ (4th Cir. 1999). The administrative law judge determined that claimant was diagnosed with mild retardation and labile emotional state with chronic recurrent anxiety and depression, and that she was found disabled by SSA. Decision and Order at 8. Based on the testimony of claimant and her treating physician, Dr. Givens, as well as the reports of psychologist Dr. Franklin A. Nash, Jr., and

psychiatrist Dr. C.W. Morris, the administrative law judge found that claimant requires significant assistance and guidance in all daily functions, and is of limited intelligence, with an I.Q. of 59 at age 13 as reported by Dr. Nash.[2] Decision and Order at 8; Director's Exhibits 8, 9; Claimant's Exhibit 1; Employer's Exhibit 2. While Dr. Joel S. Dill, a psychologist, opined that claimant "should be able to perform simple one to two step repetitive tasks commensurate with low level unskilled entry level tasks," Employer's Exhibit 1, the administrative law judge reasonably found Dr. Dill's conclusion to be equivocal based on his use of the word "should" and his indication that a review of claimant's records of performance at the Muhlenberg County Opportunity Center would be helpful in ascertaining her overall functioning level.[3] Decision and Order at 8-9; Employer's Exhibit 1; *see Justice v.*

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[2]Dr. Dill subsequently administered another test which demonstrated a full-scale I.Q. of 50. While indicating that the results suggested some malingering, Dr. Dill concluded that there was "no doubt that she is of limited intelligence." Employer's Exhibit 1.

[3]The administrative law judge credited the testimony of claimant's brother, Ricky D. Adler, that the Muhlenberg County Opportunity Center provides training to people with low I.Q.s in a structured work environment, for the purpose of building self-esteem rather than providing a means of financial support. Decision and Order at 9; Hearing Transcript at 22-23, 27-29. Based on the testimony of claimant and her brother, the administrative law judge determined that claimant briefly worked for at least two separate periods at the Opportunity Center for approximately six hours

*Island Creek Coal Co.*, 11 BLR 1-91 (1988). Moreover, the administrative law judge acted within his discretion as trier-of-fact in finding Dr. Dill's opinion outweighed by the conflicting opinion of Dr. Givens,[4] who observed claimant during examinations performed over a more than twenty-five year period, beginning on October 7, 1972. Decision and Order at 9; *see Tussy v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). The administrative law judge's finding, that claimant has been continuously disabled since at least age thirteen, is supported by substantial evidence, in accordance with applicable law, and thus is affirmed.

Employer also contends that, consistent with the reasoning in *Kidda v. Director, OWCP*, 7 BLR 1-202 (1984), *aff'd*, 769 F.2d 165, 8 BLR 2-28 (3d Cir. 1985), *cert. denied*, 475 U.S. 1096 (1986), the fact of claimant's marriage on April 4, 1980, forever terminated her dependency status thereafter for purposes of augmented benefits pursuant to Section 725.209(a)(1) or survivor's benefits pursuant to Section 725.219. We disagree. In *Kidda*, the Board held that pursuant to 20 C.F.R. §725.219(b), reentitlement is not permitted when the disability of an unmarried adult child of a deceased miner reemerges after a period of substantial gainful employment. *Id.* On appeal, the United States Court of Appeals for the Third Circuit concluded that the legislative history of Section 402(d)(1)(B) of the Social Security Act, 42 U.S.C. §402(d)(1)(B), from which Section 902(g) of the Black Lung Benefits Act was taken, reflected a congressional understanding that only those children who suffer from a permanent and total disablement and thus have been continuously disabled from an age earlier than the age of their independence would be eligible for benefits. *Id.* This legislative history does not, however, reflect any congressional intent to preclude entitlement of a disabled child who is "unmarried" by reason of divorce. By contrast to the factual situation in *Kidda*, where the claimant was disabled as a child but engaged in substantial gainful employment for fifteen years and then became disabled again after termination of employment, in the

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per day, two days per week, ultimately earning $2.00 per hour. Decision and Order at 6, 9; Hearing Transcript at 11, 14, 15, 23, 28.

[4]Dr. Givens opined that claimant's mental retardation rendered her totally and permanently dependent, and that claimant required assistance and guidance in all functions and was unable to perform any type of occupation. Claimant's Exhibit 1.

present case, the administrative law judge determined that the claimant was continuously disabled since her minority, and that with the exception of the three to four days that she lived with her husband, claimant lived with and was dependent upon her mother and the miner for her personal needs and support. The administrative law judge further determined that the pertinent regulations merely require an adult disabled child to be "unmarried" rather than "never married" in order to qualify as a dependent, and that the Director's interpretation of the regulations was entitled to deference. Decision and Order at 9-11. Inasmuch as claimant's marriage ended by reason of divorce on September 2, 1980, a date prior to the filing of the miner's claim for benefits on July 6, 1981, the administrative law judge properly found that claimant was unmarried at all relevant times herein, *i.e.*, from the date of the miner's and then his widow's entitlement to benefits until their respective deaths, *see* 20 C.F.R. §§725.209, 725.211, 725.227, and that claimant remained unmarried thereafter. Decision and Order at 10-11. The administrative law judge thus found that unlike *Kidda*, where the disabled child sought to have benefits reinstated when his disability recurred following a period of employment after the age of majority, claimant herein satisfied the conditions of relationship and dependency at the time of her initial entitlement to benefits as an augmentee and as a survivor. Decision and Order at 10. Moreover, contrary to employer's contentions, the SSA's interpretation of its regulations supports claimant's and the Director's position and the administrative law judge's findings. Under the Social Security Act, while an adult disabled child who is entitled to benefits and whose entitlement is terminated because of marriage may not be reentitled to those benefits when the marriage ends by reason of divorce or death of the spouse, initial entitlement to benefits is not precluded if the child's marriage has ended by reason of divorce, annulment, or death of the spouse. 42 U.S.C. §402(d)(1), (5), §402(h)(1); 20 C.F.R. §§ 404.350, 404.351, 404.370; S.S.R. 84-1. We therefore affirm, as supported by substantial evidence and in accordance with law, the administrative law judge's finding that claimant qualifies as a dependent and is entitled to benefits both as an augmentee and as a survivor.

Lastly, employer maintains that due process bars the award of retroactive benefits from 1981 through 1996 because employer, in reasonable reliance on Judge Kendrick's 1988 finding that claimant did not qualify as a dependent, did not develop evidence between 1988 and 1996 and thus could not present a meaningful defense thereafter regarding claimant's condition. Employer asserts that it was irreparably prejudiced, and that the only equitable remedy, consistent with the decisions in *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), and *Venicassa v. Consolidation Coal Co.*, 137 F.3d 197, 21 BLR 2-277 (3d Cir. 1998), is dismissal of employer as the responsible operator and imposition of liability upon the the Black Lung Disability Trust Fund (Trust Fund).

Employer's arguments are without merit. Unlike the factual situation in *Lockhart*, where the government's protracted delay in notifying employer of its potential liability was the direct cause of employer's inability to develop medical evidence while the miner was alive, thus depriving employer of a fair opportunity to mount a meaningful defense, or the factual situation in *Venicassa,* where the Director's failure to make a timely designation of the proper responsible operator jeopardized the award of benefits which had been made to the miner, in the present case employer was timely notified of its potential liability for benefits in the miner's and widow's claims, which listed claimant as a dependent, disabled adult child, *see* Director's Exhibits 1, 16, and was again timely notified when claimant filed her application for survivor's benefits, *see* Director's Exhibits 37, 38. Additionally, at hearings before Judges Kendrick and O'Neill, employer fully presented its case and introduced documentary evidence in support thereof, which included an examination report by employer's expert, Dr. Dill, Employer's Exhibit 1, and the deposition of claimant's treating physician, Dr. Givens, Employer's Exhibit 2. Inasmuch as employer has demonstrated no core violation of due process, *see generally Stanley, supra*, we reject employer's argument that imposition of liability upon the Trust Fund is proper.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge