

BRB No. 06-0584 BLA

STEPHEN W. CAMPBELL)	
)	
Claimant-Respondent)	
)	
v.)	
)	
TENNESSEE COAL COMPANY)	
)	
Employer-Petitioner)	DATE ISSUED: 04/27/2007
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Lois A. Kitts (Baird & Baird), Pikeville, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (04-BLA-6620) of Administrative Law Judge Alice M. Craft on a 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). The administrative law judge credited claimant with seventeen years of coal mine employment. Considering the claim, filed on November 15, 2002, pursuant to the regulations at 20 C.F.R. Part 718, the administrative law judge found that the evidence was sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits and determined that they should be augmented on behalf of claimant's wife and disabled adult son.

On appeal, employer contends that the administrative law judge erred in determining that the miner's adult son is a qualifying dependent under the Act. Employer also alleges that its right to due process was violated, as it was prevented from challenging the son's fulfillment of the criteria for augmented benefits. Claimant has not responded to employer's appeal and the Director, Office of Workers' Compensation Programs, has declined to respond unless specifically requested to do so.¹

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363 (1965).

The facts relevant to the issue of claimant's adult son's status are as follows: In claimant's application for benefits, when asked to provide information on any unmarried children he had that are age eighteen or older and disabled, claimant identified his son, Stephen Corey Wayne Campbell. Director's Exhibit 2. Claimant also submitted a printout from the Social Security Administration (SSA) dated April 6, 2004, detailing the payment of Supplemental Security Income (SSI) benefits extending from January 1, 1997 through April 2004, and containing the statement that, "[o]ur records show that you became disabled on June 1, 1998." Director's Exhibit 12. The record also contains correspondence from employer to the administrative law judge dated February 10, 2005, indicating that the employer contested dependency of claimant's adult son. The administrative law judge acknowledged employer's letter at the March 29, 2005 hearing and employer's counsel confirmed that the adult son's status as a dependent was a contested issue. Hearing Transcript at 6, 49. Upon conclusion of claimant's testimony on cross-examination, claimant's counsel inquired as to whether employer's counsel would like to ask claimant about his dependent son, to which employer's counsel responded, "[n]o, I do not have any questions." *Id.* at 50.

After consideration of the evidence of record, the administrative law judge found that:

¹ Employer does not challenge the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. 718.202(a)(1) and invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. These findings, and the award of benefits, are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[Claimant] has one disabled adult child, Stephen Wayne Corey Campbell, who is 22 years old. Tr. at 32. The Employer did not challenge dependency of his wife, Tr. at 6, but did as to his adult son. Social Security records indicate that his son is disabled and receives Social Security benefits under the Supplemental Security Income Program. Director's Exhibit 12. I find that he has two dependents for purposes of augmentation, his wife and his adult son.

Decision and Order at 3.

Employer argues initially that the administrative law judge erred in finding that claimant's benefits should be augmented on behalf of his adult son when there is no medical evidence in the record establishing that the son is disabled. This contention is without merit. Pursuant to 20 C.F.R. §725.209, which governs the augmentation of a miner's benefits on behalf of a dependent child, a miner must establish that the adult child is unmarried and is under a disability as defined in section 223(d) of the Social Security Act.² 20 C.F.R. §725.209(a)(1), (2)(ii). Because Section 725.209 does not prescribe the manner in which these elements are to be established, reference must be made to other sources to resolve this issue.

In *Betty B Coal Company v. Director, OWCP [Stanley]*, 194 F.3d 491, 503, 22 BLR 2-1, 2-22 (4th Cir. 1999), the employer argued that the administrative law judge's order to augment the living miner's benefits on behalf of the miner's adult son violated the employer's right to due process and was in error. The United States Court of Appeals for the Fourth Circuit rejected these contentions, stating that the employer "likely had no defense to augmentation," as "[t]he son's eligibility for and receipt of social security disability benefits is of record, and the regulations use the social security definition."³ *Stanley*, 194 F.3d at 503, 21 BLR at 2-22. In *Scalzo v. Director, OWCP*, 6 BLR 1-1016 (1984), the Board addressed

² Under section 223(d) of the Social Security Act, disability is defined as the "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).

³ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's qualifying coal mine employment occurred in Tennessee. Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). The Fourth Circuit's decision in *Betty B Coal Company v. Director, OWCP [Stanley]*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999), nevertheless provides guidance in resolving this issue.

the issue of whether the administrative law judge properly found that a deceased miner's adult child was not disabled under section 223(d) of the Social Security Act. Among the reasons that the Board cited in support of its decision to vacate the administrative law judge's finding was the administrative law judge's failure to consider an SSA determination that the adult child was disabled. The Board stated that this evidence was "highly probative," as it constituted "a determination by an agency with specialized expertise, applying the definition of disability which must be applied to this controversy." *Scalzo*, 6 BLR at 1-1019-1020.

In this case, the administrative law judge determined that the disability criterion was met based upon a letter from the SSA, dated April 6, 2004, to claimant's adult son setting forth a table indicating that he had received SSI benefits beginning on June 1, 1998 and continuing to April 1, 2004. Director's Exhibit 12. The SSA representative also stated that "[o]ur records show that you became disabled on 6/1/98." *Id.* Because the SSA document is of record and contains statements that SSA determined claimant's adult son to be disabled and that he is receiving SSI benefits, we affirm the administrative law judge's finding that claimant's adult son met the disability requirement, as her finding is consistent with the language of Section 725.209 and is supported by substantial evidence.⁴ *Stanley*, 194 F.3d at 503, 21 BLR at 2-22; *Scalzo*, 6 BLR at 1-1019-1020.

Contrary to employer's argument, the Board's decision in *Tackett v. Director, OWCP*, 10 BLR 1-117 (1987), does not mandate vacating the administrative law judge's finding that claimant's adult son is disabled. Employer maintains that *Tackett* supports the principle that "medical evidence must be produced to establish disability, and the claimant's statements, standing alone, are insufficient to meet the burden of proof." Employer's Brief at 4. *Tackett* concerned the administrative law judge's application of 20 C.F.R. §725.221, which sets forth the criteria relevant to claims for survivor's benefits filed by adult children. Section 725.221 provides that the adult child must prove that he or she is unmarried and is under a disability, as defined in section 223(d) of the Social Security Act, that began before the age of twenty-two. 20 C.F.R. §725.221. In *Tackett*, the Board affirmed the administrative law judge's finding that the deceased miner's adult daughter did not satisfy the disability requirement, as "the record contained several statements by the daughter that described her condition and limitations, but no *medical* evidence of any disability." 10 BLR at 1-178

⁴ Supplemental Security Income (SSI) benefits are paid to low-income persons who are over the age of sixty-five, persons who are blind, or persons who are disabled. 20 C.F.R. §416.202. The definition of disability for purposes of receipt of SSI benefits is that same as that set forth in section 223(d) of the Social Security Act. *Id.*; 20 C.F.R. §416.905.

(emphasis in original). The present case is distinguishable, however, in light of the fact that the record herein contains documentary evidence of an SSA determination that claimant's adult son is under a disability as defined in section 223(d) of the Social Security Act.

Similarly, employer's references to the Board's decision in *Reightnouer v. Director, OWCP*, 2 BLR 1-334 (1979), and a published Decision and Order issued by an administrative law judge are inapposite, as those cases concerned the use of an SSA determination of a miner's general disability to establish total respiratory or pulmonary disability in a claim for black lung benefits. Moreover, *Reightnouer* does not support employer's contention that the administrative law judge erred in relying upon the SSA document in this case, as the Board indicated that an SSA determination may be used "as some evidence of the existence of total disability" at the administrative law judge's discretion. *Reightnouer*, 2 BLR at 1-336.

In setting forth its contention that the evidence of record is insufficient to establish that claimant's adult child is disabled, employer also stated that "the miner has never said that [his adult son] became disabled before the age of eighteen." Employer's Brief at 5. Pursuant to Section 725.209, however, there is no requirement that the adult child's disability commence by a certain age in order for a living miner's benefits to be augmented on that child's behalf. 20 C.F.R. §725.209; see *Hite v. Eastern Associated Coal Corp.*, 21 BLR 1-46 (1997); *Wallen v. Director, OWCP*, 13 BLR 1-64 (1989). Thus, we reject employer's contention.⁵

In addition to arguing that the evidence of record is insufficient to support the administrative law judge's finding that claimant's adult son is disabled, employer asserts that claimant never said that his son is unmarried. However, a review of the record reveals that on his application for benefits, dated November 11, 2002, claimant provided information about his son in the section asking him to identify his *unmarried* children who are under the age of eighteen, between the ages of eighteen and twenty-three and in school, or over the age of eighteen and

⁵ Moreover, we note that the miner's son, according to the Social Security Administration, began receiving SSI benefits on June 1, 1998 which, in accordance with the administrative law judge's crediting of claimant's testimony that his son is now twenty-two, indicates that he became disabled prior to reaching age eighteen. Director's Exhibit 12.

disabled.⁶ Director's Exhibit 2. Neither claimant nor employer subsequently proffered evidence contradicting the adult son's unmarried status. Thus, based on the evidence of record, it was within the administrative law judge's discretion to find that claimant's adult child is not married based on the miner's statements in the initial application for benefits. See *Knuckles v. Director, OWCP*, 869 F.2d 996, 998, 12 BLR 2-217, 2-219 (6th Cir. 1989), citing *Mosley v. Peabody Coal Co.*, 769 F.2d 357, 360, 8 BLR 2-22, 2-25 (6th Cir. 1985); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). We affirm, therefore, the administrative law judge's determination that claimant established that his adult child is a dependent pursuant to Section 725.209, as it is rational and supported by substantial evidence.

In addition to contending that the administrative law judge erred in finding claimant's son dependent pursuant to Section 725.209, employer alleges various due process violations. Citing *Zaccaria v. American Coal Corp.*, 9 BLR 1-119, 1-122 (1986), employer argues that because no SSA or other documents containing medical evidence regarding the adult son's disability were presented, it was not afforded the right to rebut evidence regarding his disability. Employer also claims that it was prevented from exercising its right to examine and question the adult child. These arguments have no merit.

The due process right to be heard is a right to "choose . . . whether to appear or default, acquiesce or contest." *Stanley*, 194 F.3d 491, 503, 22 BLR 2-1, 2-21, citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)(emphasis added). Contrary to employer's assertion, a review of the record establishes that claimant presented documentary evidence that his adult son is disabled and is receiving Social Security benefits, and that the administrative law judge credited this evidence. Decision and Order at 3. Employer chose not to develop any documentary evidence in response to the SSA determination that claimant submitted. The record also reflects that at the hearing, employer exercised its right to contest the son's eligibility for augmented benefits, but chose not to ask claimant any questions about his son's disability or marital status. Hearing Transcript at 6, 49, 50.

⁶ The Application for Miner's Claims for Benefits Under the Black Lung Benefits Act, Form CM-911, requires a claimant to certify that the information provided in the application is true and correct to the best of the claimant's knowledge and belief. The application form also provides notice that a person who makes false or misleading statements or representations in the application for the purpose of receiving benefits is subject to criminal prosecution and penalties. Claimant signed his application for benefits, certifying that the information was true and accurate. Director's Exhibit 2.

The Board's decision in *Zaccaria* also provides no support for employer's position. In *Zaccaria*, claimant applied for, and was awarded, Social Security benefits under Part B, and then applied for medical benefits only under Part C. Employer contested its exclusion from participation at the SSA proceedings involving the determination of Part B eligibility, but the Board found this argument unpersuasive because employer had no cognizable interest affected by its exclusion in light of the *de novo* administrative hearing afforded employer under Part C.

In the present claim, according to the letter detailing SSI payments from SSA, claimant's son became disabled on June 1, 1998. Thus, at the initial determination of the adult child's eligibility for disability benefits, employer had no cognizable interest in contesting claimant's son's disability status. However, employer had both the opportunity and incentive to contest the son's disability status and eligibility for augmented benefits at the *de novo* hearing held before the administrative law judge in this claim on March 29, 2005. Nevertheless, employer presented no contrary evidence challenging the determination of the adult child's disability and asked claimant no questions about his son, but instead stated only that it contested the adult child's dependency and eligibility for augmented benefits. Hearing Transcript at 6, 49, 50. Because employer had the opportunity to challenge the documentary and testimonial evidence but chose not to do so, employer's claim that it was deprived of its due process rights in this case has no merit.

Accordingly, we affirm the administrative law judge's Decision and Order awarding benefits and augmenting the benefits on behalf of claimant's wife and adult son.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge