BRB No. 07-0514 BLA

C.H.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MAGIC MINING, INCORPORATED	)	DATE ISSUED: 04/30/2008
	)	
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 and the Decision and Order Denying Employer's Motion for Reconsideration and Granting Claimant's Motion for Reconsideration of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Barry H. Joyner (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Decision and Order Denying Employer's Motion for Reconsideration and Granting Claimant's

Motion for Reconsideration (2005-BLA-05588) of Administrative Law Judge Paul H. Teitler on a claim filed on January 20, 2004, 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] The administrative law judge determined that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.203, and 718.204(b), (c). Accordingly, benefits were awarded. Employer subsequently filed a motion for reconsideration, challenging the administrative law judge's findings on the merits, while claimant also filed a motion for reconsideration, asserting that the administrative law judge erred in determining that he had no dependents for purposes of augmentation of benefits. After considering the parties' arguments on reconsideration, the administrative law judge revised his decision to reflect that claimant was entitled to augmented benefits on behalf of two dependents, his divorced spouse and his adult disabled son.

Employer filed an appeal with the Board on March 2, 2007. While the appeal was pending, on October 15, 2007, the district director sent a letter to all parties, advising that a prior claim filed by claimant had been "mistakenly omitted" from the Director's Exhibits, and a copy of that prior claim, marked as Director's Exhibit 1, was being provided for association with the record file.[2] Upon receipt of the letter and the missing exhibit, employer filed a Motion for Remand with the Board on October 31, 2007.

In employer's appeal to the Board from the administrative law judge's award of benefits, employer challenges the administrative law judge's finding that claimant established the existence of pneumoconiosis at Section 718.202(a)(1) and that he is totally disabled due to pneumoconiosis pursuant to Section 718.204(c). Employer also contends that there is no factual support in the record for the administrative law judge's conclusion that claimant's divorced spouse received "substantial contributions" from

[1] In his January 20, 2004 application for benefits, claimant did not indicate that he had any dependents. Director's Exhibit 3. However, on February 12, 2004, claimant filed a revised application for benefits, in which he stated that he had two dependents, a divorced spouse and an adult disabled son. Director's Exhibit 4. Claimant indicated that he was not under a court order to provide support payments to his wife, but when asked whether he made substantial contributions to her, claimant answered "Yes" and wrote "40 [percent]." *Id*.

[2] The district director's October 15, 2007 letter transmitted "Director's Exhibit 1" consisting of thirty-six pages. We note that the record, transmitted to the Office of Administrative Law Judges for the formal hearing held on May 2, 2006, contained only Director's Exhibits 2-48, although the administrative law judge stated at the hearing that Director's Exhibits 1-48 were admitted into the record without objection. Hearing Transcript at 6.

him, as required by 20 C.F.R. §725.207. Employer's Brief in Support of Petition for Review at 21. Employer also asserts that the administrative law judge erred in finding that "the merely [sic] existence of a determination by Social Security that a child is disabled is sufficient to establish their dependency." Employer's Brief in Support of Petition for Review at 23. Claimant responds, urging affirmance of the award of benefits and the administrative law judge's dependency finding. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a brief on the merits of claimant's entitlement to benefits.

In the Motion to Remand, employer asserts that, due to the district director's failure to provide a complete record in this case, the administrative law judge failed to properly adjudicate this claim as a request for modification pursuant to 20 C.F.R. §725.310. Citing *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000), employer maintains that fundamental principles of due process and fairness require that employer be dismissed as the responsible operator and liability for benefits transferred to the Black Lung Disability Trust Fund. Claimant responds to Employer's motion, asserting that employer's citations to dates in the record to support its argument that this claim is a modification request are factual incorrect. Claimant further argues that regardless of the error committed by the district director, since Director's Exhibit 1 contains no medical evidence, claimant has met his burden of establishing a change in an applicable condition of entitlement at 20 C.F.R. §725.309, based on the administrative law judge's determination that the record evidence was sufficient to establish all of the requisite elements of entitlement.

The Director, in response to Employer's Motion to Remand, asserts that since the record establishes that employer was aware that claimant had a prior denied claim, the Board should reject employer's argument that it was prejudiced by the district director's inadvertent error in failing to include Director's Exhibit 1 with the formal record file. The Director disagrees with employer that the instant claim is a request for modification, and asserts that, insofar as employer specifically argued before the administrative law judge that this claim was a subsequent claim pursuant to Section 725.309, employer has waived the right to challenge that issue. Lastly, the Director contends that the administrative law judge's failure to make specific findings under Section 725.309 is harmless, since "there was no evidence developed in the prior abandoned claim." Director's Response to Motion to Remand at 4.

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.[3] 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).

Motion to Remand

Initially, we address employer's Motion to Remand. Employer relies on the Sixth Circuit's holding in *Holdman* to support its argument that it has been substantially prejudiced by the district director's failure to associate Director's Exhibit 1 with the formal record file, and that based on this error, it should be dismissed from liability for benefits in this claim.[4] *See Holdman*, 202 F.3d at 873, 22 BLR 2-44-45. After consideration of the issues on appeal, the briefs of the parties, and the procedural history of the case, we agree that a remand is necessary, but we are without authority to grant employer's request of dismissal. The regulations state that the Board "is not empowered to engage in a *de novo* proceeding or unrestricted review of a case" and is only authorized to review the administrative law judge's findings of fact and conclusions of law. 20 C.F.R. §802.301; *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990). Because it is the administrative law judge's duty to make factual determinations, we must vacate the administrative law judge's award of benefits and remand this case for the administrative law judge to consider Director's Exhibit 1 and determine whether the current claim is a subsequent claim pursuant to Section 725.309 or a request for modification pursuant to Section 725.310. If the administrative law judge determines that the case involves a modification request, he must determine whether the evidence of record has been submitted in accordance with the evidentiary limitations pursuant to 20 C.F.R. §725.414. On remand, the administrative law judge must also specifically discuss the impact of the district director's mistake in failing to properly compile the evidentiary record in this

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 10.

[4] In *Holdman*, the Department of Labor lost the evidentiary record during the pendency of employer's motion for reconsideration of an administrative law judge's award of benefits. *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000). The Sixth Circuit, after noting that the Office of Workers' Compensation Programs has the responsibility to safeguard all documents related to a claim of entitlement, held that employer was not required to make a showing of actual prejudice (*i.e.*, that benefits would have been denied if the record had not been lost), inasmuch as employer was deprived of a fair day in court, thereby suffering a core violation of its due process rights. *Id*.

case, and determine if the parties' right to due process have been denied and, if so, whether the transfer of liability to the Trust Fund is the appropriate remedy. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). Thus, we vacate the award of benefits and remand this case for further consideration.

Merits of Entitlement

In the interest of judicial economy, we will address employer's assertion that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis based on the x-ray evidence at Section 718.202(a)(1). Employer contends that the administrative law judge erred in crediting the positive readings of Dr. Baker because the administrative law judge considered Dr. Baker to be impartial. We agree.

The record contains nine interpretations of four x-rays dated October 15, 2001, March 9, 2004, June 15, 2004, and January 26, 2006. Director's Exhibits 17, 31, 36, 41; Claimant's Exhibits 1, 2; Employer's Exhibits 7, 8, 11. In his initial decision, the administrative law judge determined that claimant established the existence of pneumoconiosis at Section 718.202(a)(1), stating as follows:

> Based upon the chest x-ray evidence of record, the Claimant has established pneumoconiosis. All four x-rays were read as positive for the disease by Dr. Alexander, a board certified radiologist and B-reader. There are two x-rays that clearly establish the disease. The first is from October 15, 2001, where Dr. Alexander, dually-qualified, found an ILO classification of 1/2. The March 9, 2004 x-ray was read as positive by both Dr. Baker and Dr. Alexander, while Dr. Hayes found it to be negative. I think that the readings of Dr. Baker and Dr. Alexander establish that the x-ray is positive, due to the superior qualifications of Dr. Alexander and the independent evaluation done by Dr. Baker on behalf of the [Department of Labor]. With the June 15, 2004 and January 26, 2006 x-rays, Dr. Alexander's positive readings are in equipoise with those of Dr[s]. Poulos and Wiot, also dually-qualified physicians. Therefore, I find that the last two x-rays do not establish pneumoconiosis. However, the x-ray evidence as a whole does establish the disease, as there are two x-rays that positively establish the disease, and two that are in equipoise.
>
> Considering all of the x-ray evidence together, I find that the x-ray evidence supports a finding of the presence of pneumoconiosis.

Decision and Order Awarding Benefits at 4-5. Based on employer's request for reconsideration, which clarified that Dr. Hayes was also a dually qualified physician, the

administrative law judge revised his Section 718.202(a)(1) finding, but still concluded that claimant established the existence of pneumoconiosis:

> Considering the chest x-ray evidence of record, I again find that Claimant has established pneumoconiosis. Both Drs. Alexander and Hayes have impressive resumes and are both dually-qualified. The previous omission (that I omitted Dr. Hayes' B Reader certification) does not change my finding. The fact is that Claimant has put forth several positive readings, including the positive reading by Dr. Baker, the [Department of Labor's] doctor, who is presumably an impartial reader.

Decision and Order Denying Employer's Motion for Reconsideration and Granting Claimant's Motion for Reconsideration (Decision and Order on Reconsideration) at 3.

Contrary to the administrative law judge's finding, the opinions of the Department of Labor physicians cannot be accorded greater weight due to their impartiality, absent conclusive evidence that the other physicians of record are biased and that the Department of Labor's expert is independent. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-35-36 (1991) (*en banc*). Because the administrative law judge did not identify any evidence in the record supporting his determination that Dr. Baker is an impartial expert, we must vacate the administrative law judge's determination to assign additional weight to Dr. Baker's positive readings. As such, we must vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1).[5]

Employer's also challenges that administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c).[6]

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[5] Employer contends that the administrative law judge erred by failing to discuss the CT scan evidence. Employer's Brief in Support of Petition for Review at 16-17. However, the Sixth Circuit has held that Section 718.202(a)(1)-(4) provides alternative methods of establishing pneumoconiosis. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-216, 1-226-227 (2002) (*en banc*). Because the administrative law judge found that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), he was not obliged to further weigh the CT scan evidence. *Cf. Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208, 22 BLR 2-162, 2-170 (4th Cir. 2000); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 24-25, 21 BLR 2-104, 2-111 (3d Cir. 1997).

[6] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant is totally disabled by a respiratory or pulmonary impairment

Employer asserts that the administrative law judge erred in "mechanically" assigning greater weight to Dr. Potter's opinion, that claimant is totally disabled due to pneumoconiosis, based on Dr. Potter's status as claimant's treating physician. We agree.

In his original Decision and Order, in weighing the conflicting medical opinions on the issue of disability causation, the administrative law judge specifically noted that Dr. Potter, "while having treated [c]laimant for many years for various problems, including his smoking and heart disease, does not discuss how these other problems could have impacted [c]laimant's respiratory system." Decision and Order Awarding Benefits at 9. In contrast, the administrative law judge noted that the opinions of Drs. Rosenberg and Jarboe, were "well-reasoned and examine all possible causes of [c]laimant's respiratory problems." *Id*. The administrative law judge, however, did not resolve the conflict because he concluded that claimant had fifteen years of coal mine employment and was entitled to the rebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.305(a). On reconsideration, the administrative law judge determined that claimant was not, in fact, eligible for the Section 718.305(c) presumption, and made specific findings under Section 718.204(c). The administrative law judge stated:

> While I gave considerable weight to the opinions of Drs. Rosenberg and Jarboe in my previous Order, and carefully considered their opinions that smoking was the etiology of [c]lamant's pulmonary impairment, I still conclude that [c]laimant has met his burden of showing that pneumoconiosis is a substantially contributing cause of his disability. First, Dr. Potter, [c]laimant's treating physician, concluded that [c]laimant's severe respiratory impairment was caused by his [coal workers' pneumoconiosis]. Second, Drs. Rosenberg's and Jarboe's opinions must be read with consideration for the fact that 1) neither doctor even found the presence of pneumoconiosis, directly against my finding, and 2) both are medical experts on behalf of [employer]….

Decision and Order on Reconsideration at 4.

To the extent that the administrative law judge's analysis of whether claimant satisfied his burden of proving total disability due to pneumoconiosis was influenced by his finding that claimant established the existence of pneumoconiosis at Section

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pursuant to 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

718.202(a)(1), we vacate the administrative law judge's disability causation determination at Section 718.204(c). Decision and Order on Reconsideration at 3-4.

Additionally, we agree with employer that the administrative law judge erred in mechanically relying on Dr. Potter's diagnosis of pneumoconiosis because he is claimant's treating physician. Pursuant to 20 C.F.R. §718.104(d), the administrative law judge "must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record." 20 C.F.R. §718.104(d). The regulation also provides that the administrative law judge may give a treating physician's opinion controlling weight, provided that the weight given to this opinion is also "based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

Furthermore, the administrative law judge erred in assigning less weight to the opinions of Drs. Rosenberg and Jarboe because "both are medical experts of [employer]." Decision and Order on Reconsideration at 4. As discussed *supra*, there is no logical basis for assuming that evidence prepared in anticipation of litigation is less reliable or unfairly slanted in favor of the party presenting it. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992). Unless the physicians retained by the parties are properly held to be biased, based on the evidence in the record, the administrative law judge may not accord less weight to their opinions based upon their party affiliation. *See Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992); *Melnick,* 16 BLR at 1-36.

In summary, on remand, the administrative law judge must consider Director's Exhibit 1, and determine whether this case involves a subsequent claim or a modification request. The administrative law judge must address employer's argument that liability for benefits should transfer to the Trust Fund. In considering claimant's entitlement to benefits, the administrative law judge must reweigh the x-ray evidence at Section 718.202(a)(1), and determine whether claimant has met his burden of proof to establish the existence of pneumoconiosis. If claimant is unable to establish the existence of pneumoconiosis based on the x-ray evidence, the administrative law judge must further weigh the evidence relevant to that issue pursuant to Section 718.202(a)(2)-(4), including the CT scan evidence. If necessary, the administrative law judge must also determine whether claimant has satisfied his burden of proving that he is totally disabled due to pneumoconiosis pursuant to Section 718.204(c). *See* 20 C.F.R. §718.204(c); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Abshire v. D & L Coal Co.*, 22 BLR 1-202, 214 (2002) (*en banc*).

Eligibility of Dependents

Employer argues that the administrative law judge erred in finding that claimant is entitled to augmented benefits on behalf of his divorced spouse and his disabled adult

son. Employer's Brief in Support of Petition for Review at 21. We first address whether the administrative law judge acted within his discretion in finding that claimant's divorced spouse is a dependent.

Under Section 725.206, "an individual will be considered to be a divorced spouse of a miner if the individual's marriage to the miner has been terminated by a final divorce on or after the 10th anniversary of the marriage…." 20 C.F.R. §725.206. A divorced spouse must also satisfy certain dependency requirements. Section 725.207 provides that:

> For the purpose of augmenting benefits, an individual who is the miner's divorced spouse (§725.206) will be determined to be dependent on the miner if:
>
> (a) The individual is receiving at least one-half of his or her support from the miner (*see* §725.233(g)); or
>
> (b) The individual is receiving substantial contributions from the miner pursuant to a written agreement (*see* §725.233(c) and (f)); or
>
> (c) A court order requires the miner to furnish substantial contributions to the individual's support (*see* §725.233(c) and (e)).

20 C.F.R. §725.207.

In this case, the record establishes that claimant and his ex-wife were married for at least ten years before they were divorced.[7] 20 C.F.R. §725.206; Director's Exhibit 13. The administrative law judge determined that claimant satisfied the requirements of Section 725.207 because the record contained a Decree of Dissolution of Marriage (divorce decree), which proved that claimant was required to furnish "substantial contributions" to his ex-wife for her financial support.[8] The Decree of Dissolution of Marriage issued by the Knott Circuit Court, Commonwealth of Kentucky, provided, in relevant part, that claimant was required to pay child support in the amount of $250.00 per month until his son (who was eleven years old at the time of the divorce) attained the age of majority. Director's Exhibit 13. Claimant was not required to pay any alimony. *Id*. The Order directed that claimant's ex-wife "be allowed to live in and occupy the said

[7] The parties were married on December 28, 1966 and divorced on May 30, 1991. Director's Exhibit 13.

[8] Support, as defined in the regulations, includes "food, shelter, clothing, ordinary medical expenses, and other ordinary and customary items for the maintenance of the person supported." 20 C.F.R. §725.233(a).

house and land located at Rock Fork, Kentucky, and use the said furniture located in the house." *Id*. Claimant was also ordered to pay all bills concerning the house, except the gas bill, and to allow his ex-wife the use of his car.[9] *Id*. The administrative law judge determined that the divorce decree constituted a "court order" for the purposes of Section 725.207, and that it established that claimant was required to provide substantial contributions to his ex-wife's support. Decision and Order on Reconsideration at 5.

Employer contends that the administrative law judge's dependency ruling was in error because claimant specifically testified that he and his ex-wife no longer reside at the property identified in the divorce decree. Employer's Brief in Support of Petition for Review at 22. Employer also contends that there is no financial evidence of claimant's bills or expenses to prove that he provided over fifty percent of his ex-wife's support.[10] *Id.* We disagree.

Contrary to employer's assertion, claimant was not required to show that he provided fifty percent of his income to his ex-wife for support, as the regulations provide for evidence of "substantial contributions." The regulations define "contributions" as "contributions actually provided by the [miner] from [his or her] property or the use thereof…." 20 C.F.R. §725.233. Thus, the administrative law judge permissibly found that "a requirement to provide housing, payment of bills, and use of a car [may amount] to 'substantial contributions' to the individual's support." Decision and Order on Reconsideration at 5.

[9] The decree provided that claimant's ex-wife was entitled to any Social Security benefits she would have otherwise received if she were still married. However, as noted by the administrative law judge, the Sixth Circuit has held that Social Security payments received by a former spouse that are based on the miner's earnings are not "contributions" from the miner. *See Director, OWCP v. Hill*, 831 F.2d 635, 10 BLR 2-308 (6th Cir. 1987). Additionally, although claimant was required to provide child support, the administrative law judge properly determined that "child support is not a factor in calculating the support share." Decision and Order on Reconsideration at 5, citing *Trevena v. Director, OWCP*, 7 BLR 1-799, 802 (1985).

[10] Claimant estimated that he provided forty percent of his ex-wife's support. Hearing Transcript (HT) at 18. Claimant testified that he and his ex-wife currently reside on the same property, although not the property described in the divorce decree. HT at 7; 20. Claimant described that his ex-wife lives in "the main house," that he has a little building out back, and that his son lives "up the highway about maybe 500 yards." HT at 21. Claimant testified that he pays for the food, electric and cable bills for the main house. HT at 19. He also continues to let his wife use his car. HT at 19.

The administrative law judge also specifically addressed employer's assertion that claimant's divorced spouse was not a dependent because, even if claimant was under a "court order" to provide substantial contributions, that order was no longer valid, as the parties were not actually living in the house specified by the divorce decree. The administrative law judge rejected employer's argument, and explained:

> I would be inclined to say that if the court order decreed that the house become the sole property of the one spouse in the division of assets, that that would not constitute a continuing obligation which the other spouse was under. However, the language of the divorce decree gives the impression that the family home did not become the ex-wife's upon dissolution of the marriage, but rather she was "allowed" to live there. Employer argues that the home described in the court order, the "Rock Fork home," is no longer occupied by the ex-spouse. At the hearing on May 2, 2006, Claimant testified that he currently lives a 478 Hunter Branch Road, Garrett[,] Kentucky. (Tr. at 7). It was clear from the Claimant's testimony that he and his ex-wife currently reside on the same property. He stated "I live out the back in a little building. She lives in the house …" (Tr. at 17). He estimated that their homes were approximately forty feet apart. (Tr. at 18). So, clearly, they are residing on the same property, but I do not believe it is the home described in the divorce decree. The court order also requires Claimant to pay certain bills associated with the home and to allow his ex-wife use of his car.
>
> Under the regulations, "If such contributions are required by a court order, this condition is met whether or not the contributions were actually made." [20 C.F.R.] §. 725.233(e). This means that it is immaterial if Claimant is actually providing the contribution (i.e. the home) because he is under court order to do so, satisfying the regulatory requirements….

Decision and Order on Reconsideration at 5.

We affirm the administrative law judge's interpretation of the divorce decree as establishing that claimant provides substantial contributions to the support of his divorced spouse, as that factual determination was a matters within his sound discretion as the trier-of-fact. *Zyskoski v. Director, OWCP*, 12 BLR 1-159 (1989). Employer's request that we vacate or reverse the administrative law judge's findings, is a request for the Board to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Therefore, we affirm the administrative law judge's finding that claimant may receive, if awarded, augmented benefits on behalf of his divorced spouse pursuant to Section 725.207.

Employer also contends that the administrative law judge erred in finding that claimant was entitled to augmented benefits on behalf of an adult, disabled son. An unmarried adult child satisfies the dependency requirement if the child is under a disability as defined in Section 223(d) of the Social Security Act, 42 U.S.C. §423(d), that began before the child attained age twenty-two. 30 U.S.C. §902(g); 20 C.F.R. §§725.209(a)(2)(ii), 725.221. The Social Security Act defines "disability" as "the inability to engage in substantial gainful activity by reason of any medically demonstrable physical or mental impairment." 42 U.S.C. §423(d)(1)(A); *Tackett v. Director, OWCP*, 10 BLR 1-117, 1-118 (1987).

The administrative law judge found in this case that "claimant has put forth evidence that shows that his son was declared disabled in 1996 and was paid under [c]laimant's social security number." Decision and Order at 6; Director's Exhibit 15; *see Scalzo v. Director, OWCP*, 6 BLR 1-1016, 1-1019 (1984). Director's Exhibit 15 is a computer printout from a district office of the Social Security Administration (SSA), signed by a District Manager, which states that claimant's son was declared disabled in February 1996, at which time he would have been eighteen years of age.[11]

Employer contends that "the mere existence of a determination by Social Security that a child is disabled is [not] sufficient to establish their dependency." Employer's Brief in Support of Petition for Review at 23. Employer also notes that the computer printout by SSA states that payment status was "Terminated by Systems Action" effective October 2002. *Id*. at 24. Employer's arguments, however, do not establish error on behalf of the administrative law judge in finding claimant's son to be disabled and a dependent for purposes of augmentation of benefits.

Contrary to employer's contention, the administrative law judge had discretion to find that claimant's son was a dependent based on the disability verification issued by the SSA printout and the specific testimony of claimant that his son was disabled and receiving income under the miner's Social Security number.[12] *See generally Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd sub nom. Amax Coal Co. v. Fagg*, 865 F.2d 916 (7th Cir. 1989); *Worley v. Blue Diamond Coal Co*., 12 BLR 1-20 (1988); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Because the administrative law judge's factual and credibility determinations were reasonable and within his discretion, we affirm his finding that claimant satisfied the requirements of Sections 725.209(a)(2)(ii), 725.211. If

[11] Claimant's son was born on April 29, 1980. Director's Exhibit 14.

[12] Claimant testified that his son receives supplemental security income in the amount of $600.00 per month. Hearing Transcript at 24.

claimant is found to be entitled to benefits on remand, he therefore may receive augmented benefits on behalf of his adult disabled son.

Accordingly, the Decision and Order Awarding Benefits and the Decision and Order Denying Employer's Motion for Reconsideration and Granting Claimant's Motion for Reconsideration of the Administrative Law Judge is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge