BRB No. 02-0186 BLA

SAMANTHA VARNEY (Surviving child of DANNY VARNEY) Claimant-Respondent v. STEVEN LEE ENTERPRISES, INC. and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

Rita Ropolo (Eugene Scalia, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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.

McGRANERY, Administrative Appeals Judge:

Employer appeals the Decision and Order (2000-BLA-1067) of Administrative Law Judge Daniel F. Solomon awarding 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).[1] This case has been before the Board previously. In an Order Granting Summary Judgment and Awarding Benefits issued on October 1, 1998, Administrative Law Judge Stuart A. Levin found that claimant[2] was the surviving child of the miner and was thus entitled to benefits as a matter of law pursuant to 20 C.F.R. §725.218(a) (2000).[3] Accordingly, benefits were awarded.

Employer appealed the award of benefits to the Board and, while the appeal was pending at the Board, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion to Remand the case to the Office of Administrative Law Judges (OALJ) acknowledging that the administrative law judge's decision rested upon invalid

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are codified at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant is Samantha Danielle Varney. Claimant's mother, Tressa Varney, filed a survivor's claim on behalf of claimant, as the surviving child of the miner, Danny Varney, on May 9, 1997. Director's Exhibit 1.

[3] It was uncontested that the evidence established that the miner's death was due to pneumoconiosis. *See* 20 C.F.R. §718.205; Decision and Order at 3-4; Director's Exhibits 14-18, 21.

grounds. By Order dated March 15, 1999, the Board, without addressing the merits, granted the Director's motion and remanded the case to the OALJ for the purpose of scheduling a hearing on the issue of claimant's paternity.

On remand, in a Decision and Order issued on October 18, 1999, Judge Levin found that the evidence on claimant's paternity was incomplete and remanded the case to the district director for further development of the evidence regarding claimant's paternity. Director's Exhibit 43. On remand, additional evidence was obtained by the district director, who concluded that the miner was the biological father of claimant. The district director then forwarded the claim to the OALJ for a hearing.

In his Decision and Order, the subject of this appeal, Judge Daniel F. Solomon (the administrative law judge) found that claimant was the child of the miner in accordance with 20 C.F.R. §§718.208(f)(1) and 718.220(f)(1). The administrative law judge further found that claimant was the child of the miner pursuant to 20 C.F.R. §§718.208(a) and 718.220(a) under the laws of the State of West Virginia. Alternatively, the administrative law judge found that claimant was the child of the miner pursuant to the laws of the Commonwealth of Kentucky. Finally, the administrative law judge denied employer's request for sanctions against the Director. Accordingly, survivor's benefits were awarded to claimant.

On appeal, employer alleges several errors with respect to the administrative law judge's finding that claimant is the miner's child pursuant to 20 C.F.R. §§718.208(a), (f)(1) and 718.220(a), (f)(1). Employer also urges the Board to impose sanctions on the Director, which the Director opposes. Claimant responds, urging that the administrative law judge's Decision and Order be affirmed. The Director, as a party-in-interest, responds, urging the Board to affirm the award of benefits based upon the administrative law judge's factual findings considered in light of Section 216(h)(3)(C) of the Social Security Act, 42 U.S.C. §416(h)(3)(C), as incorporated into the Act by 30 U.S.C. §902 (g). Employer replies, opposing the Director's position.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we note that, on remand, employer filed Employer's Motion to Dismiss and for Sanctions Or in the Alternative, to Compel DNA Testing. On remand, employer asserted that the Board's decision vacating the survivor's award and remanding this case to the administrative law judge for a determination of paternity was a result of the Director's changed position with respect to the validity of its litigation position. Employer requested dismissal and sanctions, alleging that the Director's actions caused an unnecessary delay in

the resolution of the claim.[4] The administrative law judge found that sanctions, in the form of dismissal of employer as a party, or referral to the United States District Court for a contempt proceeding for alleged misconduct, were not ripe for consideration since the record was still open. The administrative law judge, however, granted the motion to compel DNA testing of claimant and her mother. Interim Order at 5, 14; Decision and Order at 3. In his most recent Decision and Order the administrative law judge awarded benefits and summarily denied employer's request for sanctions. Decision and Order at 12-13.

On appeal, Employer asserts that the administrative law judge erred in failing to sanction the Director for acting in "bad faith" since the Director originally argued that claimant was entitled to benefits as the miner's stepchild, but changed his position on appeal and requested that the case be remanded for development of the evidence of actual paternity. Employer's Brief at 25-27. The administrative law judge fully considered employer's request and chose not to impose sanctions. We are not persuaded that the administrative law judge abused his discretion in finding that sanctions were not merited in this case. Consequently, we affirm the administrative law judge's decision not to sanction the Director. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*); *see generally C&K Coal Co. v. Taylor*, 165 F.3d 254, 21 BLR 2-523 (3d Cir. 1999); *Venicassa v. Consolidation Coal Co.*, 137 F.3d, 197, 21 BLR 2-277 (3d Cir. 1998).

On the merits, the administrative law judge noted that the only contested issue in this survivor's claim was whether claimant was a surviving child of the deceased miner under Section 725.208, *see also* 20 C.F.R. §725.220. The administrative law judge initially noted that the regulation applicable to the determination of whether an individual may qualify for benefits as the child of a deceased miner is set forth in Section 725.220, which states that the provisions of Section 725.208 apply, and then sets forth provisions identical to Section 725.208.[5] The administrative law judge then concluded that Section 725.220 applied in this case.[6]

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[4]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.

[5] Section 725.208 applies to the determination of whether an individual may qualify for benefits as the child of a surviving spouse. 20 C.F.R. §725.208

[6] Section 725.220 provides in relevant part:

For purposes of a survivor's claim, an individual will be considered to be a child of a beneficiary if:

(a) The courts of the State in which such beneficiary is domiciled (see § 725.231) would find, under the law they would apply in determining the devolution of the beneficiary's intestate personal property, that the individual is the beneficiary's child; or . . .
(f) Such individual is the natural son or daughter of a beneficiary but does not have the relationship of child to such beneficiary under paragraph (a), (b), or (c) of this section, and is not considered to be the child of the beneficiary under paragraph (d) or (e) of this section, such individual shall nevertheless be considered to be the child of such beneficiary if:

(1) Such beneficiary, prior to his or her entitlement to benefits, has acknowledged in writing that the individual is his or her son or daughter, or has been decreed by a court to be the father or mother of the individual, or has been ordered by a court to contribute to the support of the individual (see § 725.233(a)) because the individual is a son or daughter.

See 20 C.F.R. §725.220; *see also* 20 C.F.R. §725.208.

Employer alleges several errors with respect to the administrative law judge's findings under Section 725.220(a) and (f)(1), including his determination of the applicable state law, the propriety of considering subsection (f)(1), the standard of proof used in determining whether the statutory presumption was rebutted and the weight accorded to the various evidentiary exhibits and testimony. We initially consider the argument raised for the first time in the Director's response brief wherein the Director states that Part A of the Act provides that the determination of whether a claimant is the "child" of the miner must be made in accordance with subsections 216(h)(2) or (3) of the Social Security Act. *See* 42 U.S.C. §416(h)(2), (3), as incorporated by 30 U.S.C. §902(g).[7] 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);[8] 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).

Although the administrative law judge considered the law of the Commonwealth of Kentucky relevant to paternity issues, the administrative law judge did not discuss state law relevant to intestacy issues applicable under subsection 416(h)(2)(A). Moreover, it is unclear, under the administrative law judge's application of the laws regarding paternity, how he concluded that claimant would inherit as a "child" of the miner. Thus, as it has not been established that claimant is the daughter of the miner, we vacate the administrative law judge's findings regarding Kentucky law.

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[7] The Act, in pertinent part, provides that:

> [t]he determination of an individual's status as the "child" of the miner . . . shall be made in accordance with section 216(h)(2) or (3) of the Social Security Act as if such miner . . . were the "insured individual" referred to therein.

30 U.S.C. §902(g).

[8] Subsection 42 U.S.C. §416(h)(2)(B) is not applicable under the facts of this case.

The Director argues that the administrative law judge never discussed Section 416(h)(3) or applied his findings to this provision, but instead, considered only 20 C.F.R. Part 725 of the Department of Labor Black Lung Regulations, "which curiously do not implement" Section 216(h)(3)(C) as it relates to a deceased miner.[9] Director's Brief at 18. The Director asserts that the Act must be given priority over the regulations, citing *Wolf Creek Collieries v. Robinson*, 872 F.2d 1264, 12 BLR 2-259 (6th Cir. 1989). We agree that the Act must be given priority over the regulations, but we decline to grant the Director's request to apply the administrative law judge's findings under Sections 725.220 and 725.208 to 20 C.F.R. §404.355(a) because it is within the authority of the administrative law judge to determine the relevant facts of this case in light of the applicable law. *See Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990). We, therefore, vacate the award of benefits and remand this case to the administrative law judge for consideration of the parties' arguments and further fact-finding, if necessary.

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed in part, vacated in part and the case is remanded for further consideration in accordance with this opinion.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

BETTY JEAN HALL,
Administrative Appeals Judge

[9] The Director also states that he is "unaware of the reasons for this omission in the black lung regulations." Director's Brief at 18.

DOLDER, Chief Administrative Appeals Judge, concurring:

For the reasons that follow, I concur with my colleagues' decision to remand this case for further consideration. I write separately because, as opposed to my colleagues, I believe, on remand, the administrative law judge must also reconsider, if reached, the issue of paternity under the applicable Kentucky law. Employer's argument that the administrative law judge's findings with respect to the applicable state law in determining whether the infant child was the child of the miner has merit. The administrative law judge erred in determining that West Virginia was the applicable state law. The domicile of the miner was Kentucky, thus Kentucky law is applicable. *See* 20 C.F.R. §725.208. The administrative law judge, after applying West Virginia law, considered, in the alternative, the laws of Kentucky in determining whether the infant claimant was the surviving child of the miner. Addressing Kentucky law, the administrative law judge found that the infant claimant was the surviving child of the miner based upon his review of the divorce decree, his acceptance of the testimony of the mother, his discrediting of the husband's testimony, and what he terms "conflicting presumptions of legitimacy." Decision and Order at 8-12. 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. KRS § 406.011; *see also*, *Vanover v. Steele*, 190 S.W. 667 (Ky. 1917); *Sergent v. North Cumberland Mfg. Co.*, 66 S.W. 1036 (Ky. 1902). Moreover, it is undisputed that this presumption is one of the strongest of law and may only be rebutted by clear and convincing evidence. *Bartlett v. Commonwealth of Kentucky*, 705 S.W.2d 470 (Ky. 1986); *Bradshaw v. Bradshaw*, 295 S.W.2d 571 (Ky. 1956).

On appeal, employer argues that the administrative law judge's finding that the presumption of paternity had been rebutted is not consistent with the limited means of rebuttal approved by Kentucky law. I agree that in light of the Kentucky case law cited by employer, the administrative law judge has not sufficiently supported his conclusion that, under the facts of this case, the presumption of paternity has been rebutted. Consequently, I would vacate the administrative law judge's findings regarding Kentucky law and instruct that, if this issue is again addressed on remand, the administrative law judge should revisit whether, under the facts of this case, the evidence of record supports a finding of rebuttal of the presumption of paternity.

In addition, the Director contends that the infant claimant is entitled to benefits based upon proof that she is the daughter of the miner and that the evidence establishes one of the enumerated conditions. 42 U.S.C. §416(h)(3)(C), as incorporated by 30 U.S.C. §902(g). I fully agree with my colleagues that in light of this assertion which is raised for the first time on appeal, the appropriate course of action is to remand this case to the administrative law judge for findings on this issue (and the objections to this assertion). *See Harlan Bell Coal Co. v. Lemar,* 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990).

NANCY S. DOLDER, Chief
Administrative Appeals Judge