BRB No. 13-0277 BLA

BRENDA SUE NEWSOME (Widow of and o/b/o the Estate of GRANT NEWSOME, JR.)	)	
Claimant-Respondent	)	
v.	)	
D & N COAL CORPORATION	)	DATE ISSUED: 03/26/2014
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Granting Augmented Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

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

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand Granting Augmented Benefits (2007-BLA-05190 and 2007-BLA-05191) of Administrative Law Judge Pamela J. Lakes, rendered with respect to a miner's subsequent claim and a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] This case is before the Board for the second time. The Board previously affirmed the administrative law judge's award of benefits, based on the miner's subsequent claim, and her determination in the survivor's claim that claimant, the widow of the miner, is automatically entitled to benefits, pursuant to amended Section 932(*l*), *see* 30 U.S.C. §932(*l*).[2] *Newsome v. D & N Coal Corp.*, BRB No. 11-0235 BLA, slip op. at 10, 12 (Jan. 23, 2012) (unpub.). However, the Board agreed with employer that the administrative law judge erred in failing to provide any bases for her determination that claimant is entitled to augmented benefits on behalf of her adult disabled son. *Id*. at 12-13. The Board therefore remanded the case for the administrative law judge to determine, under the facts of this case, whether claimant's disabled adult son satisfied the requisite standards of relationship and dependency for augmentation of benefits. *Id*. The administrative law judge was instructed to explain her findings in accordance with the Administrative Procedure Act.[3] *Id*. at 13.

[1] A complete procedural history of the case is set forth in *Newsome v. D & N Coal Corp.*, BRB No. 11-0235 BLA, slip op. at 2-3, n.1 (Jan. 23, 2012) (unpub.).

[2] The Board rejected employer's arguments regarding the application of the evidentiary limitations and the exclusion of a portion of a medical report by Dr. Caffrey pursuant to 20 C.F.R. §725.414. *Newsome*, BRB No. 11-0235 BLA, slip op. at 4-5. With regard to the miner's subsequent claim, the Board affirmed, as unchallenged, the administrative law judge's findings that the newly submitted evidence established total disability at 20 C.F.R. §718.204(b), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *Id*. at 6-7. Furthermore, the Board rejected employer's challenges to the weight accorded the medical opinions of Drs. Perper, Rasmussen, Rivera, Dahhan, and Fino, relevant to the issues of the existence of legal pneumoconiosis and disability causation at 20 C.F.R. §§718.202(a)(4), 718.204(c). *Id*. at 7-10.

[3] The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Following issuance of the Board's decision, employer filed a motion for reconsideration which was denied.[4] On remand, the administrative law judge determined that claimant's adult child qualifies as a dependent pursuant to 20 C.F.R. §725.209, for purposes of the augmentation of benefits. The administrative law judge ordered augmented survivor's benefits to be paid to claimant, commencing November 1, 2005.

On appeal, employer challenges the Board's prior affirmance of the award of benefits in the miner's and the survivor's claims. Employer asserts that the administrative law judge erred in augmenting benefits for claimant's disabled adult son. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, urging the Board to reject employer's arguments in challenging the validity of the evidentiary limitations and in granting augmented 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 rational, supported by substantial evidence, and in accordance with applicable law.[5] 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).

Entitlement to Benefits

Initially, employer requests that the Board revisit its prior affirmance of the administrative law judge's award of benefits in the miner's claim and the survivor's claim. Employer, however, has not established that the Board's affirmance of the administrative law judge's findings on the merits of entitlement was clearly erroneous, or set forth any other valid exception to the law of the case doctrine. *See Newsome*, BRB No. 11-0235 BLA (Jan. 23, 2012) (unpub.); *see Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Furthermore, we reject employer's assertion that, based on *Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 700 F.3d 878, 25 BLR 2-213 (6th Cir. 2012), the case must be remanded for further consideration of whether claimant established the existence of pneumoconiosis, based on a weighing of all the relevant evidence together at 20 C.F.R. §718.202(a). The Board

[4] The Board summarily denied employer's motion for reconsideration of the award of benefits in both claims. *See Newsome v. D & N Coal Corp.*, BRB No. 11-0235 BLA (Jun. 15, 2012) (unpub. Order).

[5] The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibits 4, 6. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

held previously that "the administrative law judge considered the other medical evidence of record and permissibly concluded that it did not undermine the medical opinion evidence," relevant to the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Newsome*, BRB No. 11-0235 BLA, slip op. at 9. Thus, we conclude that a remand for further consideration based on *Hensley* is not necessary.

Augmentation of Benefits

The regulations allow for the augmentation of benefits if the requisite standards of relationship and dependency are met. 20 C.F.R. §725.201(d). The regulation at 20 C.F.R. §725.209 provides that, for the purpose of augmenting the benefits of a miner or surviving spouse, a child will be determined to be dependent if the child is unmarried, and either under eighteen years of age or under a disability as defined in Section 223(d) of the Social Security Act, 42 U.S.C. §423(d), or the child is eighteen years or older and is a student. *See Hite v. Eastern Assoc. Coal Co.*, 21 BLR 1-46 (1997); *Wallen v. Director, OWCP*, 13 BLR 1-64 (1989). Based on her consideration of the record, the administrative law judge found that claimant's son is unmarried and suffers from a disability as defined in Section 223(d) of the Social Security Act. Decision and Order on Remand at 5-8. We affirm, as unchallenged by employer on appeal, the administrative law judge's findings that claimant satisfied the relationship requirement for her adult son, and that he is disabled. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983).

Employer's sole contention is that administrative law judge erred in augmenting benefits because claimant's son became disabled after the age of 22. Employer contends that the administrative law judge erred in finding that "the age cut-off" date specified in 20 C.F.R. §725.221 is inapplicable under the facts of this case.[6] We disagree.

As noted by the administrative law judge, employer's argument is "based upon [e]mployer's confusion between the standards for a dependent qualifying for survivor's benefits in his own right and the standards for a dependent qualifying as an augmentee." Decision and Order on Remand at 6. In *Hite*, the Board recognized that there are differing standards for determining dependency. The Board held that the child as a dependent and augmentee under 20 C.F.R. §725.209 remains unfettered by the age cut-off requirement mandated in 20 C.F.R. §725.221 for the disabled adult child who seeks benefits in his/her own right. *Hite*, 21 BLR at 1-50, *citing Wallen*, 13 BLR at 1-66-68.

[6] The regulation at 20 C.F.R. §725.221 states that "for purposes of determining whether a child was dependent upon the deceased miner, the provisions of 20 C.F.R. §725.209 shall be applicable, except that for purposes of determining the eligibility of a child who is under a disability as defined in section 223(d) of the Social Security Act, such disability must have begun before the child attained the age of 22." *Id*.

Consequently, the Board has specifically recognized that there is "no time limitation on disabled adult child claims for augmented benefits pursuant to Section 725.209." *Id*.

Furthermore, the Department of Labor, in revising the regulation at 20 C.F.R. §725.209, rejected arguments similar to those asserted by employer, that applying 20 C.F.R. 725.209, without the age cut-off, is inconsistent with the Act:

> (a) In the initial notice of proposed rulemaking, the Department erroneously proposed changing §725.209(a)(2)(ii) to state that, in order to be considered a dependent, a child who is at least 18 and not a student must be under a disability that commenced before the age of 22. The purpose of the change was to reflect in the regulation itself the age by which certain children's disabilities must commence, a requirement imposed by an incorporated provision of the Social Security Act. After further consideration, however, the Department re-proposed the regulation without the new language. Eliminating the age by which the disability must have begun for a dependent child harmonizes §725.209 with the statutory definition by preserving the distinction between a child/augmentee and a child/beneficiary. A child who claims benefits in his or her own right based on personal disability (child/beneficiary) must prove the disability arose before age 22 as required by 30 U.S.C. 902(g). A dependent child who is an augmentee of a beneficiary [under 30 U.S.C. 902(a)(1)], however, is exempt from this requirement *because the statutory definition of "dependent" explicitly exempts a "child" from the requirement that disability begin by a certain age.*

65 Fed. Reg. 79,920, 79,963 (Dec. 20, 2000) (emphasis added) (internal citations omitted).

For all of the above-stated reasons, we reject employer's assertion that the administrative law judge erred by not applying 20 C.F.R. §725.221.[7] Because the

[7] Employer states that claimant's adult son "was not deemed to be a dependent in [the miner's] claim and that should have been dispositive on the issue in [the survivor's] claim." Employer's Brief in Support of Petition for Review at 15. Contrary to employer's assertion, the administrative law judge observed correctly that, with respect to the miner's claim, the district director determined, in an Amended Award of Interim Benefits issued on December 22, 2008, that claimant's adult son "meets all the qualifications to receive augmented benefits as a dependent disabled adult child of the claimant[.]" Director's Exhibit 82; *see* Decision and Order on Remand at 1-4; September 28, 2012 Notice of Assignment on Remand and Order.

administrative law judge's finding at 20 C.F.R. §725.209 is consistent with applicable law and supported by substantial evidence, we affirm her decision to grant augmented benefits to claimant.

Accordingly, the administrative law judge's Decision and Order on Remand Granting Augmented Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge