

BRB No. 09-0148 BLA

D.E.)
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 Claimant-Petitioner)
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 v.) DATE ISSUED: 10/26/2009
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 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Survivor Benefits of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Dana C. Madsen, Spokane, Washington, for claimant.

Michelle S. Gerdano (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Survivor Benefits (2008-BLA-0016) of Administrative Law Judge Steven B. Berlin rendered 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). Claimant seeks survivor benefits as a disabled adult child of a deceased miner who was receiving benefits under the Act.¹ The

¹ The miner filed a claim for benefits on September 7, 1983, which was awarded by the district director on March 12, 1984. Director's Exhibit 1. The benefits were augmented for his wife and two dependent children, claimant and her sister. *Id.*

administrative law judge determined that claimant failed to satisfy the requirements for dependency pursuant to 20 C.F.R. §§725.209, 725.221. Specifically, the administrative law judge noted that claimant had not sufficiently addressed her marital status, although he assumed for the purposes of his decision that claimant had never been married. The administrative law judge found that claimant was not under the age of eighteen or a student, and that the record failed to establish that claimant was under a disability as defined by Section 223(d) of the Social Security Act prior to August 22, 1996, the date upon which claimant attained age twenty-two. Accordingly, the administrative law judge denied benefits.

Claimant appeals, asserting that the administrative law judge erred in denying benefits because she provided “unrebutted evidence that she has been disabled and unable to work since February 2, 1995 to the present.” Claimant’s Brief at 4. The Director, Office of Workers’ Compensation Programs (the Director) responds, urging affirmance of the administrative law judge’s denial of benefits. The Director asserts that “the administrative law judge should have conclusively found that [c]laimant failed to establish she is unmarried” and maintains that since “there is no convincing evidence in the record that [claimant] has never been married or is not now married,” she is not entitled to survivor benefits.² Director’s Letter Brief at 2.

Augmentation ceased for claimant when she graduated from high school on June 30, 1993. *Id.* Approximately seven years later, on November 2, 2000, the miner requested that claimant be reinstated as a dependent for purposes of augmentation of his benefits, based on a disability award issued to claimant on September 29, 2000 by the Social Security Administration (SSA). *Id.* The miner subsequently died on November 23, 2000. Director’s Exhibit 2. On December 6, 2000, the miner’s widow, who is also claimant’s mother, filed a claim for survivor benefits and identified claimant as her disabled adult dependent child. *Id.* The district director awarded survivor benefits to the miner’s widow on January 19, 2001, and also found claimant to be a qualifying dependant of the widow on June 6, 2001. *Id.* The miner’s widow died on January 9, 2008, and claimant filed an application for survivor benefits on February 4, 2008. Director’s Exhibits 3, 5. The district director issued a Proposed Decision and Order on March 14, 2008, finding that claimant had not established her dependency as a disabled adult child. Director’s Exhibit 8. Claimant requested a hearing and the case was assigned to the administrative law judge, who issued a Decision and Order Denying Survivor Benefits on October 15, 2008, which is the subject of this appeal.

² We affirm, as unchallenged by the parties on appeal, the administrative law judge’s findings that claimant satisfied the relationship requirement and that there is no

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 into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The regulations provide that a child of a deceased miner is entitled to benefits if the requisite 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 attained age twenty-two. 20 C.F.R. §§725.209(a)(2)(ii), 725.221. The Social Security Act defines "disability" as 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); *Tackett v. Director, OWCP*, 10 BLR 1-117, 1-118 (1987) (emphasis added). Statements of a claimant, standing alone, are insufficient to prove the existence of disability; thus, medical evidence must be produced. 42 U.S.C. §423(d)(5)(A); *Tackett* at 1-118. 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.

After consideration of the administrative law judge's Decision and Order, the briefs of the parties, and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error because the administrative law judge properly found that the record did not contain any reliable medical evidence establishing the onset of claimant's disability before the age of twenty-two. *See Hite v. Eastern Assoc. Coal Co.*, 21 BLR 1-46 (1997); *Wallen v. Director, OWCP*, 13 BLR 1-64 (1989); Decision and Order at 3.

As noted by the administrative law judge, there is no dispute that claimant was found to be disabled by the Social Security Administration (SSA) as of September 29,

surviving spouse or surviving divorced spouse. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

³ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner's last year of coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 1.

1998.⁴ Decision and Order at 10. The administrative law judge correctly found that claimant attained age twenty-two on August 12, 1996 and, therefore, he properly focused his inquiry on whether the record established that claimant was also disabled, as defined by Social Security Act, prior to August 12, 1996. *Id.*; see 20 C.F.R. §§725.209(a)(2)(ii), 725.221.⁵

Initially, the administrative law judge considered whether claimant satisfied her burden of proving that she had not been engaged in any substantial gainful work activity prior to age twenty-two. Decision and Order at 11. The administrative law judge noted that the 1998 SSA decision indicated that claimant had past work as a day care provider, thereby suggesting that claimant had been engaged in gainful employment “for at least some of the time before she attained age [twenty-two].” *Id.* However, because the record was “poorly developed” with respect to claimant’s work history, the administrative law judge also considered whether the medical evidence established that claimant was disabled prior to August 12, 1996.⁶ *Id.*

The administrative law judge correctly noted that the medical evidence of record consists of progress notes and opinions of two treating physicians, Drs. McCarthy and Clode.⁷ Dr. McCarthy’s treatment notes begin with a diagnosis of asthma on October 28, 1983, when claimant was nine years old. Claimant’s Exhibit (unmarked). Dr. McCarthy continued to treat claimant for allergy flare-ups and intermittent asthmatic attacks over the following five years. *Id.* He recommended that claimant avoid allergens and aspirin,

⁴ The SSA found that claimant was disabled by obesity, the residuals of a fractured tibia and knee injury, asthma, migraine headaches, depression (due to family stress and her weight) and a “conversion disorder with mixed presentation.” Director’s Exhibit 1.

⁵ The administrative law judge also analyzed the evidence in conjunction with the regulatory scheme devised by SSA for making a disability determination. See 20 C.F.R. §404.1520(a)(4)(i)-(iv); Decision and Order at 10.

⁶ The administrative law judge noted that claimant’s counsel had also represented claimant at the Social Security hearing and inferred that “counsel is fully aware of the documentation needed to make out a claim of disability under the Social Security Act.” Decision and Order at 4 n.8. Thus, the administrative law judge concluded that if claimant had failed to provide the appropriate documentation to verify her work history in this claim, “it was not because she was unaware of what was needed.” *Id.*

⁷ We note that claimant submitted all of her supporting evidence to the administrative law judge in an attachment that was unmarked for identification by either the administrative law judge or claimant. For the purposes of this decision, we reference claimant’s evidence as being contained in Claimant’s Exhibit (unmarked).

and prescribed bronchodilator by inhaler twice daily. In April 1987, Dr. McCarthy wrote that claimant's asthma "is much better doing physical exercise and more active in other ways . . . much improved." *Id.* Dr. McCarthy, however, also indicated that claimant was obese and suffered from mild hypertension. *Id.*

The administrative law judge observed that there was a gap in Dr. McCarthy's treatment records between April 1987 and February 1993.⁸ Decision and Order at 4. In a progress note dated October 26, 1993, when claimant was nineteen years old, Dr. McCarthy reported that claimant had been "fine" until she ingested strawberries, but also described that her asthma was in "chronic poor control." Claimant's Exhibit (unmarked). Claimant saw Dr. McCarthy on December 7, 1993, January 4, 1994 and February 9, 1994 for flare-ups of asthma, at which times he indicated that claimant was not using her inhaler as directed or complying with his instructions to avoid cigarette smoke exposure. *Id.*

Dr. McCarthy examined claimant on February 2, 1995 and diagnosed that she had "marked impairment" from asthma, which caused a "very significant interference with the ability to perform one or more basic work-related activity." Claimant's Exhibit (unmarked). He opined that claimant could work at least half-time in a normal day at a light duty level. *Id.* In a letter dated February 11, 1995 addressed to the Washington Department of Social and Health Services, Dr. McCarthy wrote that claimant "has daily disruptive symptoms and takes enough inhaled bronchodilators to put her at risk of death from complications." *Id.* He further stated that "[a]lthough I don't consider [claimant] to be permanently disabled, at this point I do feel she is unable to hold any kind of employment due to her medical problem of asthma." *Id.* On February 23, 1995, Dr. McCarthy completed an evaluation form, indicating that claimant was limited to a light level of exertion, but noted that frequent physical activity such as walking could "worsen" claimant's asthma. *Id.* In his last progress note dated March 6, 1996, which was five months prior to claimant's twenty-second birthday, Dr. McCarthy wrote that claimant was to see Dr. Clode for treatment of her asthma, which he described as "mild, chronic, no flares." *Id.*

By letter dated September 3, 1996, addressed to the Washington Division of Vocational Rehabilitation, Dr. Clode stated that "[claimant's] asthmatic control is really fairly good at the present time[,] although I would not want to see her work in any particularly dusty environment which might impair her respiratory status." Claimant's

⁸ The administrative law judge indicated that the medical record presented to him was incomplete since the exhibit list from the SSA hearing indicated that Dr. McCarthy's records were 181 pages long and "nothing like that is in the present record." Decision and Order at 4 n.8.

Exhibit (unmarked). Dr. Clode also examined claimant on August 17, 1998 and noted that claimant suffered asthma from birth and migraine headaches since April of 1991. *Id.* He assessed that claimant was able to perform part-time work at the sedentary level. *Id.*

The administrative law judge found that while there are references in the record to claimant having migraine headaches for the relevant time period, there is no evidence to establish that claimant's migraine headaches were of such severity as to render claimant disabled. Decision and Order at 11-12. Additionally, the administrative law judge noted that while claimant was diagnosed with obesity, that condition was also not identified as preventing claimant from any substantial gainful work activity.⁹ *Id.* at 12.

The administrative law judge also found that claimant failed to establish that she was disabled prior to age twenty-two as a result of asthma. Although Dr. McCarthy reported on February 11, 1995 that claimant was unable to work due to her asthma, the administrative law judge reasonably concluded that Dr. McCarthy failed to explain his disability diagnosis "within the meaning of the Social Security Act," which requires consideration of vocational factors. Decision and Order at 13. Specifically, the administrative law judge found that Dr. McCarthy did not address whether claimant was precluded from performing any "other work in the national economy," not just her usual employment." *Id.* Moreover, the administrative law judge noted that "[e]ven assuming that Dr. McCarthy's opinion is otherwise reliable, nothing about it indicates that [c]laimant's condition had lasted [twelve] months or was likely to continue lasting until at least [twelve] months had passed; indeed the evidence of the record is to the contrary." *Id.* Additionally, the administrative law judge found that the form completed by Dr. McCarthy on February 23, 1995, negates any finding of disability since he indicated that claimant could perform sedentary work. Decision and Order at 14.

With respect to Dr. Clode's treatment, the administrative law judge properly found that the only restriction identified by Dr. Clode in his September 3, 1996 correspondence to the Washington Division of Vocational Rehabilitation was that claimant should avoid working in any dusty environment. Decision and Order at 14-15; Director's Exhibit 2. Dr. Clode specifically check-marked a box on the August 17, 1998 physical evaluation

⁹ The administrative law judge properly rejected claimant's assertion that she had all of the medically determinable impairments identified by SSA prior to age twenty-two. In this regard, the administrative law judge found that while claimant was awarded SSA disability, in part, based on depression and conversion disorder, there was no evidence of psychological impairments in the record before him. Decision and Order at 17 n.22. Furthermore, the administrative law judge found that "nothing on the record shows that [c]laimant was experiencing pain (lasting at least [twelve] consecutive months) related to her history of a broken leg and injured knee prior to age [twenty-two]." *Id.*

form indicating that claimant could perform at least part-time sedentary work. Decision and Order at 15-17. Thus, we affirm the administrative law judge's finding that the treatment records and reports by Drs. McCarthy and Clode fail to establish that claimant was disabled as of August 22, 1996, the date when she turned age twenty-two. Decision and Order at 15-17.

The administrative law judge has discretion to make credibility determinations and draw inferences from the record before him. See *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Claimant's general assertion that the evidence is sufficient to establish her burden of proof amounts to no more than a request that the Board reweigh the evidence of record, which is beyond the Board's scope of review. See *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). We affirm, as supported by substantial evidence, the administrative law judge's finding that the record, as a whole, established that claimant could perform sedentary work prior to age twenty-two and, therefore, was not disabled pursuant to 20 C.F.R. §§725.209, 725.221, from engaging in a substantial gainful activity by reason of any medically demonstrable physical or mental impairment.¹⁰ See 20 C.F.R. §§725.209, 725.221; *Hite v. Eastern Associated Coal Co.*, 21 BLR 1-46 (1997); *Wallen v. Director, OWCP*, 13 BLR 1-64 (1989). Thus, we affirm the administrative law judge's finding that claimant failed to establish dependency pursuant to 20 C.F.R. §725.218(a). Because claimant has failed to satisfy her burden to establish dependency, a requisite element of entitlement in this survivor's claim, we affirm the administrative law judge's denial of benefits. See *Tackett*, 10 BLR at 1-118.

¹⁰ Because we affirm the administrative law judge's finding that claimant has not established disability pursuant to 20 C.F.R. §§725.209, 725.221, we need not address the Director's assertions that the record does not establish that claimant has never been married or is not now married.

Accordingly, the administrative law judge's Decision and Order Denying Survivor Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge