

BRB No. 92-0150 BLA

DAVID M. SAUNDERS)
)
 Claimant-Petitioner)
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 v.)
)
 SHANNON-POCAHONTAS COAL) DATE ISSUED:
 COMPANY)
)
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Melvin Warshaw, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

William T. Brotherton, III, Charleston, West Virginia, for employer.

Tanya P. Harvey (Thomas S. Williamson, Jr., Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: BROWN and McGRANERY, Administrative Appeals Judges, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order (91-BLA-1697) of Administrative Law Judge Melvin Warshaw denying modification pursuant to 20 C.F.R. §725.310, and consequently denying augmented benefits on behalf of claimant's disabled child 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 determined that Administrative Law Judge Richard E. Huddleston issued a Decision and Order on December 21, 1987, wherein he awarded benefits to claimant but found that the evidence failed to establish that claimant's adult disabled daughter was a dependent child for the purpose of augmenting benefits. Accordingly, benefits were awarded and augmented by only one dependent, claimant's wife. Employer appealed, but claimant did not file a cross-appeal regarding the augmentation issue, and the Board affirmed the administrative law judge's Decision and Order awarding benefits.

Upon the district director's issuance of an Order to Show Cause as to why modification proceedings should not be instituted, and employer's opposition thereto, this case was forwarded to the Office of Administrative Law Judges and assigned to Administrative Law Judge Warshaw. Administrative Law Judge Warshaw found that the evidence failed to establish either a mistake in a determination of fact or a change in conditions pursuant to Section 725.310, and thus denied modification.

In the instant appeal, claimant challenges the administrative law judge's denial of modification pursuant to Section 725.310. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds in support of claimant'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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant maintains that his adult disabled daughter, Martha, meets the relationship and dependency requirements of 20 C.F.R. §§725.208 and 725.209, and thus contends that modification pursuant to Section 725.310 is appropriate based on Administrative Law Judge Huddleston's mistake in a determination of fact, *i.e.*, that Martha was not a dependent child for the purpose of augmenting benefits. Administrative Law Judge Warshaw, however, noted that Administrative Law Judge

Huddleston found that Martha was not a dependent child because she became disabled after she attained age 18, rather than before age 18 as specified by the provisions at 20 C.F.R. §725.221, which are applicable when determining whether a child qualifies as the dependent of a *deceased* miner. Administrative Law Judge Warshaw therefore found that since Administrative Law Judge Huddleston's factual findings were accurate, the dispute is one of law, which is not a proper basis for modification pursuant to Section 725.310. Claimant and the Director disagree with the administrative law judge, arguing that the augmentation issue involves the application of legal standards to a set of facts and is thus a question of fact for purposes of modification.

Subsequent to the issuance of the administrative law judge's Decision and Order denying modification, the United States Court of Appeals for the Fourth Circuit, wherein appellate jurisdiction of this case lies, held that the Director's interpretation of the modification regulation is entitled to deference, thus if a claimant avers generally that the administrative law judge improperly found the ultimate fact and erroneously denied benefits, the district director and/or the administrative law judge have the authority to modify the denial of benefits. *Jessee v. Director, OWCP*, No. 92-2279, F.3d , BLR (4th Cir., Sept. 2, 1993). In light of *Jessee*, we vacate the administrative law judge's denial of modification, and remand this case for the administrative law judge to determine whether claimant's daughter qualifies as a dependent child pursuant to Sections 725.208 and 725.209 for the purpose of augmenting claimant's benefits, and whether modification is consequently appropriate pursuant to Section 725.310.

Accordingly, the administrative law judge's Decision and Order denying modification and augmented benefits is vacated, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY

Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge