

BRB No. 13-0290 BLA

BARBARA A. MEEKS)
(Widow of ROGER MEEKS))
)
 Claimant-Respondent)
)
 v.)
)
 KELLY CREEK RESOURCES)
)
 and)
)
 AMERICAN MINING INSURANCE) DATE ISSUED: 04/18/2014
 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 Granting Augmented Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Thomas L. Wyatt (Summers & Wyatt, P.C.), Chattanooga, Tennessee, for claimant.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting Augmented Benefits (2010-BLA-05905) of Administrative Law Judge Daniel F. Solomon, rendered on 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).

Claimant¹ filed her claim for survivor's benefits on September 26, 2005, and the district director awarded benefits on November 29, 2005. Director's Exhibits 2, 12. On January 29, 2010, the district director issued an amended award, finding that claimant's adult daughter is disabled, and that, therefore, claimant is entitled to augmented benefits. Employer disagreed with the award of augmented benefits, and, at employer's request, the case was referred to the administrative law judge for a hearing. The administrative law judge determined that claimant's adult daughter is disabled, and thus qualifies as a dependent pursuant to 20 C.F.R. §725.209, for purposes of the augmentation of benefits. Accordingly, the administrative law judge ordered employer to pay augmented survivor's benefits to claimant.

On appeal, employer argues that the administrative law judge erred in finding claimant's daughter to be disabled. Claimant responds, urging affirmance of the award of augmented benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's contention that the administrative law judge failed to apply the proper criteria in finding claimant's daughter to be disabled.

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.² 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹ Claimant is the surviving spouse of the miner, who died on August 30, 2005. Director's Exhibit 2.

² The miner's last coal mine employment was in Tennessee. Director's Exhibit 3. 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, 1-202 (1989) (en banc).

A miner's spouse who is receiving survivor's benefits may qualify for augmented benefits on behalf of a child if the requisite standards of relationship and dependency are met.³ See 20 C.F.R. §§725.201(d), 725.209. Employer asserts that claimant failed to establish that her daughter is her dependent. As is relevant here, a survivor's child is dependent, for purposes of augmentation, if the child is unmarried and "under a disability as defined in section 223(d) of the Social Security Act, 42 U.S.C. 423(d)." 20 C.F.R. §725.209(a)(2)(ii). Section 223(d) of 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).

In considering whether claimant's daughter is disabled, as defined by the Social Security Act, the administrative law judge initially noted that, in support of her claim for augmented benefits, claimant submitted a copy of a December 30, 2008, Social Security Administration (SSA) award of benefits, finding that claimant's adult daughter has been disabled since August 1, 2005.⁴ Decision and Order at 3; Director's Exhibit 8. Although, as the administrative law judge found, the award of Social Security disability benefits to claimant's daughter does not automatically entitle claimant to augmented black lung benefits, such an award is highly probative. See *Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 503, 22 BLR 2-1, 2-22 (4th Cir. 1999) (observing that employer "likely ha[d] no defense to augmentation on the merits" where claimant's son's receipt of Social Security disability benefits was in the record); *Scalzo v. Director, OWCP*, 6 BLR 1-1016, 1-1019-20 (1984) (holding that determination regarding disability by SSA "is

³ Employer does not dispute that claimant's daughter is her child, pursuant to 20 C.F.R. §725.208, and that claimant's daughter is unmarried, pursuant to 20 C.F.R. §725.209(a)(1). Those findings are therefore affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8-9.

⁴ Specifically, Administrative Law Judge William P. Newkirk of the Social Security Administration found that claimant's daughter had a severe impairment due to a stroke suffered in 1999; obesity; knee pain; shortness of breath; right wrist numbness; and memory problems "resulting in organic and affective mental disorders." Director's Exhibit 8. Judge Newkirk further determined that the combination of her exertional and non-exertional limitations left claimant's daughter with a residual functional capacity that restricted her to "less than even the full range of sedentary work, with mental capacity limitations essentially precluding a residual function capacity for engagement in any type of substantial gainful activity on a sustained basis." *Id.* Judge Newkirk thus found that claimant's daughter could not perform her past work or any other jobs existing in the national economy, and awarded benefits. *Id.*

highly probative evidence which, if not controlling, can be afforded great weight”); Decision and Order at 9.

Contrary to employer’s argument, and as the Director asserts, the administrative law judge then rationally considered the same five criteria used by the SSA to determine disability, *see* 20 C.F.R. §§404.1520, 416.920, together with the medical treatment notes submitted by employer, and reasonably determined that there was no evidence of record that undermined the SSA award. *See Stanley*, 194 F.3d at 503, 22 BLR at 2-22; *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); Decision and Order at 9-15; Employer’s Brief at 12-13; Director’s Brief at 2-3. Employer argues that the administrative law judge erred in his analysis of the medical treatment records. However, employer does not contend that the SSA award of disability benefits to claimant’s daughter was erroneous, or that it is no longer valid. *See Stanley*, 194 F.3d at 503, 22 BLR at 2-22; *Scalzo*, 6 BLR at 1-1019-20. Rather, employer is asking for a reweighing of the evidence, which the Board is not empowered to do. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Substantial evidence supports the administrative law judge’s determination that employer failed to present evidence calling into question the SSA determination that claimant’s daughter is disabled as defined in section 223(d) of the Social Security Act, 42 U.S.C. 423(d). *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); Decision and Order at 15. We, therefore, affirm the administrative law judge’s findings that claimant met her burden of proof to establish that her daughter is a dependent child, pursuant to 20 C.F.R. §725.209(a)(2)(ii), and that claimant is entitled to augmented benefits, pursuant to 20 C.F.R. §725.201(d).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge