

BRB Nos. 13-0384 BLA  
and 13-0384 BLA-A

RICHARD E. TOY )  
)  
Claimant-Petitioner )  
Cross-Respondent )  
)  
v. )  
)  
CARPENTERTOWN COAL & COKE )  
COMPANY )  
)  
and )  
)  
BIRMINGHAM FIRE ) DATE ISSUED: 04/30/2014  
INSURANCE/CHARTIS )  
)  
Employer/Carrier- )  
Respondents )  
Cross-Petitioners )  
)  
DIRECTOR, OFFICE OF WORKERS' )  
COMPENSATION PROGRAMS, UNITED )  
STATES DEPARTMENT OF LABOR )  
)  
Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Lynda Glagola (Lungs at Work), McMurray, Pennsylvania, Lay Representative, for claimant.

Christopher L. Wildfire (Pietragallo Gordon Alfano Bosick & Raspanti, LLP), Pittsburgh, Pennsylvania, for employer/carrier.

Maia S. Fisher (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer/carrier (employer) cross-appeals, the Decision and Order (2012-BLA-5918) of Administrative Law Judge Drew A. Swank awarding augmented benefits on a miner's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-044 (2012)(the Act). This case is before the Board for the second time. In a Decision and Order dated January 29, 2010, Administrative Law Judge Thomas M. Burke adjudicated the claim, filed on June 25, 2007, pursuant to 20 C.F.R. Part 718, and awarded benefits commencing the month during which the claim was filed, augmented by reason of claimant's dependent spouse. Judge Burke's award of benefits was affirmed by the Board on March 30, 2011. *Toy v. Carpentertown Coal & Coke Co.*, BRB No. 10-0364 BLA (Mar. 30, 2011)(unpub.).

Following claimant's request to additionally augment benefits for his disabled stepson<sup>1</sup> and the submission of documentation, the district director issued an amended award of benefits to reflect that Paul Schrecengost was the dependent disabled adult stepson of claimant and that augmentation of benefits on his behalf was retroactive to June 2007, the month and year that claimant filed for benefits. Director's Exhibit 47. Employer requested a hearing, Director's Exhibit 58, and the case was assigned to Judge Swank (the administrative law judge).

In a Decision and Order issued on April 29, 2013, the administrative law judge reviewed the evidence of record and determined that Mr. Schrecengost qualified as a dependent disabled child of the miner pursuant to 20 C.F.R. §§725.208(c),<sup>2</sup> 725.209(a).<sup>3</sup>

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<sup>1</sup> Claimant's letter to the district director requesting augmentation of benefits is not in the file. However, the file reflects that on July 20, 2011, the district director acknowledged claimant's request. Director's Exhibit 44.

<sup>2</sup> Section 725.208 provides, in pertinent part, that an individual will be considered to be the child of a beneficiary if the individual is the stepchild of such beneficiary by reason of a valid marriage of the individual's parent to such beneficiary. 20 C.F.R. §725.208(c).

<sup>3</sup> Section 725.209 provides, in pertinent part, that for purposes of augmenting the benefits of a miner. . . an individual who is the beneficiary's child will be determined to be dependent on the beneficiary, if the child (1) is unmarried; and (2) is under a disability as defined in section 233(d) of the Social Security Act, 42 U.S.C. 423(d).

The administrative law judge further determined, however, that the doctrine of collateral estoppel precluded the award of augmented benefits on behalf of Mr. Schrecengost payable prior to January 29, 2010, the date Judge Burke's Decision and Order was issued. Accordingly, the administrative law judge found that payment of augmented benefits on behalf of Mr. Schrecengost would not begin until December 21, 2011, the date that claimant demonstrated, through the submission of Social Security Administration (SSA) records, that the condition of dependency through disability had been met under 42 U.S.C. §423(d).<sup>4</sup>

In the present appeal, claimant challenges the administrative law judge's determination that augmented benefits on behalf of Mr. Schrecengost are payable from December 21, 2011, rather than from June 2007. Employer cross-appeals, challenging the administrative law judge's determination that the award of benefits was properly augmented to include Mr. Schrecengost as claimant's disabled adult stepson. The Director, Office of Workers' Compensation Programs (the Director), has filed a consolidated response, agreeing with claimant that augmented benefits on behalf of claimant's adult disabled stepson are payable as of June 2007.<sup>5</sup>

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.<sup>6</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hichman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We will first address employer's argument on cross-appeal, that the administrative law judge erred in augmenting the award of benefits to include payments on behalf of

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<sup>4</sup> The regulations at 20 C.F.R. §725.209 use the Social Security Act (SSA) definition of disability to determine eligibility for black lung benefits. *See* 20 C.F.R. §725.209(a)(2)(ii); *Betty B Coal Company v. Director, OWCP* [*Stanley*], 194 F.3d 491, 503, 22 BLR 2-1, 2-22 (4th Cir. 1999); *Hite v. Eastern Assoc. Coal Co.*, 21 BLR 1-46, 1-49 (1997).

<sup>5</sup> We affirm, as unchallenged on appeal, the administrative law judge's finding that Paul Schrecengost meets the relationship and dependency requirements of an augmentee pursuant to 20 C.F.R. §§725.208(c), 725.209(a)(2)(ii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

<sup>6</sup> The law of the United States Court of Appeals for the Third Circuit is applicable, as claimant was employed in the coal mining industry in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3.

claimant's disabled stepson. Employer asserts that claimant is collaterally estopped from relitigating the augmentation issue, arguing that Judge Burke's determination, that claimant had only one dependent, his wife, for purposes of augmentation, is not subject to revisitation. Employer also argues that claimant waived this issue, because he failed to raise it before the district director or Judge Burke, and never previously claimed his stepson as a dependent under the Act. Employer further maintains that modification of the award of benefits is not appropriate in this case, because there is no "change" in status and no "mistake of fact," as Mr. Schrecengost existed in the same relationship with claimant at the time of the prior litigation. Lastly, employer argues that, because it had no notice or opportunity to oppose Mr. Schrecengost's dependency status, and because the increased payment creates an unforeseen and unanticipated liability, employer's due process rights were violated, mandating that the Black Lung Disability Trust Fund assume responsibility for the increased augmented benefits. Employer's Brief at 6-11. Employer's arguments are without merit.

We reject employer's argument that the doctrine of collateral estoppel<sup>7</sup> is applicable to preclude claimant from "relitigating" the issue of augmentation of benefits in this claim. Contrary to employer's argument, Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.310, authorizes the district director or any party, at any time before one year from the date of the last payment of benefits or the denial of benefits, to seek modification of an award or denial, based on a change in conditions or a mistake in a determination of fact. 20 C.F.R. §725.310; *see Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-61-63 (3d Cir. 1995). Furthermore, as the fact-finder has the discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted, we find no merit to employer's arguments that the augmentation issue was waived or that modification is not applicable in this instance because there has been no "change" or "mistake." *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-29 (4th Cir. 1993)(concluding that the fact-finder may "simply rethink" a prior finding). In the present case, the administrative law judge reviewed the evidence of record and determined that claimant demonstrated that "[Mr.] Schrecengost met the conditions of relationship and dependency" and that "claimant could add additional

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<sup>7</sup> Under the doctrine of collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. *Montana v. United States*, 440 U.S. 147, 153 (1979); *see Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217, 23 BLR 2-393, 2-400 (4th Cir. 2006).

dependents for benefit augmentation purposes and request that his award be modified accordingly.” Decision and Order at 6. As the modification provisions under Section 725.310 displace the finality of Judge Burke’s decision, and claimant timely sought modification of the terms of his original award of benefits within one year of the Board’s issuance of its Decision and Order, the doctrine of collateral estoppel is inapplicable to preclude the administrative law judge from redetermining the number of claimant’s dependents. *See* 20 C.F.R. §725.310; *Jessee*, 5 F.3d at 725, 18 BLR at 2-29. Additionally, contrary to employer’s assertions, the record reflects that claimant submitted partial documentation in 2007 regarding his stepson’s dependency, which was acknowledged by the district director and placed into evidence before Judge Burke and the administrative law judge.<sup>8</sup> The record also reflects that the issue of dependency was listed as a contested issue before Judge Burke, with the notation that “claimant has two dependents for purposes of augmentation.” Director’s Exhibit 31. As employer was not denied the opportunity to develop evidence and to fully present its case before the administrative law judge on the issue of augmentation, we discern no due process violation, and we reject employer’s arguments to the contrary. *See North Am. Coal Co. v. Miller*, 870 F.2d 948, 951, 12 BLR 2-222, 2-228 (3d Cir. 1989); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-49 (1990); Director’s Exhibits 12, 31, 45, 46, 49, 58. Accordingly, we affirm the administrative law judge’s determination that claimant’s award of benefits was properly augmented to reflect Mr. Schrecengost as a dependent.

We now address claimant’s contention in his appeal that June 2007, the date of claimant’s entitlement to benefits, is the appropriate date from which the payment of augmented benefits on behalf of Mr. Schrecengost should commence. The administrative law judge determined that, pursuant to 20 C.F.R. §725.210,<sup>9</sup> benefits augmented by

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<sup>8</sup> In a 2007 file memo, the district director stated,

When the miner filed, he did not allege any dependents. During claim development, a birth certificate, Social Security Administration verification of income letter, and a note from Dr. Leo [stating that Mr. Schrecengost was not capable of living independently] was submitted on behalf of Paul Schrecengost. Since the claim is denied, development is being curtailed per [Section] 725.414. If the claim is eventually reversed, relationship and dependency of Paul Schrecengost will need to be developed.

Director’s Exhibit 12.

<sup>9</sup> Section 725.210 provides, in pertinent part, that augmented benefits payable on behalf of a child shall begin with the first month in which the dependent satisfies the conditions of relationship and dependency set forth in this subpart. 20 C.F.R. §725.210.

reason of claimant's dependent disabled adult stepson would properly begin with the first month in which the dependent satisfied the conditions of relationship and dependency. Decision and Order at 6. The administrative law judge found that, while the initial documentation submitted by claimant to the district director established Mr. Schrecengost's relationship as claimant's stepson by reason of claimant's marriage in 1995, it was not until claimant submitted the SSA benefit report to the district director on December 21, 2011 that sufficient evidence was submitted to establish that Mr. Schrecengost was under a disability pursuant to 42 U.S.C. 423(d).<sup>10</sup> See 20 C.F.R. §725.209; Decision and Order at 4; Director's Exhibit 51. The administrative law judge concluded that claimant qualified for augmented benefits for the dependent, Mr. Schrecengost, as of December 21, 2011, because that was the date that "claimant demonstrated that [Mr.] Schrecengost met the conditions of relationship and dependency." Decision and Order at 6, 7.

We agree with the Director's interpretation of the plain language of Section 725.210, that the operative date for determining an augmentee's entitlement to benefits is the date the conditions of relationship and dependency are met or "satisfied," rather than the date that the evidence of those conditions is submitted into the record. See 20 C.F.R. §725.210. As the administrative law judge determined that Mr. Schrecengost became claimant's stepson in 1995 and that he was disabled prior to that time, Mr. Schrecengost met the requirements of relationship and dependency prior to the filing of claimant's application for benefits and is, therefore, entitled to benefits from June 2007, the date of claimant's entitlement. See *Adler v. Peabody Coal Co.*, 22 BLR 1-43, 1-51 (2000); 20 C.F.R. §725.503(d)(1). Consequently, we modify the administrative law judge's decision to reflect that claimant is entitled to augmented benefits on behalf of Mr. Schrecengost, payable as of June 2007.

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<sup>10</sup> The SSA benefit report stated that Paul Schrecengost is receiving benefits as a disabled adult under the Social Security Act and that he became disabled prior to the age of twenty-two, i.e., prior to 1992. Director's Exhibit 51.

Accordingly, the administrative law judge's Decision and Order is affirmed, as modified to reflect June 2007 as the date from which payment of augmented benefits on behalf of Mr. Schrecengost commence.

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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BETTY JEAN HALL  
Administrative Appeals Judge