

BRB No. 99-1184 BLA

DONNA F. FLOYD)
(o/b/o ARNOLD DUSTIN DAVIS,)
surviving child of CLARENCE E. DAVIS))
)
Claimant-Petitioner)
)
v.)
)
TENNESSEE CONSOLIDATED 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 Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Alexander W. Gothard (Hatcher, Johnson, Meany & Gothard), Chattanooga, Tennessee, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen), Washington, D.C., for employer.

Barry H. Joyner (Henry L. Solano, 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: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (98-BLA-1367) of Administrative Law Judge Mollie W. Neal awarding benefits on a survivor's 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).¹ The administrative law judge found, as uncontested, that the evidence established that the miner's death was due to pneumoconiosis, *see* 20 C.F.R. §718.205. The administrative law judge further found that claimant established that he was the miner's surviving child in accordance with the laws of Tennessee and the regulations, *see* 20 C.F.R. §§725.208(a), (d), (f)(1) and 725.220(a), (d), (f)(1). Finally, the administrative law judge found that claimant established that he was dependent on the deceased miner under 20 C.F.R. §§725.209 and 725.221. Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in finding that claimant is a surviving child of the miner. Claimant responds, urging that the administrative law judge's Decision and Order be affirmed. The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, responds, urging the Board to vacate the administrative law judge's finding and remand the case for reconsideration.

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

¹ Claimant is Arnold Dustin Davis. Claimant's mother, Donna F. Floyd, filed a survivor's claim on behalf of claimant as the surviving child of the miner, Clarence E. Davis, on September 3, 1998, Director's Exhibit 1.

The administrative law judge noted that the only contested issue in this survivor's claim was whether claimant was a surviving child of the deceased miner under Section 725.208, *see also* 20 C.F.R. §725.220.² A review of the record indicates that claimant was born on February 14, 1989, Director's Exhibit 2. Claimant was born out of wedlock and claimant's original birth certificate did not list the name of his father, Hearing Transcript at 18; Employer's Exhibit 1 at 9, 23; Director's Exhibit 8. Claimant's mother subsequently married Tommy Walters on November 11, 1989, Hearing Transcript at 18; Employer's Exhibit 1 at 9.³ Claimant's mother testified that she was not entirely sure if her relationships with the miner, Clarence E. Davis, and Tommy Walters had occurred at the same time, Hearing Transcript at 23, 33, 55, 62; Employer's Exhibit 1 at 35, 39-42.

On August 26, 1994, an "Order of Legitimation" was issued by a Tennessee Juvenile Court based on a joint petition filed by claimant's mother and the miner naming the miner as the biological father of claimant who had supported claimant since his birth, granting custody of claimant to the miner as his legitimate child and ordering that a new birth certificate be issued reflecting that claimant's last name be the same as the miner's last name, Director's Exhibit 8. At the time the Order was issued, the husband of claimant's mother, Tommy Walters, was deceased, claimant's mother was in jail, and claimant was living in a children's home, Hearing Transcript at 24-25, 42, 54. Subsequently, claimant lived with the miner until the miner's death on September 23, 1996, Director's Exhibit 4; Hearing Transcript at 23, 28; Employer's Exhibit 1 at 48, 71. Although the miner had been awarded benefits on a miner's claim since January, 1991, claimant was never listed as a child of the miner for the purpose of augmenting the miner's benefits, Director's Exhibit 4, 10, 22; Hearing Transcript at 25, 27, 46, but claimant does receive social security benefits as a surviving child of the miner, Director's Exhibit 4, 8; Hearing Transcript at 27; Employer's Exhibit 1 at 59. Claimant's amended birth certificate, listing the miner as his father and reflecting that claimant's last name is the same as the miner's last name, was ultimately issued on October 16, 1997, Director's Exhibit 2.

² Inasmuch as the administrative law judge's findings that the miner's death was due to pneumoconiosis, *see* 20 C.F.R. §718.205, and that claimant established that he was dependent on the miner under Sections 725.209 and 725.221 are not challenged, they are affirmed, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

³ A review of the record does not support employer's contention that it is possible that claimant was born when his mother was married to Tommy Walters, giving rise to a presumption that claimant is the child of Tommy Walters. The record indicates that claimant was born on February 14, 1989, Director's Exhibit 2, whereas claimant's mother did not marry Tommy Walters until November 11, 1989, Hearing Transcript at 18; Employer's Exhibit 1 at 9.

In determining whether an individual may qualify as the child of a deceased miner, Section 725.220 provides that the provisions of Section 725.208 apply and then sets forth provisions identical to Section 725.208, which the administrative law judge applied in this case.⁴ Section 725.220 provides in relevant part:

For purposes of a survivor's claim, an individual will be considered to be a child of a beneficiary if:

(a) The courts of the State in which such beneficiary is domiciled (see § 725.231) would find, under the law they would apply in determining the devolution of the beneficiary's intestate personal property, that the individual is the beneficiary's child; or

(d) Such individual does not bear the relationship of child to such beneficiary under paragraph (a), (b), or (c) of this section, but would, under State law, have the same right as a child to share in the beneficiary's intestate personal property; or

(f) Such individual is the natural son or daughter of a beneficiary but does not have the relationship of child to such beneficiary under paragraph (a), (b), or (c) of this section, and is not considered to be the child of the beneficiary under paragraph (d) or (e) of this section, such individual shall nevertheless be considered to be the child of such beneficiary if:

(1) Such beneficiary, prior to his or her entitlement to benefits, has acknowledged in writing that the individual is his or her son or daughter, or has been decreed by a court to be the father or mother of the individual, or has been ordered by a court to contribute to the support of the individual (see § 725.233(a)) because the individual is

⁴ We reject claimant's contention that employer had the burden to prove that claimant is not the surviving child of the miner. Claimant must prove all the elements of entitlement, including claimant's status as an eligible surviving child of the miner, *see* 20 C.F.R. §§718.403, 725.4, 725.218, 725.220; *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994) *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

a son or daughter; or

(2) Such beneficiary is shown by satisfactory evidence to be the father or mother of the individual and was living with or contributing to the support of the individual at the time such beneficiary became entitled to benefits.

See 20 C.F.R. §725.220; *see also* 20 C.F.R. §725.208.

Thus, the administrative law judge considered the applicable law of Tennessee, the domicile of the miner at his death, *see* 20 C.F.R. §725.231(b). The administrative law judge found that the applicable section of the Tennessee Code provides that for purposes of intestate succession, a person born out of wedlock is the child of the father if:

The paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof.

Tenn. Code Ann. §31-2-105(a)(2)(B); *see also* *Bilbrey v. Smithers*, 937 S.W.2d 803, 807 (Tenn. 1996). Consequently, the administrative law judge found the 1994 “Order of Legitimation” issued by the Tennessee Juvenile Court naming the miner as claimant’s father established that claimant was the miner’s surviving child in accordance with laws of Tennessee and the “relationship prong of the eligibility test” in the regulations, Decision and Order at 5-6. *See* 20 C.F.R. §725.220(a). Alternatively, the administrative law judge held that by virtue of the state court Order, claimant would have the same right as a child to share in the miner’s intestate personal property under Section 725.208(d), *see also* 20 C.F.R. §725.220(d).⁵

⁵ The administrative law judge also found that the regulations do not require that a child be the biological child of the putative father if, under Section 725.208(f)(1), *see also* 20 C.F.R. §725.220(f)(1), the putative father acknowledges the child in writing and/or it has been decreed by a court. Contrary to the administrative law judge’s finding that claimant could also be considered the surviving child of the miner under Section 725.208(f)(1), *see also* 20 C.F.R. §725.220(f)(1), because the miner acknowledged claimant as his child in writing and it had been decreed by a court, Decision and Order at 7, Sections 725.208(f)(1) and 725.220(f)(1) require the miner to have acknowledged claimant as his child in writing prior to the miner’s entitlement to benefits. A review of the record indicates that the miner began receiving benefits on a miner’s claim in January, 1991, Director’s Exhibit 10, whereas the miner did not file a written petition for, and obtain, an Order of Legitimation until 1994. Moreover, the administrative law judge’s characterization that Section 725.208(f)(1), *see also* 20 C.F.R. §725.220(f)(1), does not require that a child be the biological child of the miner is misplaced, as it requires that claimant be the “natural son” of the miner. Claimant’s contention that claimant would be considered the “natural” child of the miner under the

The administrative law judge further rejected employer's contentions that the state Order may have been procured by fraud or misrepresentation and that the administrative law judge should allow a collateral attack on the Order and compel claimant to submit to DNA blood-testing in order to confirm that claimant was the miner's surviving child. The administrative law judge found that employer failed to allege with particularity or specificity the basis for its allegations of fraud, rendering its contention to be no more than "mere speculation and supposition," and found no reason to doubt the actions of the deceased miner and the testimony of claimant's mother, which he found credible. Decision and Order at 6-7. Alternatively, the administrative law judge also held that employer may not collaterally attack the state court Order before the administrative law judge, because the administrative law judge held that she was without authority to consider employer's allegation of fraud and found that a collateral attack would be time barred under Tennessee law.

Social Security regulations at 20 C.F.R. §404.355 is irrelevant to this case arising under the Act.

Employer contends that the state court Order naming the miner as claimant's father was issued without any actual proof of paternity and without any contested adversarial adjudication giving employer an opportunity to rebut the determination made in the Order by DNA blood-testing. Employer also contends that the record suggests that the Order was obtained improperly, as the miner obtained custody of claimant when claimant's mother was in prison in order to remove claimant from a children's home. Employer notes that claimant's mother testified that she agreed to the Order because she was afraid she would lose her kids and that the miner might "take him forever," *see* Hearing Transcript at 41-42; Employer's Exhibit 1 at 67-68.⁶ Thus, employer contends that the administrative law judge erred in holding that employer may not collaterally attack the state court Order before the administrative law judge. Finally, employer notes that the Tennessee Court of Appeals has held that DNA blood-test results obtained after an Order of Legitimation identifying a child's father was issued can provide grounds to subsequently collaterally attack the Order in state court when it is no longer equitable that the Order be given prospective effect, *see White v. Armstrong*, No. 01A01-9712-JV-00735, 1999 WL 33085 (Tenn. Ct. App., Jan. 27, 1999).⁷

⁶ Claimant's mother also testified, however, that she was not forced to do anything false or fraudulent in jointly seeking to obtain the state court Order, Hearing Transcript at 25, 27, and did not refuse to sign the joint petition, Employer's Exhibit 1 at 54.

⁷ DNA test results contrary to the findings of a prior Order of Legitimation were

presented as evidence in *White v. Armstrong*, No. 01A01-9712-JV-00735, 1999 WL 33085 (Tenn. Ct. App., Jan. 27, 1999), but employer has not submitted contrary DNA test results as evidence in this case, but merely requested that the administrative law judge compel claimant to undergo DNA blood-testing to confirm the miner's paternity in this case. Although claimant contends that a finding as to whether claimant is actually related to the miner is not necessary under Tennessee's workers' compensation law, claimant's contention is irrelevant to this case arising under the Act. However, it is not clear from a review of record who employer wants tested and/or how such testing will rebut the paternity of the deceased miner. Employer originally filed a motion to compel DNA blood-testing in January, 1999, requesting that claimant and another son of the miner's be tested. At the hearing, however, employer stated that it only wanted claimant to be tested, not the other son of the miner's, Hearing Transcript at 6, noting that, apparently, it already had DNA evidence available for comparison from "Mr. Davis," Hearing Transcript at 12. Finally, employer then stated in its post-hearing brief to the administrative law judge that it wanted claimant and his mother tested, but did not clarify how the miner's paternity could be disproved by such a test.

In regard to whether employer could collaterally attack the state court Order before the administrative law judge, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that a federal tribunal should accept the determination made by the State court where the following prerequisites are found:

1) An issue in a claim for federal benefits previously has been determined by a State court of competent jurisdiction; 2) this issue was genuinely contested before the State court by parties with opposing interests; 3) the issue falls within the general category of domestic relations law; and 4) the resolution by the State trial court is consistent with the law enunciated by the highest court in the State,

see Gray v. Richardson, 474 F.2d 1370, 1372-1373 (6th Cir. 1973); *see also George v. Sullivan*, 909 F.2d 857, 860-861 (6th Cir. 1990); *Dennis v. Railroad Retirement Board*, 585 F.2d 151, 154 (6th Cir. 1978). The Court further indicated, that in situations falling within the general category of domestic relations when all the prerequisites *supra*, were not found, special deference should nevertheless be given by federal tribunals to the resolution by a State court, as traditionally the states, not the federal government, have been considered the exclusive arbiter of these problems, *id.* Thus, the court held that in cases where a federal tribunal must determine state law in interpreting a federal statute or where the right of a child to federal benefits is controlled by a state's law of intestate succession of personal property, although the federal tribunal is not bound by the decision of a State court, the federal tribunal is not free to ignore an adjudication of a state trial court where it is fair and consistent with the law as enunciated by the highest court of the State, *see Dennis*, 585 F.2d at 153; *Gray*, 474 F.2d at 1373; *see also Commissioner of Internal Revenue v. Estate of Bosch*, 387 U.S. 456, 465 (1967)(in applying a federal statute, if there is no decision by a state's highest court as to an underlying issue of state law, then federal authorities must apply what they find to be the state law after giving "proper regard" to [the] relevant rulings of other courts of the state).

Consequently, because the 1994 "Order of Legitimation" naming the miner as the biological father of claimant was issued by the Tennessee Juvenile Court based on an uncontested joint petition filed by claimant's mother and the miner, without providing employer an opportunity to contest the issue of claimant's paternity, employer could collaterally attack the state court order before the administrative law judge, *see George, supra; see also Gray, supra; Dennis, supra.* Although the administrative law judge was not bound by the state court "Order of Legitimation," the administrative law judge need not ignore it if he found that it was consistent with the law as enunciated by the Tennessee Supreme Court, the highest court of the State, *see Estate of Bosch, supra; Gray, supra; see also Dennis, supra.* As the administrative law judge found, and the Tennessee Supreme Court has held, pursuant to Section 31-2-105(a)(2)(B) of the state code, *see Tenn. Code Ann. §31-2-105(a)(2)(B)*, if there has been an adjudication of paternity prior to the death of the father, the child born out of wedlock inherits by intestate succession as a legitimate child,

title to the decedent's real property vests in that child immediately upon death of the decedent, and no further adjudication is necessary to establish the child's right to inherit, *see Bilbrey*, 937 S.W.2d at 807.

In addition, contrary to employer's and the Director's contentions, the administrative law judge did not base his decision solely on his holding that employer could not collaterally attack the state court "Order of Legitimation." The administrative law judge found that the "Order of Legitimation" was sufficient to meet claimant's burden of proof of establishing that he was the miner's surviving child pursuant to, by inference, Section 725.220(a) in accordance with laws of Tennessee or, alternatively, established that claimant would have the same right as a child to share in the miner's intestate personal property under Section 725.208(d), *see also* 20 C.F.R. §725.220(d). "When the party with the burden of persuasion establishes a prima facie case supported by 'credible and credited evidence,' it must either be rebutted or accepted as true," *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994) *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). In this case, the administrative law judge found no reason to doubt the actions of the deceased miner and testimony of claimant's mother, which he found credible, and the administrative law judge found that employer failed to establish that the "Order of Legitimation" was fraudulently obtained. Thus, the administrative law judge found that employer, in effect, failed to rebut the finding of the "Order of Legitimation" and/or failed to establish any basis to collaterally attack the "Order of Legitimation."

It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded witnesses, *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), and to assess the evidence of record and draw his own conclusions and inferences therefrom, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Moreover, an administrative law judge has discretionary authority under 29 C.F.R. §18.14 and 20 C.F.R. §§725.455 and 725.456(e) when considering the reasonableness of requests to compel discovery, *see Cline v. Westmoreland Coal Co.*, 21 BLR 1-69, 1-77 (1997); *Thomas v. Director, OWCP*, 9 BLR 1-239 (1987). Specifically, it is within an administrative law judge's discretion to refuse an employer's request to compel an examination of a claimant where the administrative law judge finds that the employer did not proffer evidence to support and/or demonstrate that its request for an examination is reasonable under the circumstances and is based on a valid question necessitating the examination, but merely asserted its unsubstantiated opinion that an examination was necessary, *see Allen v. Island Creek Coal Co.*, 15 BLR 1-32 (1991), *aff'd on recon.*, 21 BLR 1-1 (1996). Thus, as the administrative law judge, within his discretion, provided other valid, alternative reasons for his findings, any potential error by the administrative law judge in holding that employer could not collaterally attack the state court Order is harmless, *see Searls v. Southern Ohio*

Coal Co., 11 BLR 1-161 (1988); *Kozele v. Rochester & Pittsburg Coal Co.*, 6 BLR 1-378 (1983); *see also Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Consequently, as the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge when his findings are supported by substantial evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we affirm the administrative law judge's finding that claimant established that he was the miner's surviving child in accordance with the laws of Tennessee and Sections 725.208(a), (d) and 725.220(a), (d) as supported by substantial evidence and we affirm the administrative law judge's denial of employer's request to compel claimant to submit to DNA blood-testing, *see Allen, supra*.

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge