BRB No. 96-1584 BLA

NORMA H. HITE (Widow of JAMES HITE) Claimant-Petitioner v. EASTERN ASSOCIATED COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

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

Bryan A. Sims (Arter & Hadden), Washington, D.C., for employer.

Edward Waldman (J. Davitt McAteer, Acting 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, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (95-BLA-1751) of Administrative Law

[1]Claimant, Norma Hite, is the widow of James Hite, the miner, who died on June 29, 1988. Director's Exhibit 3. The miner was receiving black lung disability benefits at the time of his death pursuant to a claim filed on April 2, 1975. Director's Exhibit 26.

Judge Mollie W. Neal denying augmented survivor's benefits 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). On July 26, 1988, claimant notified the Department of Labor (DOL) of her husband's death, and the district director subsequently awarded survivor's benefits on August 5, 1988. Director's Exhibits 1, 5. Claimant's award of survivor's benefits was later augmented as a result of her daughter's[2] enrollment as a full-time student at Southern West Virginia Community College. Director's Exhibit 6. However, claimant's daughter subsequently withdrew from college, and as a result, claimant has not received augmented benefits on her daughter's behalf since November 1989. Director's Exhibit 12. Claimant currently seeks augmented benefits on behalf of her daughter as a disabled adult child.[3] The administrative law judge found that pursuant to 20 C.F.R. §725.209, claimant was not entitled to augmented benefits because the onset of her daughter's disability did not occur prior to the cessation of her studies in October 1989. Accordingly, the administrative law judge denied augmented benefits. On appeal, claimant argues that the administrative law judge erred in her interpretation of 20 C.F.R. §725.209. Claimant urges the Board to reverse the administrative law judge's decision and award augmented benefits. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a Motion to Remand, agreeing with claimant that 20 C.F.R. §725.209 imposes no age cut-off for establishing the disability of an adult child for purposes of *augmentation* of the benefits of a surviving spouse.

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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[2]Claimant's daughter, Donna Hite, was born on January 7, 1969. Director's Exhibit 11. At the time claimant notified the Department of Labor of the miner's death, claimant's daughter had already attained the age of 18.

[3]On July 30, 1993, the Social Security Administration (SSA) awarded Donna Hite SSA child insurance benefits as a disabled adult child. Director's Exhibit 19.

After citing the requirements of Section 725.209,[4] the administrative law judge stated that "[c]laimant must establish that her daughter...was under a disability as defined in Section 223(d) of the Social Security Act and that such disability began before [claimant's daughter] ceased being a student in October of 1989." Decision and Order at 5. The administrative law judge then proceeded to evaluate the medical evidence and found that the earliest medical report which concluded that claimant's daughter is disabled by her psychiatric problems reaches that conclusion "from December, 1990 forward--after [claimant's daughter] withdrew from school in October, 1989." *Id.* at 8. The administrative law judge, therefore, concluded that there is no medical evidence in the record which establishes disability before claimant's daughter ceased school, therefore, claimant failed to establish her daughter's status as a disabled adult child. *Id.*

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[4]Section 725.209(a) provides, in pertinent part:

> For purposes of augmenting the benefits of a miner or surviving spouse, the term "beneficiary" as used in this section means only a miner or surviving spouse entitled to benefits (see §725.202 and §725.212). An individual who is the beneficiary's child (§725.208) will be determined to be, or to have been dependent on the beneficiary, if the child:
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> (1) Is unmarried; and
>
> (2)(i) Is under 18 years of age; or
>
> (ii) 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); or
>
> (iii) Is 18 years of age or older and is a student.

20 C.F.R. §725.209.

Both claimant and the Director are correct that Section 725.209(a) does not require that claimant demonstrate that her adult daughter became disabled prior to the date she ceased being a student. Although it is not entirely clear from the Decision and Order, the administrative law judge appears to have applied the requirements of Section 725.221[5] instead of Section 725.209. In *Wallen v. Director, OWCP*, 13 BLR 1-64 (1989), the Board compared these two similar regulations and held that there are differing standards for the adult disabled child as an augmentee [Section 725.209] and the adult disabled child who seeks benefits in his/her own right [Section 725.221]. After considering the legislative history of the pertinent provisions of the Social Security Act, 42 U.S.C. §423(d), the Board concluded that the child as a dependent and augmentee under 20 C.F.R. §725.209 remains unfettered by the age cut-off requirement mandated in 20 C.F.R. §725.221 for the disabled adult child who seeks benefits in his/her own right. *Wallen*, 13 BLR at 1-67-68; *see* 42 U.S.C. §§402(a), 402(g); *see also Tackett v. Director, OWCP,* 10 BLR 1-117 (1987). Hence, the Board concluded that nothing in the language of §402(a) of the Social Security

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[5]Section 725.221 provides:

> For the purposes of determining whether a child was dependent upon a deceased miner, the provisions of §725.209 shall be applicable, except that for purposes of determining the eligibility of a child who is under a disability as defined in section 223(d) of the Social Security Act, ***such disability must have begun before the child attained age 18, or in the case of a student, before the child ceased to be a student.***

20 C.F.R. §725.221 (emphasis added).

Act, or in the implementing regulations at 20 C.F.R. §725.209, or in the intent of Congress as reflected in the legislative history warrants the administrative law judge's construction in *Wallen* that the miner's daughter must have become disabled by a specified age to support augmentation of the miner's benefits on her behalf. *Wallen,* 13 BLR at 1-68. Thus, there is no time limitation on disabled adult child claims for augmented benefits pursuant to Section 725.209. Therefore, we vacate the administrative law judge's denial, and remand the case for the administrative law judge to reconsider the issue of claimant's entitlement to augmented benefits under 20 C.F.R. §725.209.[6]

[6]We decline claimant's request to instruct the administrative law judge to award benefits as of December 1, 1990. While the administrative law judge noted that Dr. Whelan's treatment notes from late November and early December 1990 note the presence of a major affective disorder, there is no indication from the decision that the administrative law judge accepted the doctor's conclusions. Decision and Order at 6; Director's Exhibit 19. Furthermore, the question of the marital status of claimant's daughter remains unresolved. *See* Decision and Order at 8, n.4.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge