

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601



BRB No. 16-0021 BLA

MARGARET WOODS)	
o/b/o THEDA M. RITTER)	
(Daughter of GARNETT RITTER))	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED: 12/19/2016
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Petitioner)	DECISION and ORDER

Appeal of the Decision and Order Granting Survivor's Benefits of Pamela J. Lakes, United States Department of Labor.

Joseph E. Wolfe, Brad A. Austin and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Acting 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: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order Granting Survivor's Benefits (2013-BLA-05722) of Administrative Law Judge Pamela J. Lakes awarding benefits on a claim filed pursuant to

the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Claimant is the disabled adult daughter of the deceased miner. This case involves her second request for modification of the district director's denial of her claim for survivor's benefits.¹

In the Decision and Order, the administrative law judge accepted the Director's concession that claimant is the adult daughter of a deceased miner whose death was determined to be due to pneumoconiosis. As to claimant's modification request, the administrative law judge found that claimant demonstrated that she became disabled by Asperger's syndrome prior to the age of twenty-two, thereby establishing a mistake in a determination of fact in the prior denial under 20 C.F.R. §725.310. The administrative law judge further determined that granting modification would render justice under the Act. On the merits, the administrative law judge found that because claimant had not engaged in substantial gainful activity, she had been continuously disabled as of the filing of her claim for survivor's benefits. Accordingly, the administrative law judge awarded survivor's benefits to claimant.

On appeal, the Director initially states that he does not dispute the administrative law judge's finding that claimant has suffered from Asperger's syndrome her entire life. The Director contends, however, that the administrative law judge erred in finding that claimant had been continuously disabled by Asperger's syndrome at the time a survivor's claim was filed on her behalf on March 17, 2010. In support of his argument, the Director maintains that the administrative law judge did not consider evidence that is relevant to whether claimant's employment between 1987 and 2000 constituted

¹ Prior to the miner's death on June 27, 1993, the miner was awarded black lung benefits commencing August 1, 1980. Director's Exhibits 4, 5. His widow was awarded survivor's benefits on July 30, 1993. Director's Exhibits 6, 7. On June 27, 2002, the widow's award was amended to add claimant as an augmentee. Director's Exhibit 9. On August 10, 2009, claimant's mother died. Director's Exhibit 10. On March 17, 2010, claimant's sister, Margaret Woods, filed a survivor's claim on claimant's behalf as a dependent child. Director's Exhibit 12. The district director denied the claim on March 25, 2010, because claimant did not establish that she was disabled prior to age twenty-two, as required by 20 C.F.R. §§725.219 and 725.221. Director's Exhibit 13. On February 11, 2011, claimant requested modification, which the district director denied on June 7, 2011. Director's Exhibits 16, 19. On June 4, 2012, claimant requested modification for the second time, which the district director denied on February 13, 2013, because claimant did not prove that she was disabled prior to turning twenty-two years old. Director's Exhibits 20, 24. At claimant's request, the case was transferred to the Office of Administrative Law Judges on April 30, 2013. Director's Exhibits 25, 27.

substantial gainful activity and did not accurately characterize claimant's job performance. Claimant responds, urging affirmance of the administrative law judge's award of benefits.²

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.³ 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).

The sole issue presented in this case is whether the administrative law judge properly determined that because claimant's approximately thirteen years of employment between 1987 and 2000⁴ did not constitute substantial gainful activity,⁵ claimant's disability had been continuous when her survivor's claim was filed in 2010. The provisions relating to the disability and dependency of an adult child are set forth in the Act and its implementing regulations at 20 C.F.R. §§725.208, 725.209, 725.218-221,

² We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner's death was due to pneumoconiosis, that claimant satisfied the relationship requirements pursuant to 20 C.F.R. §§725.208, 725.218, 725.220, that claimant established that she was under a disability, as defined in the Social Security Act, 42 U.S.C. §423(d), before she attained the age of twenty-two, and that her employment before 1987 did not constitute substantial gainful activity under the Social Security Act. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 8-9.

³ The administrative law judge did not make a finding as to where the miner performed his coal mine employment. A review of the record does not reveal evidence conclusively resolving this issue. Accordingly, where appropriate, the Board will apply federal case law regardless of which United States Court of Appeals was the source of such law. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

⁴ Claimant and her sister testified at the hearing that she was employed by the United States Army Research, Development, and Acquisition Information Systems Activity (RDAISA) from 1986 to 2000. Hearing Transcript at 11, 23. The Director states that there are RDAISA paystubs in the record indicating that claimant's start date was June 21, 1987, but asserts "[t]he exact start date of the employment does not affect the legal analysis . . ." Director's Brief at 3 n.3, *citing* Director's Exhibit 18.

⁵ In 2002, the Social Security Administration granted claimant's application for disability benefits, effective January 5, 2001. Director's Exhibits 8, 18.

725.227, which rely, in large part, on the Social Security Act and its implementing regulations at 20 C.F.R. §§414.1510, 404.1571-1576.

Pursuant to 20 C.F.R. §§725.209(a), 725.219, and 725.221, an adult child must be under a disability that began before age twenty-two and continued until the adult child filed a claim under the Act. *Kidda v. Director, OWCP*, 769 F.2d 165, 8 BLR 2-28 (3d Cir. 1985), *aff'dg Kidda v. Director, OWCP*, 7 BLR 1-202, 1-206 (1984), *cert. denied*, 475 U.S. 1096 (1986). These regulations rely on the definition of “disability” in the Social Security Act as being “the inability to engage in substantial gainful activity by reason of any medically demonstrable physical or mental impairment.” 42 U.S.C. §423(d)(1)(A); *Tackett v. Director, OWCP*, 10 BLR 1-117, 1-118 (1987). The definition of “disability” in the Social Security Act also provides that “an individual shall be determined to be under a disability only if his . . . impairment or impairments are of such severity that he is not only unable to do his previous work but cannot . . . engage in any other kind of substantial gainful work which exists in the national economy” 42 U.S.C. §423(d)(1)(A).

The implementing regulations promulgated by the Social Security Administration (SSA) define the term “substantial gainful activity” as “work that . . . [i]nvolves doing significant and productive physical or mental duties; and . . . [i]s done (or intended) for pay or profit.” 20 C.F.R. §404.1510. The determination of a person’s ability to engage in substantial gainful activity is based on “all of the medical and vocational evidence” presented. 20 C.F.R. §404.1571. If the person has an employment history, the nature of the work performed, the quality of performance, and whether the work occurred under “special conditions” are relevant factors in assessing whether the work was substantial gainful activity. 20 C.F.R. §404.1573(a)-(c).

The SSA regulations further provide, “[g]enerally, . . . [the] primary consideration [is] the earnings . . . derive[d] from the work activity.” 20 C.F.R. §404.1574(a)(1). If a person “worked for substantial earnings,” he or she is “generally” considered “able to do substantial gainful activity.” *Id.* Courts have treated the latter provision as creating a rebuttable presumption of substantial gainful activity. See *Copeland v. Colvin*, 771 F.3d 920, 924 (5th Cir. 2014); *Comstock v. Chater*, 91 F.3d 1143, 1145 (8th Cir. 1996); *Jones v. Shalala*, 21 F.3d 191, 192 (7th Cir. 1994); *Dinkel v. Sec'y of Health & Human Servs.*, 910 F.2d 315, 319 (6th Cir. 1990); *Chicager v. Califano*, 574 F.2d 161, 163 (3d Cir. 1978). To determine whether a person’s earnings were substantial, a comparison must be made to the table set forth in 20 C.F.R. §404.1574(b)(2).

In addition, the SSA regulations explain when substantial gainful activity is not established, which includes situations where the claimant is unable “to do ordinary or simple tasks satisfactorily without more supervision or assistance than is usually given

other people doing similar work,” or where the work “involves minimal duties that make little or no demands . . . and that are of little or no use to [the] employer. . . .” 20 C.F.R. §404.1573(b). Further, 20 C.F.R. §404.1573(c) of the SSA regulations discusses work that is performed “under special conditions,” such as in sheltered workshops, and sets forth conditions under which such work may or may not be considered substantial gainful activity. Factors to be considered relating to a claimant’s work impairment include: whether the claimant needed special assistance from other employees, worked irregular hours, needed frequent breaks, was able to get to work only with the help of others, was permitted to work at a lower standard of productivity, and received the opportunity to work only because of a family relationship or the employer’s concern for the claimant’s welfare. 20 C.F.R. §404.1573(c).

In this case, the work at issue is claimant’s employment at the United States Army Research, Development, and Acquisition Information Systems Activity (RDAISA) from 1987 to 2000.⁶ During her first ten years at RDAISA, claimant was a “table operator,” which required her to perform tasks involving a mainframe computer. Hearing Transcript at 11. Her last three years of employment were spent operating a printing machine and handling classified mail. *Id.* at 12-13. Claimant was required to have a security clearance when her duties included handling classified mail. *Id.* at 11; Director’s Exhibit 18 (report from Colonel Buck, dated February 14, 2000). Due to performance issues with handling classified mail, claimant’s security clearance was revoked in 2000 and her employment with RDAISA ended.⁷ Hearing Transcript at 17-18; Director’s Exhibit 18 (report from Colonel Buck, dated February 14, 2000; undated letter from Margaret Woods at 9).

In the administrative law judge’s Decision and Order, she summarized the evidence relevant to the nature of claimant’s work at RDAISA in detail. Decision and Order at 3-6. The administrative law judge then set forth her ultimate determination as to whether claimant’s job at RDAISA constituted substantial gainful activity in a separate section of her Decision and Order, accompanied by factual findings relevant to whether

⁶ Prior to claimant’s employment at RDAISA, she worked at an apparel factory, sewing waistbands. Hearing Transcript at 23. Claimant was laid off from the apparel factory because she could not keep up with the production requirements. *Id.* at 10-11. Claimant then obtained an associate degree in child care and got a job with a Head Start program but was subsequently fired. Director’s Exhibit 18.

⁷ Claimant’s sister indicated in a letter that claimant resigned from her position at RDAISA before termination proceedings were completed. Director’s Exhibit 18 (undated letter from Margaret Woods at 9).

claimant's work occurred under the special conditions described in 20 C.F.R. §404.1573(c). The administrative law judge determined that: claimant's employment at RDAISA was only part-time; "little evidence was offered as to the magnitude of earnings;" claimant's work "could accurately be characterized as 'make work' or 'an act of charity;'" and claimant kept her job only because of "an unusual effort by her co-workers to protect her." Decision and Order at 9. Based on these findings, the administrative law judge concluded, "[t]he mere fact that [claimant] had [sic] may have had earnings of an unspecified amount" in her job at RDAISA, "which [is] comparable to sheltered employment, is insufficient to break the continuity of her disability." *Id.* Accordingly, the administrative law judge granted claimant's request for modification pursuant to 20 C.F.R. §725.310 and awarded survivor's benefits. *Id.*

The Director contends that the administrative law judge made several errors in finding that claimant's work at RDAISA was not substantial gainful activity that precluded an award of survivor's benefits. The Director maintains that the administrative law judge failed to consider the earnings reflected in claimant's SSA records and pay stubs for the period when she worked at RDAISA. In addition, the Director asserts that claimant's RDAISA pay stubs contradict the administrative law judge's finding that claimant's work was only part-time, as they reflect that claimant worked full eighty-hour biweekly pay periods.⁸ The Director also argues that the evidence of record is insufficient to establish that the special conditions set forth in 20 C.F.R. §404.1573(c) existed with respect to claimant's employment at RDAISA. In particular, the Director maintains that the administrative law judge erred in failing to explicitly address evidence that indicates claimant's work performance issues only occurred in the last few years of her employment at RDAISA.

In finding that the record contained "little evidence" of claimant's earnings, the administrative law judge did not indicate that she had reviewed claimant's Earnings and Leave Statements while employed at RDAISA or the SSA's Notice of Award detailing claimant's entitlement to Social Security disability benefits, effective July 2001, which includes a statement of claimant's annual taxable earnings at RDAISA. Decision and Order at 9; Director's Exhibit 18. We agree with the Director's contention that the administrative law judge overlooked this relevant evidence in concluding that the record contains little evidence of claimant's earnings. Director's Brief at 9. In addition, because the administrative law judge did not consider the evidence of claimant's earnings, she did not make a finding as to whether these earnings were sufficient to invoke the presumption that claimant's work was substantial gainful activity under 20 C.F.R. §404.1574(a)(1).

⁸ The Director observes correctly that substantial gainful activity can be performed even on a part-time basis. Director's Brief at 10 n.10, *citing* 20 C.F.R. §404.1572(a).

See Copeland, 771 F. 3d at 924; *Chater*, 91 F. 3d at 1145; *Jones*, 21 F. 3d at 192; *Dinkel*, 910 F.2d at 319; *Chicager*, 574 F. 2d at 163. We therefore must vacate the administrative law judge's determination that the evidence of record supports a finding that claimant's work at RDAISA was not substantial gainful activity.

We also find merit in the Director's assertion that the administrative law judge did not adequately explain her finding that claimant performed poorly at RDAISA and that her employment, especially the first ten years, constituted "make work" or an "act of charity" under 20 C.F.R. §404.1573(c), and therefore did not constitute substantial gainful activity. Decision and Order at 3-6, 9. We cannot discern the basis for the administrative law judge's finding, particularly in light of contrary evidence indicating that claimant's job performance was satisfactory until new duties were added in the final years of her employment.⁹ Consequently, the administrative law judge did not comply with the Administrative Procedure Act (APA).¹⁰ *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). We therefore cannot affirm the administrative law judge's finding that claimant's job at RDAISA did not constitute substantial gainful activity and did not preclude claimant from satisfying the requirement of continuous disability for eligibility at 20 C.F.R. §725.221. We vacate the administrative law judge's determination that claimant established a basis for modification at 20 C.F.R. §725.310 and remand this case to the administrative law judge to reconsider whether claimant engaged in substantial gainful activity during her employment at RDAISA between 1987 and 2000.

⁹ The record contains paystubs from RDAISA for the period between 1995 and 2000, reflecting that claimant's yearly salary increased from \$22,000 to \$27,000, and was reduced only during the three-year period when the handling of classified material was added to her duties. Director's Exhibit 18. In addition, there is an evaluation of claimant by Lee Cooper, a psychologist, who related a statement by claimant's sister that claimant "did well at this job until they added duties that involved handling confidential mail." Director's Exhibit 18 (report from Lee Cooper, dated September 27, 2000). Colonel Buck, an Army officer, recommended in a report submitted in conjunction with the formal proceedings to terminate claimant's employment at RDAISA in 2000, that her security clearance be revoked, based on concerns about her handling of classified mail "during the past two years." *Id.* (report from Colonel Buck, dated February 14, 2000).

¹⁰ The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

On remand, the administrative law judge must address the evidence of claimant's earnings at RDAISA and determine whether such evidence is sufficient to invoke the presumption that claimant engaged in substantial gainful activity at 20 C.F.R. §404.1574(b)(2)(i). If the administrative law judge finds that the presumption has been invoked, she must then address all evidence relevant to claimant's job performance and determine whether claimant has rebutted the presumption by establishing that she worked under special conditions as defined in 20 C.F.R. §404.1573(b), (c), and therefore was under a continuous disability as required by 20 C.F.R. §725.221. *See Kidda*, 7 BLR at 1-202. In so doing, the administrative law judge must resolve the conflicts in the evidence and set forth her findings in detail, including the underlying rationale, in compliance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

Accordingly, the administrative law judge's Decision and Order Granting Survivor's Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge