BRB No. 02-0307 BLA

JAMES E. FERRIS (Surviving Son of JAMES M. FERRIS) Claimant-Respondent v. EASTERN ASSOCIATED COAL CORPORATION Employer-Petitioner 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 of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

Michelle S. Gerdano (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: McGRANERY, HALL and GABAUER, Administrative Appeals Judges.

McGRANERY, J.:

Employer appeals the Decision and Order (00-BLA-1019) of Administrative Law Judge John C. Holmes (the administrative law judge) denying employer's request for modification of an award of benefits on a survivor's claim[1] filed pursuant to the provisions of Title IV of the Federal Coal

[1]Claimant was born on April 22, 1970. Director's Exhibit 5. Claimant is the surviving son of the miner, James M. Ferris, who died on March 2, 1997. Director's Exhibits

Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[2] The administrative law judge found that the evidence of record shows that claimant is unable to engage in substantial gainful activity due to his mental condition, namely undifferentiated schizophrenia, and thus, that claimant is disabled, in accordance with the definition of "disability" under Section 223(d) of the Social Security Act, 42 U.S.C. §423(d). The administrative law judge further determined that claimant established the requisite dependency on the miner, and, accordingly, denied employer's request for modification of the administrative law judge's November 16, 1999 award of benefits.

On appeal, employer contends that the administrative law judge erroneously awarded benefits based on the undisputed fact that claimant *currently* experiences psychiatric problems, failing to determine the pertinent issue, namely, whether claimant was disabled before he graduated from college and ceased to be a student in May of 1992. Employer asserts that the reports of Drs. Hutton, Wright and Burstein, as well as the report of Errol Sadlon, a vocational specialist, conclusively establish that claimant was not disabled at the pertinent time, and urges the Board to remand the case so that the administrative law judge may consider those reports and weigh them appropriately. Employer's Brief at 16. Employer further contends that the administrative law judge failed to consider altogether the reports of Drs. Wright and Burstein and that he failed to provide a proper basis for discrediting the medical opinion of Dr. Hutton and the report of Errol Sadlon. Employer also asserts that it was error for the administrative law judge not to consider the evidence in the context of the Social Security Administration's regulations codified at 20 C.F.R. Part 404.

8, 17. Claimant filed the instant claim for survivor's benefits on June 2, 1997. Director's Exhibit 1. The Social Security Administration awarded claimant disability benefits in 1997, finding that claimant's disability due to schizophrenia began on July 10, 1990. Director's Exhibit 6.

[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended (the Black Lung Act). These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Employer, citing the decision of the United States Supreme Court in *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v.Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), contends that the administrative law judge impermissibly shifted the burden of proof to employer to prove that claimant was not disabled in 1992 when he graduated from college and ceased to be a student. Employer urges the Board to reverse the administrative law judge's decision and remand the case to the administrative law judge "for a fresh look at the relevant evidence." Employer's Brief at 18. Claimant responds, and urges affirmance of the decision below. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief, limited to responding to two of employer's arguments, namely: (1) that the administrative law judge erroneously shifted to employer the burden of proof to establish that claimant was not disabled at the pertinent time; and (2) that the administrative law judge erred in not applying the Social Security Administration's regulations codified at 20 C.F.R. Part 404. Employer has filed a reply to the Director's response brief.

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

The regulations provide that a child of a deceased miner is entitled to benefits if the standards of relationship and dependency are met. In the instant case, it is undisputed that claimant meets the relationship requirement as he is the deceased miner's surviving son. Therefore, claimant must establish his dependency on the deceased miner. An unmarried adult child satisfies the dependency requirement if such child 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), provided that the disability began before the child attained age 22, or in the case of a student, before the child ceased to be a student. 20 C.F.R. §§725.209, 725.221. For purposes of this claim, "disability" under the Social Security Act is defined 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).

The administrative law judge awarded benefits in the instant case by Decision and Order dated November 16, 1999. Director's Exhibit 50. Employer timely petitioned for modification under 20 C.F.R. §725.310 (2000)[3] of the administrative law judge's award of

[3]The amendments to the regulation at 20 C.F.R. §725.310 (2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2, 65 Fed.Reg. 80,057.

benefits, Director's Exhibit 59, and submitted new evidence. In order to establish modification, employer must establish a change in claimant's condition or a mistake in a determination of fact contained in the administrative law judge's 1999 award of survivor's benefits. 20 C.F.R. §725.310 (2000).

Employer contends that the administrative law judge did not determine claimant's disability as of the pertinent time, namely, before 1992, when claimant ceased to be a student. In his Decision and Order, the administrative law judge indicated, "[t]he Employer argues that the Claimant is not disabled and was not disabled when he graduated from college as required under 20 C.F.R. §725.221, based upon evidence submitted by various medical and vocational experts." Decision and Order at 6. The record indicates that employer raised both issues, namely, whether claimant is currently disabled and whether claimant was disabled before he graduated from college and ceased to be a student in 1992. *See* Director's Exhibit 59 (Employer's Petition for Modification dated January 24, 2000); Employer's Closing Argument dated April 5, 2001. The administrative law judge, in his Decision and Order, addressed both of these issues. *See* Decision and Order at 3-7.

Employer asserts that the administrative law judge committed reversible error in not applying the Social Security Administration's regulatory disability criteria codified at 20 C.F.R. Part 404 to determine claimant's level of functioning in 1992. Employer submits that "[w]hile the evidence conflicts on whether any of the disabling criteria are present now," Employer's Brief at 16, there is no evidence establishing that claimant was incapable of substantial gainful activity in 1992. The Director contends that although the Act incorporates the statutory definition of "disability" from the Social Security Act, the Social Security Administration's regulations codified at 20 C.F.R. Part 404 do not apply directly to determinations made by an administrative law judge, unless the Department of Labor's regulations so state. The Director argues that because there is no such regulatory provision, the administrative law judge acted properly in not applying the Social Security Administration's regulations provided at 20 C.F.R. Part 404. Employer replies that although the administrative law judge may not have been obligated to apply the regulations contained at 20 C.F.R. Part 404, he erred in failing to apply any criteria to determine claimant's disability.

Employer's contentions lack merit. The Black Lung Act's implementing regulation at 20 C.F.R. §725.221incorporates the Social Security Act's definition of "disability," *see* 42 U.S.C. §423(d)(1). Neither the Black Lung Act nor its implementing regulations provides, however, that the Social Security Administration's regulatory criteria apply to an administrative law judge's determination of disability issues arising under the Black Lung Act. Consequently, the administrative law judge, in the instant case, acted properly in not applying the Social Security Administration's regulations contained in 20 C.F.R. Part 404. Rather, the administrative law judge properly found:

> The Claimant's successful claim with the Social Security Administration is evidence of his disability in the most precise meaning of that term under 20 C.F.R. §725.221. While the Social Security Administration's determination - which was conducted formally under a complex regulatory scheme - is not given dispositive weight, I find it highly relevant evidence of the Claimant's disability. The Claimant supports this determination with a psychological report and a vocational assessment, which aver that he is unable to perform any type of substantial gainful activity.

Decision and Order at 6.

Employer next contends that the administrative law judge failed to weigh adequately the relevant evidence and to provide sufficient explanation for his findings. Employer relies on the medical opinions of Drs. Hutton,[4] Wright[5] and Burstein,[6] as well as the report of Errol Sadlon,[7] a vocational rehabilitation consultant, to meet its burden on modification in the

[4]Dr. Hutton testified that he was "giving his best judgment of [claimant's] current functioning and his prognosis. I think I could get him to work." Employer's Exhibit 5 at 46. Dr. Hutton also testified that claimant is more "at risk" for deterioration or decompensation in a work or work-like setting because of his problems and history. *Id*. at 35. Dr. Hutton added that he would "build that into his treatment plan" and did not expect that such deterioration would be a persistent problem. *Id.* Dr. Hutton further testified that without continued medical treatment and counseling, claimant is more likely to decompensate. *Id.* at 50.

[5]Dr. Wright, a psychiatrist, opined that claimant was not disabled as of his twenty-second birthday but the doctor indicated that he could not address claimant's current functional status without evaluating him personally. Employer's Exhibit 3.

[6]Dr. Burstein opined that claimant "is capable of significant employment, notwithstanding his recognized mental compromise from a psychiatric disorder." Employer's Exhibit 4.

[7]Mr. Sadlon opined that claimant is not currently disabled and was not disabled at the time he was in college. Employer's Exhibits 1, 2. Mr. Sadlon agreed with Dr. Hutton's conclusion that claimant is capable of working, with continued counseling support. Employer's Exhibit 1. Mr. Sadlon's deposition included the following testimony:

> Question: If we took him as he is today, as he presents himself today, is he employable?

Answer: That's a very good question and a very difficult one for me to answer. Per my evaluation of him, I felt he could work. Per my evaluation of him, I question whether he would be hired by his demeanor or how he presents himself.

So it became somewhat of a question to me whether he actually could return to work at the time I evaluated him or whether some intervention would be necessary. I think there is some intervention necessary because he may manipulate interviews or how he presents himself and would not get hired. But that may not mean that he is not able to perform the job, but it's how he is interpreting his situation and how he presents himself.

instant case. Weighing the opinions of Dr. Hutton and Mr. Sadlon, the administrative law judge found:

> Even if I were to disregard the Social Security Administration's determination and the Claimant's evidence, I am not persuaded that the Employer's evidence conclusively demonstrates that the Claimant was or is not disabled. Dr. Sadlon, when asked whether the Claimant could work, responded, "That's a very good question." I view this as an admission that the Claimant's argument of disability has merit. Dr. Hutton, whose testimony the Employer would have accorded the most weight, indicated that his conclusions were not certain, but merely his "best judgment." Dr. Hutton also acknowledged that the Claimant would likely "decompensate" if he were to engage in employment. I find that the Employer's evidence is not conclusive as to the Claimant's disability.

Decision and Order at 7. The administrative law judge summarized, but did not weigh, the

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> Question: You sound to me like you are saying that he is capable, that he has the intellectual capacity for employment but it is a question of his emotional condition.
>
> Answer: That's the major question, the emotional condition, and that's the one the psychiatrists or psychologists are going to have to answer. Per my review of the records and evaluating him, I didn't find it was going to be something which would keep him from working.

Employer's Exhibit 6 at 37, 38.

December 18, 2000 opinion of Dr. Wright and the December 19, 2000 opinion of Dr. Burstein, offered and relied upon by employer in support of its Petition for Modification. Employer argues that the administrative law judge incorrectly interpreted Mr. Sadlon's testimony and thereby showed "results-oriented reasoning." Employer's Brief at 17. Similarly, employer argues that the administrative law judge's basis for according less weight to Dr. Hutton's opinion was improper. Employer further argues that the administrative law judge's observations of claimant's nervousness and discomfort at the hearing "hardly [constitute] substantial evidence of the ultimate issue: whether he was able to hold some sort of job when he graduated with a computer science degree." Employer's Brief at 17.

In the instant case, the administrative law judge failed to consider all of the relevant evidence, as he is required to do pursuant to the Act and regulations, and this failure constitutes reversible error. 30 U.S.C. §923(b); 20 C.F.R. §725.477(b); *see also* Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Specifically, the administrative law judge did not indicate what weight, if any, he accorded to the December 18, 2000 opinion of Dr. Wright and the December 19, 2000 opinion of Dr. Burstein, which are relied upon by employer in support of its Petition for Modification. The administrative law judge's Decision and Order, therefore, cannot be affirmed, and we thus vacate it.

Further, inasmuch as the administrative law judge is no longer available to the Department of Labor, on remand, this case will necessarily be reassigned to another administrative law judge by the Chief Administrative Law Judge. Consequently, the new administrative law judge will make his own credibility determinations, hence, we do not reach employer's arguments challenging the credibility determinations made by Judge Holmes. We remand the case for the newly assigned administrative law judge to consider *de novo* the evidence submitted in connection with employer's Petition for Modification.

Lastly, employer argues that the administrative law judge impermissibly shifted the burden of proof to employer, requiring that employer establish that claimant is not currently disabled. Employer indicates that it is its burden to establish that claimant was not disabled before he graduated from college and ceased to be a student in 1992 and that the administrative law judge erred in finding to the contrary. The Director disagrees with employer's assertion that the administrative law judge erred in this regard. The Director argues that because employer petitions for modification of the administrative law judge's 1999 award of benefits, employer has the burden of proof, as the party seeking the termination of benefits previously awarded, to establish that claimant was not under a disability at the pertinent time. Employer replies that the Director's argument confuses employer's burden on modification with claimant's ultimate burden of proving that he is disabled.

Employer's contention lacks merit. The administrative law judge awarded benefits in the instant case by Decision and Order dated November 16, 1999. Director's Exhibit 50. Employer subsequently petitioned for modification of the administrative law judge's award of benefits. 20 C.F.R. §725.310 (2000); Director's Exhibit 59. Employer, in so doing, seeks termination of this award of benefits. Consequently, employer, as the moving party, bears the burden of proof to establish grounds for modification of the award. 20 C.F.R. §725.310 (2000); *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 139 (1997). Therefore, the administrative law judge did not err by requiring that employer meet its burden of proof on modification.

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded to the Office of Administrative Law Judges for further consideration consistent with this opinion.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

BETTY JEAN HALL
Administrative Appeals Judge

I concur in the result only.

PETER A. GABAUER, Jr.
Administrative Appeals Judge