

BRB No. 14-0182 BLA

MOSCOE ENDICOTT (deceased)/)
JEFFREY ENDICOTT (son))
)
Claimant-Respondent)
)
v.)
)
VANDYKE BROTHERS COAL) DATE ISSUED: 10/20/2014
COMPANY, INCORPORATED)
)
and)
)
OLD REPUBLIC INSURANCE COMPANY)
)
Employer/Carrier-)
Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Awarding Augmented Benefits of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

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

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer/carrier.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding

Augmented Benefits (2009-BLA-5753) of Administrative Law Judge Christine L. Kirby rendered in conjunction with a miner's claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act).

Based on a claim filed on January 21, 2003, the miner was awarded black lung disability benefits on February 18, 2010, that continued until his death. On June 10, 2011, a claim was filed to augment the miner's benefits on behalf of the disabled adult son of the miner (hereinafter "claimant").¹ Pursuant to cross-motions for summary judgment, the administrative law judge found that claimant's Social Security Administration (SSA) record and letter confirming a disability award by the SSA were sufficient to establish that claimant is disabled, and thus qualifies as a dependent pursuant to 20 C.F.R. §725.209 for purposes of augmentation. Accordingly, the administrative law judge granted claimant's motion for summary judgment and ordered employer to pay the miner augmented benefits on behalf of claimant, his disabled adult son.

On appeal, employer contends that the administrative law judge erred in determining that the miner's award of benefits should be augmented, arguing that the record is insufficient to establish that claimant is disabled as defined by Section 223(f) of the Social Security Act. In response, claimant urges affirmance of the administrative law judge's finding that the miner established entitlement to augmented benefits. The Director, Office of Workers' Compensation Programs, has declined to respond unless specifically requested to do so. In a reply brief, employer reiterated its arguments that the administrative law judge erred in finding that the evidence of record was sufficient to establish that claimant was under a continuing disability as defined by Section 223(f) of the Social Security Act from August 2007 through July 2011.

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. 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, 363 (1965).

The facts relevant to the issue of claimant's status as an augmentee in the miner's claim are as follows: in the miner's January 2003 application for benefits, when asked to provide information on any unmarried children he had that are age eighteen or older and disabled, the miner stated that there were three disabled children but that "none are now dependent on me." Director's Exhibit 1. The miner was subsequently awarded benefits

¹ The miner, Moscoe Endicott, died on August 17, 2011, and his son, Jeffrey Endicott, is pursuing augmented benefits on the miner's behalf. Director's Exhibit 12.

on March 11, 2010, commencing as of August 2007.² Director's Exhibit 4. On June 10, 2011, an application to augment the miner's benefits was filed on behalf of Jeffrey Endicott (claimant), the miner's disabled adult son. Director's Exhibit 5. The record contains a letter from the SSA dated July 8, 2011, stating that claimant became eligible for SSA disability in October 1992, and setting forth the amount of claimant's current monthly SSA benefits for the time period from December 2008 through the date of the letter. Director's Exhibit 11. The record also contains an Amended Award of Benefits in the miner's claim, augmenting the miner's benefits from August 2007 (the month in which the miner's benefits commenced) through July 2011 (the month prior to the miner's death) on behalf of claimant. Director's Exhibit 14. The Amended Award thus resulted in an underpayment of benefits. Director's Exhibits 14, 19. Additionally, the record contains a letter from the Department of Labor (DOL) in response to employer's challenge to DOL's authority to retroactively award augmented benefits to the miner absent a petition for modification. Director's Exhibits 16, 17. In this letter, the claims examiner states that claimant met all the necessary requirements to be added as an augmentee to the miner's claim. Director's Exhibit 14. Employer ultimately requested a hearing in this matter, Director's Exhibit 22, and the case was transferred to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 26.

Based on her consideration of the cross-motions for summary judgment and the evidence of record, the administrative law judge found that employer's evidence, i.e., Dr. Smith's report, treatment notes from claimant's physicians during the time period at issue, and the "lack of evidence on [claimant's] ability to work between 2007 and 2011[,]" was not persuasive evidence supportive of employer's argument that claimant was not disabled during this time period. Decision and Order at 4. Rather, the administrative law judge found that she could rely on the claimant's SSA record and the July 8, 2011 letter from SSA confirming claimant's continuing award of SSA disability benefits. Decision and Order at 4. Therefore, the administrative law judge found that the miner was entitled to augmented benefits on behalf of claimant, his disabled adult son. *Id.*

Pursuant to 20 C.F.R. §725.209, a miner's benefits may qualify for augmentation on behalf of a child if the requisite standards of relationship and dependency are met. *See*

² The miner filed a claim for benefits on January 21, 2003, which was ultimately awarded when employer withdrew controversion to entitlement on February 17, 2010. Director's Exhibits 1, 3. By Order of Remand dated February 18, 2010, Administrative Law Judge Richard T. Stansell-Gamm noted employer's withdrawal of controversion and remanded the case to the district director for appropriate administrative action. Director's Exhibit 3. In a Proposed Decision and Order on Remand issued on March 11, 2010, the district director awarded benefits. Director's Exhibit 4.

20 C.F.R. §§725.201(c), 725.208, 725.209. As is relevant here, a miner's child is dependent, for purposes of augmentation, if the child is unmarried and "under a disability as defined in section 223(d) of the Social Security Act, 42 U.S.C. 423(d)." 20 C.F.R. §725.209(a)(2)(ii). Section 223(d) of the Social Security Act defines disability 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).

On appeal, employer contends that the sole issue is whether claimant was totally disabled during the period at issue, August 2007 through July 2011.³ Employer argues that the administrative law judge erred in finding that the miner's benefits should be augmented on behalf of his adult son when there is no medical evidence in the record establishing that the son was disabled for the period from August 2007 through July 2011. Specifically, employer contends that the administrative law judge erred in according determinative weight to the SSA award of disability benefits, rather than considering the medical evidence of record. This contention is without merit.

Contrary to employer's argument, the administrative law judge rationally considered the evidence of record, including the medical opinion of Dr. Smith and the medical treatment notes submitted by employer,⁴ and reasonably determined that there was no evidence of record that undermined the SSA award. See *Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 503, 22 BLR 2-1, 2-22 (4th Cir. 1999) (observing that employer "likely ha[d] no defense to augmentation on the merits" where claimant's son's receipt of Social Security disability benefits was in the record); *Scalzo v.*

³ Employer does not dispute that claimant is the miner's child, pursuant to 20 C.F.R. §725.208, and that claimant is currently unmarried, pursuant to 20 C.F.R. §725.209(a)(1).

⁴ Based on a review of the medical and psychiatric reports, as well as the Social Security records of record, Dr. Smith, a Board-certified psychiatrist, opined that:

The diagnoses made that apparently qualified him for SSA Disability through 1998 may or may not have continued and may or may not have qualified him for SSA disability criteria during the time frame in question. No records were provided to show any evidence of the continuation of the diagnoses or to support his meeting the SSA criteria for disability from 2007 through 2011 for psychiatric reasons.

Employer's Exhibit 1.

Director, OWCP, 6 BLR 1-1016, 1-1019-20 (1984) (holding that determination regarding disability by SSA “is highly probative evidence which, if not controlling, can be afforded great weight”); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); Decision and Order at 4; Employer’s Exhibit 1.

Moreover, we reject employer’s contention that it was error for the administrative law judge to rely on the determination of an agency, other than DOL, in finding that claimant satisfied his burden of establishing that he is disabled pursuant to Section 725.209. Employer’s Brief at 5-6. Although not binding on the administrative law judge, the determination by the SSA reflects “a determination by an agency with specialized expertise, applying the definition of disability which must be applied to this controversy.” *Scalzo*, 6 BLR at 1-1019; *see* 20 C.F.R. §725.209(a). Therefore, such a report “is highly probative evidence which, if not controlling, can be afforded great weight.” *Scalzo*, 6 BLR at 1020. Herein, the administrative law judge considered all the evidence of record, and reasonably found that SSA’s determination and continued payment of benefits was probative evidence that the miner’s son was disabled and that the other evidence in the record did not show that he was not disabled within the meaning of Section 223(d) of the Social Security Act. *Stanley*, 194 F.3d at 503, 22 BLR at 2-22; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; Decision and Order at 4. Consequently, the administrative law judge rationally found that the SSA determination, showing claimant’s disability began in October 1992 and was still being paid as of July 2011, was the most probative evidence of record. *See Adler v. Peabody Coal Co.*, 22 BLR 1-43, 1-51 (2000); Decision and Order at 4; Director’s Exhibit 11.

In light of the evidence of record, we hold that substantial evidence supports the administrative law judge’s determination that employer failed to present sufficient probative evidence calling into question the SSA determination that claimant was disabled as defined in section 223(d) of the Social Security Act, 42 U.S.C. 423(d), for the period between August 2007 and July 2011. *See generally Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); Decision and Order at 4. Consequently, because the SSA document is of record and contains statements that SSA determined claimant to be disabled and that he is receiving SSA disability benefits, we affirm the administrative law judge’s finding that claimant met the disability requirement, as her finding is consistent with the language of Section 725.209 and is supported by substantial evidence. *Stanley*, 194 F.3d at 503, 21 BLR at 2-22; *Scalzo*, 6 BLR at 1-1019-20. We, therefore, affirm the administrative law judge’s finding that the miner is entitled to augmented benefits. 20 C.F.R. §725.201(c).

Accordingly, the administrative law judge's Decision and Order Awarding Augmented Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge