



BRB No. 18-0085 BLA

THOMAS J. BALDONI)	
(Son of JOHN BALDONI))	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 12/13/2018
)	
DIRECTOR, OFFICE OF WORKERS’)	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Administrative Law Judge Adele Higgins Odegard, United States Department of Labor.

Thomas J. Baldoni, Jessup, Pennsylvania.

Rita Roppolo (Kate S. O’Scannlain, Solicitor of Labor; Kevin Lyskowski, 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, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals, without the assistance of counsel, the Decision and Order on Remand (2014-BLA-05513) of Administrative Law Judge Adele Higgins Odegard, denying benefits on a survivor’s claim filed on September 25, 2013, pursuant to the

¹ Claimant is the surviving adult son of the miner, who died on October 7, 1992. Director’s Exhibits 1, 3.

provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for a second time.

In a Decision and Order dated June 15, 2016, the administrative law judge denied survivor's benefits because she found that claimant did not meet the requirements of dependency as a disabled adult child of a deceased miner. Upon review of claimant's appeal, the Board held that the administrative law judge's Decision and Order did not satisfy the requirements of the Administrative Procedure Act (APA)² and vacated the denial of benefits.³ *Baldoni v. Director, OWCP*, BRB No. 16-0575 BLA, slip op. at 3 (July 10, 2017) (unpub.).

On remand, the administrative law judge again found that claimant did not meet the requirements of dependency as a disabled adult child of a deceased miner. She further found that claimant did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(b). Accordingly, the administrative law judge denied survivor's benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's denial of benefits. Claimant submitted a letter in reply to the Director's response brief.⁴

² The Administrative Procedure Act (APA) requires that every adjudicatory decision 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); see *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

³ On February 28, 2017, the administrative law judge issued an Errata Decision and Order Denying Benefits, indicating that an incomplete draft decision was issued on June 15, 2016. The Board noted, however, that once a party appeals an administrative law judge's decision to the Board, jurisdiction of that case is transferred to the Board, thereby depriving the administrative law judge of the authority to issue additional orders or decisions in that case. *Baldoni v. Director, OWCP*, BRB No. 16-0575 BLA, slip op. at 3 (July 10, 2017) (unpub.). Because the Errata Decision and Order was issued after the Board docketed claimant's appeal, the administrative law judge lacked authority to correct her decision. *Id.* Thus, the Board remanded the case for the administrative law judge to issue a new decision in accordance with the APA. *Id.*

⁴ Claimant states that he is not seeking benefits in his own right. Rather, he asserts that the evidence is sufficient to establish entitlement to benefits in the denied claims filed

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *See Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-86-87 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.⁵ 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 regulations provide that an adult child of a deceased miner who seeks survivor's benefits must satisfy the requirements of relationship and dependency set forth at 20 C.F.R. §§725.218(a), 725.220, 725.221. Claimant satisfies the dependency requirement if he is under a disability as defined in Section 223(d) of the Social Security Act, 42 U.S.C. §423(d), and the disability began before claimant reached the age of twenty-two. 20 C.F.R. §§725.209(a)(2)(ii), 725.221. 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); *Tackett v. Director, OWCP*, 10 BLR 1-117, 1-118 (1987).

by his father, the deceased miner, and his mother, the miner's deceased widow. Claimant's Letter dated April 9, 2018; *see* Director's Exhibit 1. The Board previously explained, however, that claimant's father's claim was finally denied on April 16, 1981, and his mother's claim was finally denied on July 26, 2006. *Baldoni*, slip op. at 2. The Board concluded that there is no authority for adjudicatory review of the denied claims filed by claimant's parents and the only claim for consideration in this appeal is claimant's survivor's claim. *Id.* The Board's holding on this issue constitutes the law of the case, and claimant has not shown that an exception to the doctrine applies here. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-15 (1993); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990).

⁵ Because the miner's last coal mine employment was in Pennsylvania, the Board will apply the law of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

In support of his claim, claimant submitted an undated report from Dr. Serene, indicating that claimant has had a “seizure disorder” since childhood.⁶ Director’s Exhibit 9. Dr. Serene noted that claimant’s condition is controlled by medication, and that claimant is currently able to support himself. *Id.* The administrative law judge found that while Dr. Serene’s report “establishes that [claimant] has a disorder, it does not establish that [claimant’s] disorder would prevent him from engaging in substantial gainful activity.” Decision and Order on Remand at 8.

Claimant also submitted a letter from Dr. Weiss dated February 24, 1975. Director’s Exhibit 10. The administrative law judge found that Dr. Weiss examined claimant when he was “approximately [nineteen] years old.” Decision and Order on Remand at 7 n.7. According to Dr. Weiss, claimant had a “convulsive disorder with Jacksonian manifestations since April of 1970,” he experienced convulsions once a month on average and sometimes lost consciousness, which was followed by a headache and a “cloudy sensorium.” Director’s Exhibit 10. Dr. Weiss indicated, however, that claimant did not have any physical abnormalities and that a “complete and detailed neurological examination was negative.” *Id.* He further noted that claimant had “won several awards for excellence” during school. *Id.*

The administrative law judge found that Dr. Weiss’s letter did not establish that claimant was unable to engage in substantial gainful activity. Decision and Order on Remand at 9. Rather, Dr. Weiss’s letter “suggests that [c]laimant was successful despite his disorder.” *Id.*

The administrative law judge further found that “claimant’s own hearing statements go against a disability finding.” Decision and Order on Remand at 8. Specifically, the administrative law judge noted claimant’s testimony that he received an accounting degree from the University of Scranton and was employed doing “accounting and finance.” *Id.* at 6, *quoting* Hearing Transcript at 32. He also noted that claimant had never received any type of disability benefits.⁷ *Id.* at 8.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *Oggero*

⁶ Based on claimant’s hearing testimony, the administrative law judge found that Dr. Serene prepared his report “sometime between 2013 and 2014.” Decision and Order on Remand at 7.

⁷ Claimant did not submit any record of his earnings to establish that his employment was not substantial and gainful. 20 C.F.R. §404.1574(a) (earnings are the primary consideration in determining substantial gainful activity).

v. Director, OWCP, 7 BLR 1-860, 1-865 (1985); *Young v. Barnes & Tucker Co.*, 11 BLR 1-147, 1-150 (1988). Because the administrative law judge rationally found that claimant did not establish that he is under a disability as defined in Section 223(d) of the Social Security Act, 42 U.S.C. §423(d), we affirm her determination that claimant did not establish dependency on the miner as an adult, disabled child. 42 U.S.C. §423(d)(1)(A); 20 C.F.R. §§725.218(a); 725.221; *Tackett*, 10 BLR at 1-118. We, therefore, affirm the administrative law judge's finding that claimant is not entitled to survivor's benefits.⁸

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

⁸ Because we affirm the administrative law judge's finding on dependency, benefits are precluded based on claimant's survivor's claim, and we need not address her finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis. 20 C.F.R. §§725.218(a), 725.220, 725.221.