

**PART X**

**SURVIVORS' CLAIMS**

**B. DERIVATIVE ENTITLEMENT**

An eligible survivor is derivatively entitled to an award of survivor's benefits if the deceased miner, as a result of a claim filed prior to January 1, 1982, was receiving benefits at the time of his death under a finally adjudicated award of benefits for total disability due to pneumoconiosis or if benefits are ultimately awarded on the miner's claim under Section 415, 30 U.S.C. §925, or Part C of Title IV of the Act. 20 C.F.R. §§725.212, 725.218, 725.222. Thus, where the miner's claim is ultimately denied, there is no miner's award from which a survivor's award can be derived. 30 U.S.C. §901(a); 20 C.F.R. §725.212; see **Pothering v. Parkson Coal Co.**, 861 F.2d 1321, 1328, 12 BLR 2-60, 2-70 (3d Cir. 1988); **Smith v. Camco Mining Inc.**, 13 BLR 1-17 (1989). In **Beard v. Union Carbide Corp.**, 1 BLR 1-791 (1978), the Board upheld the validity and constitutionality of the derivative entitlement provisions then in effect, 20 C.F.R. §§715.201 and 715.207, that are substantively similar to those in Part 725, see 20 C.F.R. §§725.212, 725.218, 725.222.

The 1981 Amendments eliminated the language of the 1972 Act that allowed a survivor to receive benefits if the miner was totally disabled due to pneumoconiosis prior to death, but died from an unrelated cause. The remaining language directs that survivors are eligible for benefits if the miner's death was due to pneumoconiosis. 30 U.S.C. §901(a). If no claim was filed by the miner prior to January 1, 1982, which could provide a basis for derivative entitlement under Section 401(a), 30 U.S.C. §901(a), or for the survivor claimant to benefit from the miner's filing date under Section 422(l), 30 U.S.C. §932(l), see **Smith, supra**, the survivor must establish that death was due to pneumoconiosis, except where entitlement is established under Section 718.306, 20 C.F.R. §718.306, on a claim filed prior to June 30, 1982. 20 C.F.R. §§725.212, 725.218, 725.222; see **Neeley v. Director, OWCP**, 11 BLR 1-85 (1988). Consequently, where no miner's claim was filed prior to January 1, 1982, survivors cannot benefit from entitlement derivative of an award to the miner.

The Board will defer to the interpretation of the Director that automatic derivative entitlement is not available under Section 725.218(a)(2) where a determination has been made under Part B that the miner was totally disabled due to pneumoconiosis at the time of death or that the miner's death was due to pneumoconiosis. **Reigh v. Director, OWCP**, 19 BLR 1-64 (1995).

The Board declined to apply the holding of the Sixth Circuit in **Director, OWCP v.**

**Saulsberry**, 887 F.2d 667, 13 BLR 2-80 (6th Cir. 1989) in a claim arising within the appellate jurisdiction of the Third Circuit, noting that, unlike **Deloe v. Director, OWCP**, 15 BLR 1-9 (1991), the Director did not concede the application of **Saulsberry**. Thus, the automatic derivative entitlement provision pursuant to Section 725.218(a)(2) is not available to claimant where the previous award of benefits was made pursuant to Part B. **Reigh, supra**.

## CASE LISTINGS

### DIGESTS

The Sixth Circuit has held that a prior determination of survivor benefit eligibility pursuant to Part B of Title IV of the Act, 30 U.S.C. §§921-925, eliminates the necessity of independently establishing the miner's total disability due to pneumoconiosis under the criteria in Part C of the Act in order to establish a survivor's entitlement under 20 C.F.R. §725.218(a)(2). **Director, OWCP v. Saulsberry**, 887 F.2d 667, 13 BLR 2-80 (6th Cir. 1989).

The Board held that inasmuch as the miner was determined to be totally disabled due to pneumoconiosis by the SSA, in a surviving children's claim filed prior to January 1, 1982, claimant, as the miner's surviving divorced spouse, is entitled to benefits pursuant to Section 725.212(a)(3)(ii). In doing so, the Board extended the holding of the Sixth Circuit in **Director, OWCP v. Saulsberry**, 887 F.2d 667, 13 BLR 2-80 (6th Cir. 1989), *aff'g Saulsberry v. Director, OWCP*, BRB No. 86-2650 BLA (Oct. 31, 1988)(unpub.), that Section 725.218(a)(2) requires only that the miner's disability be "determined as the result of a claim filed prior to January 1, 1982," to Section 725.212(a)(3)(ii). **Deloe v Director, OWCP**, 16 BLR 1-9 (1991).

The Director, in defending a Part C claim, acting for the interests of the participants in the Trust Fund, has not been provided with due process and the right to a full and fair hearing if the Trust Fund is assessed liability resulting from an obligation arising from a Part B claim. **Reigh v. Director, OWCP**, 19 BLR 1-64 (1995).

The Board will defer to the interpretation of the Director that automatic derivative entitlement is not available under Section 725.218(a)(2) where a determination has been made under Part B that the miner was totally disabled due to pneumoconiosis at the time of death or that the miner's death was due to pneumoconiosis. **Reigh v. Director, OWCP**, 19 BLR 1-64 (1995).

The Board declined to apply the holding of the Sixth Circuit in **Director, OWCP v. Saulsberry**, 887 F.2d 667, 13 BLR 2-80 (6th Cir. 1989) in a claim arising within the appellate jurisdiction of the Third Circuit, noting that, unlike **Deloe v. Director, OWCP**,

15 BLR 1-9 (1991), the Director did not concede the application of **Saulsberry**. Thus, the automatic derivative entitlement provision pursuant to Section 725.218(a)(2) is not available to claimant where the previous award of benefits was made pursuant to Part B. **Reigh v. Director, OWCP**, 19 BLR 1-64 (1995).

Based upon the current position of the Director, the Board modified its prior decision and held that under the statutory language of the Act at Section 432(l), a party filing a Part C claim is able to avail himself of derivative entitlement from a previous award of benefits under a Part B claim. The Board noted that by definition, Subchapter IV of Chapter 30 of the United States Code contains both Part B and Part C of the Act, and the language of Section 432(l) of the Act specifically provides that entitlement is available to be derived from any determination of entitlement from any claim arising under Subchapter IV which was filed prior to January 1, 1982, where the other conditions of derivative entitlement are met. **Reigh v. Director, OWCP**, 20 BLR 1-44 (1996), *modifying on recon.*, 19 BLR 1-64 (1995).

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