

PART II
DEFINITIONS

B. SURVIVORS/DEPENDENTS

2. DEPENDENT OR SURVIVING CHILD

The Act defines "child" as a child or stepchild who is unmarried and 1) under the age of eighteen; 2) disabled (as defined by the Social Security Act), which disability began before an age specified in the Social Security Act (42 U.S.C. §402(d)(1)(B)(ii)), or, if a student, which began before the child ceased to be a student; or 3) a student. 30 U.S.C. §902(g). The term dependent includes a child, as defined above, excluding subsection (g)(2)(B)(ii). 30 U.S.C. §902(a)(1). Sections 725.208 and 725.209 discuss the requirements for relationship and dependency of a child with respect to augmentation. Sections 725.218 to 725.221 address the conditions and duration of entitlement and the relationship and dependency requirements concerning entitlement for a surviving child.

Reentitlement to survivor's benefits for a disabled dependent is not permitted where the dependent child, after establishing entitlement, later secured gainful employment, and thus interrupted the continuity of his disability. Under 20 C.F.R. §725.219, a dependent's eligibility, once lost, does not reemerge upon subsequent disability. *Kidda v. Director, OWCP*, 7 BLR 1-202 (1984), *aff'd*, 769 F.2d 165, 8 BLR 2-28 (3d Cir. 1985). In addition, benefits are payable only to persons who establish their eligibility for time periods subsequent to December 31, 1973. 30 U.S.C. §932(e); *Patynski v. Director, OWCP*, 6 BLR 1-1097 (1984) (claimant, a dependent child at the time of the miner's death in 1928 was held not to be an eligible dependent).

In determining whether a child qualifies as a dependent of a miner, the administrative law judge must inquire whether he or she is disabled as defined in the Social Security Act, 42 U.S.C. §423(d). This disability must prevent the dependent from performing not only previous work, but also, considering age, education and work experience, from engaging in any other kind of substantial gainful work that exists in the national economy. *Scalzo v. Director, OWCP*, 6 BLR 1-1016 (1984).

The Board upheld the administrative law judge's denial of benefits to the adult daughter of a deceased miner claiming that she was under a disability that began before she was 18 years old pursuant to Sections 725.227 and 725.221. The record contained several statements by claimant that described her condition and limitations, but no *medical* evidence of any disability. See 42 U.S.C. §423(d); 20 C.F.R. §416.912;

Tackett v. Director, OWCP, 10 BLR 1-117 (1987).

CASE LISTINGS

[step-daughter, considered miner's dependent child for Social Security Administration purposes, qualified as dependent under the Act] **Jones v. The New River Co.**, 3 BLR 1-199 (1981), *overruled on other grounds*, **Borgeson v. Kaiser Steel Corp.**, 8 BLR 1-312 (1985), *rev'd on other grounds*, 12 BLR 1-169 (1989)(en banc).

[claimant's daughter's benefits reinstated, as she was entitled to receive them until age 23, as long as she remained unmarried and a student] **Hamilton v. Island Creek Coal Co.**, 4 BLR 1-548 (1982).

[married child of miner not a dependent under the Act even though also handicapped] **Parsons v. Director, OWCP**, 4 BLR 1-514 (1981).

[financial dependency on miner not required for claimant to be eligible to receive benefits on miner's disabled child's behalf] **Manioc v. Barnes and Tucker Co.**, 5 BLR 1-683 (1983).

[Second Circuit reversed district court's finding and held that claimant, legally blind since birth, was disabled and entitled to benefits as a surviving disabled child if he had not engaged in substantial gainful activity] **McBrayer v. Secretary of Health and Human Services**, 712 F.2d 795, 5 BLR 2-107 (2d Cir. 1983).

[Claimant not eligible survivor/dependent disabled child as work as an office cleaning woman and telephone receptionist at \$255 per month, constitutes substantial gainful activity] 20 C.F.R. §§404.1571-74; **Piccin v. Director, OWCP**, 6 BLR 1-616 (1983).

[miner's daughter not eligible dependent survivor because there was no proof that disability commenced before 18] **Lupasky v. Director, OWCP**, 7 BLR 1-532 (1984).

[administrative law judge properly found that claimant, a school teacher who was blind and assisted in her work beyond the help usually rendered other individuals, qualified as a dependent child under the Act as her work did not constitute substantial gainful work activity as defined in 20 C.F.R. §404.1566(b)] **Turkovich v. Director, OWCP**, 7 BLR 1-182 (1984).

[Third Circuit held that under Section 412(a)(3) of the Act, 30 U.S.C. §922(a)(3), once a child found to be dependent has obtained substantial and gainful employment, eligibility is lost] **Kidda v. Director, OWCP**, 769 F.2d 165, 8 BLR 2-28 (3d Cir. 1985).

[A deceased miner's adult disabled child, whose marriage was terminated by reason of divorce prior to the filing of the miner's claim and the date from which the miner's benefits commenced, was "unmarried" as required by 20 C.F.R. §725.209 at the time of her initial entitlement to benefits as an augmentee and as a survivor in her own right.] **Adler [Stobaugh] v. Peabody Coal Co.**, 22 BLR 1-43 (2000).

DIGESTS

The Board affirmed the administrative law judge's finding that the two illegitimate children of the miner qualified as his eligible survivors for augmentation purposes. Here, claimant, the surviving spouse of the miner, filed a claim and the two illegitimate children also filed a claim. As the miner has acknowledged in writing that he was contributing monthly to the support of the illegitimate children and the record contained testimony that the miner had acknowledged them as his children, the Board affirmed the administrative law judge's inclusion of them as augmentees of the miner as based on substantial evidence and supported by the Act. **Hawkins v. Peabody Coal Co.**, 11 BLR 1-157 (1988), *aff'd on other grounds*, No. 89-3336 (6th Cir. Jan. 2, 1990) (unpublished); see also **House v. Clinchfield Coal Co.**, 6 BLR 1-1123 (1984).

Under 20 C.F.R. §218(a)(2), the Sixth Circuit held that a surviving child of the miner who filed a Part C claim in 1978 is eligible via the widow's Part B claim because it was uncontested that the child met the relationship and dependency requirements. Therefore, the child did not have to establish that the miner was totally disabled due to pneumoconiosis under Part C. **Director, OWCP v. Saulsberry**, 887 F.2d 667, 13 BLR 2-80 (6th Cir. 1989).

The Board held that there is no age cut-off for "the child as a dependent and augmentee under Section 402(a) of the Act [as it] remains unfettered by the age cut-off requirement mandated in Section 402(g)(2)(B)(ii) of the Act for the disabled adult child who seeks benefits in its own rights." **Wallen v. Director, OWCP**, 13 BLR 1-64 (1989); 20 C.F.R. §725.209.

The Board held that the administrative law judge rationally found that claimant was not the deceased miner's child within the meaning of 20 C.F.R. §§725.208, 725.220, and, therefore pursuant to 20 C.F.R. §725.545(c)(2) and (c)(5), that claimant was not a proper substitute party-in-interest so as to entitle her to any underpayment that may be due the miner. See 20 C.F.R. §725.545. The Board relied on the law of the State of Illinois, the domicile of the miner at the time of his death, for purposes of determining claimant's relationship to the miner. See 20 C.F.R. §§725.208, 725.220(a), 725.231. In affirming the administrative law judge's finding that claimant was not the miner's child by virtue of the principle of equitable adoption under Illinois law, the Board held that the record did not contain any evidence of an express or implied contract to adopt inasmuch as there was no indication claimant's birth father intended to relinquish parental rights or

that the miner intended to adopt claimant. **Edwards v. Director, OWCP**, 16 BLR 1-43 (1990); see also **Monahan v. Monahan**, 14 Ill.2d 449, 153 N.E.2d 1 (1958); **Weiss v. Beck**, 1 Ill.2d 420, 115 N.E.2d 768 (1953); **Fromzen v. Hallmer**, 404 Ill.596, 89 N.E.2d 818 (1950).

On reconsideration, the Board held that if a child, adopted by a surviving spouse following the miner's death, meets the two-part test of relationship with and dependency on the surviving spouse as set out in 20 C.F.R. §§725.208, 725.209, then the child may be the basis for augmented benefits to the extent the surviving spouse is found entitled to survivor's benefits. See 30 U.S.C. §§902(g), 922(a); 20 C.F.R. §725.520(c). **Blair v. R and E Coal Co.**, 20 BLR 1-15 (1996), *modifying on recon.*, 16 BLR 1-113 (1992).

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).

The principle articulated by the Third Circuit in **Kidda** was extended to situations where a married child attempts to establish dependency, holding that claimant cannot regain unmarried status for purposes of establishing dependency upon her parents pursuant to Section 725.209(a)(i) where the child has married and is subsequently widowed. In the case at bar, claimant was initially married in 1947, was married for seven years, divorced, remarried in 1955 and remained married until the death of her husband in 1988. During the duration of her thirty-three year marriage, her father, the miner, died in 1960, and the widow of the miner died in 1979. Claimant cannot successfully argue that she remains dependent upon her parents as an unmarried child given the facts of this case. Once a surviving child loses dependency status, that status cannot be regained through the cessation and reemergence of elements of dependency. **Reigh v. Director, OWCP**, 20 BLR 1-44 (1996), *modifying on recon.*, 19 BLR 1-64 (1995).

Referencing its holding in **Wallen v. Director, OWCP**, 13 BLR 1-64 (1989), the Board held that Section 725.209(a) [20 C.F.R. §725.209(a)] does not require an adult disabled child of a miner or surviving spouse to demonstrate that he/she became disabled prior to attaining the age of 18, or in the case of a student, before the child ceased being a student, which are requirements in cases where adult disabled children seek benefits in their own right pursuant to Section 725.221. Thus, there is no time limitation on disabled adult child claims for augmented benefits pursuant to Section 725.209(a). **Hite v. Eastern Associated Coal Company**, 21 BLR 1-46 (1997).

The Board held that because claimant, the miner's son, was married, the administrative law judge correctly found that claimant did not meet the definition for the term "child" contained in Section 402(g) of the Act, and therefore was not entitled to benefits. Additionally, because Section 402(g) requires without exception that a claimant be unmarried to receive benefits as a child, the Board held that the administrative law judge was not required to make a factual inquiry into whether claimant was still financially dependent on his parents despite his marriage. **Sullenberger v. Director, OWCP**, 22 BLR 1-54 (2000).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §725.219 (d) is impermissibly retroactive as applied to pending claims, but may be applied to new claims filed after January 19, 2001, the revised regulations' effective date. **Nat'l Mining Ass'n v. Department of Labor**, 292 F.3d 849, 866-867, 23 BLR 2-124 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). [Note: The D.C. Circuit also stated that the revised regulation at Section 725.219(c) is impermissibly retroactive as applied to pending claims. This is a typographical error, however, as Section 725.219(c) was unchanged from the prior edition of the regulations.]

The Board reversed the administrative law judge's finding that claimant was eligible for benefits as the deceased miner's "child." The Board relied upon the law of the State of Kentucky, the domicile of the miner at the time of his death, for purposes of determining claimant's relationship to the miner. See 42 U.S.C. §416(h)(2), (3), as incorporated into the Act by 30 U.S.C. §902(g). Applicable Kentucky statutory law and precedent established that genetic testing with a statistical probability of 99% for paternity (which the Board noted was present in this case) was dispositive of the paternity issue. **Varney v. Steven Lee Enterprises, Inc.**, BLR , BRB No. 05-0440 BLA (Jan. 31, 2006).

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