

Chapter 12

Introduction to Survivors' Claims

I. Generally

The Act provides benefits to eligible survivors of deceased miners. Eligible survivors may include the miner's widowed spouse, divorced widowed spouse, children, parents, and siblings. 20 C.F.R. § 725.201. To be considered eligible for benefits, each survivor must meet the conditions of entitlement, including relationship and dependency. 20 C.F.R. §§ 725.212-725.233.

For a discussion of the effect of stipulations in the miner's claim on a survivor's claim, see Chapter 11. For application of collateral estoppel in a survivor's claim, see Chapter 25.

A. Distinction between survivor and augmentee

A survivor's benefits arise from the miner's death, and these benefits are distinct *augmented* benefits for a spouse or child arising from a miner's lifetime claim, or a survivor's lifetime claim. See 20 C.F.R. §§ 725.204-725.211. Notably, the fact that a spouse or divorced spouse "was, or was not, a dependent for purposes of *augmenting* the miner's benefits for a certain period . . . is not determinative of the issue of whether the individual is a dependent survivor of such miner." 20 C.F.R. § 725.227 (emphasis added).

B. Survivor and miner claims—consolidated for hearing, adjudicated independently

A survivor's claim is distinct from a living miner's claim, and the claims must be considered independently. Often, a survivor's claim is consolidated with the living miner's claim for purposes of holding a hearing, and issuing a decision on the merits. However, a specific finding regarding entitlement must be made for the survivor whose claim is filed after January 1, 1982, where the miner is not entitled to benefits as a result of a claim filed prior to January 1, 1982. *Neely v. Director, OWCP*, 11 B.L.R. 1-85 (1988). The only exception to this rule is where (1) a survivor's claim is filed after January 1, 2005, and is pending on or after March 23, 2010, and (2) the miner was finally awarded benefits in his or her lifetime claim. If these threshold criteria are met, the survivor is automatically entitled to benefits pursuant to

the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148 § 1556 (2010)

Moreover, evidence is limited in miners' and survivors' claims filed after January 19, 2001 pursuant to 20 C.F.R. § 725.414. For further discussion of evidentiary limitations under the amended regulations, see Chapter 4. For discussion of the possible application of collateral estoppel in a survivor's claim based on findings in the living miner's claim, see Chapter 25.

C. Entitlement precluded, felonious and intentional homicide of the miner or other beneficiary

Despite finding relationship and dependency established in a particular survivor's claim, there are rare instances where the survivor will not be entitled to benefits even if the miner died due to coal workers' pneumoconiosis. Twenty C.F.R. § 725.228 provides the following:

An individual who has been convicted of the felonious and intentional homicide of a miner (or) other beneficiary shall not be entitled to receive any benefits payable because of the death of such miner or other beneficiary and such person shall be considered nonexistent in determining the entitlement to benefits of other individuals.

20 C.F.R. § 725.228.

II. Qualifying for benefits

A. Surviving spouse and surviving divorced spouse

To qualify for benefits, a surviving spouse or surviving divorced spouse must demonstrate a relationship to, and dependency on, the miner.

1. Spouse -- relationship to the miner

a. Surviving spouse

An individual is the surviving spouse of a miner if one of the following is established: (1) the courts of the state in which the miner was domiciled (20 C.F.R. § 725.231) at the time of his or her death would find the individual and the miner were validly married, or the state court would find the individual was the miner's surviving spouse; (2) under state law the individual would have the right of a spouse to share in the miner's intestate personal property; or (3) the individual went through a marriage ceremony

with the miner resulting in a purported marriage which, but for a legal impediment (20 C.F.R. § 725.230), would have been a valid marriage. See *also* 20 C.F.R. § 725.214.

b. Surviving divorced spouse

An individual is the "surviving divorced spouse" of a deceased miner if such individual's marriage to the miner was terminated by a final divorce on, or after, the tenth anniversary of the marriage. If the individual was married to, and divorced from, the miner more than once, then the regulations require that the individual have been married to the miner in each calendar year of the period beginning ten years immediately before the date on which any divorce became final and ending with the year in which the divorce became final. 20 C.F.R. § 725.216.

2. Spouse and divorced spouse, dependency on the miner

A surviving spouse or surviving divorced spouse also must establish financial dependency on the miner during the miner's lifetime.

a. The regulation, surviving spouse

Twenty C.F.R. § 725.215 provides a surviving spouse is dependent on the miner if, at the time of the miner's death:

- (a) the individual was living with the miner (§ 725.232); or
- (b) the individual was dependent upon the miner for support or the miner has been ordered by a court to contribute to such individual's support (§ 725.230); or
- (c) the individual was living apart from the miner because of the miner's desertion or other reasonable cause; or
- (d) the individual is the natural parent of the miner's son or daughter; or
- (e) the individual had legally adopted the miner's son or daughter while the individual was married to the miner and while such son or daughter was under the age of 18; or
- (f) the individual was married to the miner at the time both of them legally adopted a child under the age of 18; or

(g) the individual was married to the miner for a period of not less than 9 months immediately before the day on which the miner died, unless the miner's death:

(i) Is accidental (as defined in paragraph (g)(2) of this section, or

(ii) Occurs in the line of duty while the miner is a member of a uniformed service serving on active duty (as defined at § 404.1019 of this title), and the surviving spouse was married to the miner for a period of not less than 3 months immediately prior to the day on which the miner died.

Subsection (g)(2) describes accidental death of a miner. 20 C.F.R. § 725.215. Moreover, 20 C.F.R. § 725.215(g)(3) provides:

The provisions of paragraph (g) shall not apply if the adjudication officer determines that at the time of the marriage involved, the miner would not reasonably have been expected to live for 9 months.

20 C.F.R. § 725.215(g)(3).

b. The regulation, surviving divorced spouse

An individual who is the miner's surviving divorced spouse is dependent on the miner if, for the month before the month in which the miner died:

(a) the individual was receiving at least one-half of his or her support from the miner (§ 725.233(g)); or

(b) the individual was receiving substantial contributions from the miner pursuant to a written agreement (§ 725.233(c) and (f)); or

(c) a court order required the miner to furnish substantial contributions to the individual's support (§ 725.233(c) and (e)).

20 C.F.R. § 725.217. See also *Gala v. Director, OWCP*, 3 B.L.R. 1-809 (1981); *Dercole v. Director, OWCP*, 3 B.L.R. 1-76 (1981).

c. "Support," defined

- Based on expenses

Under 20 C.F.R. § 725.233, the term "support" is defined as "food, shelter, clothing, ordinary medical expenses, and other ordinary and customary items for the maintenance of the person supported. A determination of "support" is based on expenses, not income. *Putman v. Director, OWCP*, 12 B.L.R. 1-127 (1988).

- Actual, regular contributions from miner required

Twenty C.F.R. §§ 725.217 and 725.233(b) require actual, regular contributions from the miner. *Walker v. Director, OWCP*, 9 B.L.R. 1-233 (1987); *Ensinger v. Director, OWCP*, 833 F.2d 678 (7th Cir. 1987).

- Receipt of Social Security benefits from miner not count

In *Lombardy v. Director, OWCP*, 355 F.3d 211 (3rd Cir. 2004), a surviving, divorced spouse's reliance on Social Security benefits, derived from the miner's employment, did not qualify her as a "dependent" of the miner for purposes of receiving black lung benefits. The court cited to *Taylor v. Director, OWCP*, 15 B.L.R. 1-4, 1-7 (1991) as well as *Director, OWCP v. Ball*, 826 F.2d 603 (7th Cir. 1987), *Director, OWCP v. Hill*, 831 F.2d 635 (6th Cir. 1987), and *Director, OWCP v. Logan*, 868 F.2d 285, 286 (8th Cir. 1989) to hold Social Security benefits are not part of the miner's property, and do not constitute a "contribution" to the survivor for purposes of establishing dependency under the Black Lung Benefits Act.

See also *Director, OWCP v. Hill*, 831 F.2d 635 (6th Cir. 1987) (surviving wife who received Social Security benefits based on earnings of former spouse was not a "dependent" for purposes of receiving black lung benefits; those payments were not considered "contributions" under the regulations).

- Child support not count

Payments for child support should not be used in calculating "support" for purposes of determining dependency of a survivor. *Trevena v. Director, OWCP*, 7 B.L.R. 1-799, 1-802 (1985).

- Divorce decree not require contributions, no dependency

Director, OWCP v. Ball, 826 F.2d 603 (7th Cir. 1987); *Taylor v. Director, OWCP*, 967 F.2d 961 (4th Cir. 1992) (order of divorce, through which the court retained the right to impose support obligations, did not require the miner to make any contribution to his ex-wife's support, so as to entitle her to benefits as a dependent, divorced spouse). See also 20 C.F.R. § 725.233(b) and (c).

- Dependency status as "augmentee" not determinative

The fact that a spouse or divorced spouse "was, or was not, a dependent for purposes of augmenting the miner's benefits for a certain period . . . is not determinative of the issue of whether the individual is a dependent survivor of such miner." 20 C.F.R. § 725.227.

3. Spouse and divorced spouse, each entitled to full share of benefits

Prior to promulgation of the December 2000 amendments to the regulations, the courts held a surviving spouse and surviving divorced spouse were each entitled to a full share of benefits.

In *Peabody Coal Co. v. Director, OWCP [Ricker]*, 182 F.3d 637 (8th Cir. 1999), one surviving spouse had been married to the miner until the time of his death, and had not remarried. The surviving divorced spouse had been married to the miner for at least ten years, and "received substantial monetary support from him." As noted by the court, the District Director awarded both survivors 100 percent of the basic benefit award pursuant to a change in the Department of Labor's policy. The court upheld these payment amounts, and reasoned the plain language of the Act provides "both a surviving wife and a qualifying surviving divorced wife are entitled to full benefits" See 30 U.S.C. §§ 902(e) and 922(a)(3) and (5).

In *Mays v. Piney Mountain Coal Co.*, 21 B.L.R. 1-59 (1997), the Board held, where "the miner is survived by two 'widows,' it is reasonable to conclude that each surviving 'widow' is entitled to compensation under the Act as a primary beneficiary, thereby receiving 100% (each) of the basic benefit." The Fourth Circuit upheld the Board's decision in *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753 (4th Cir. 1999) because "a surviving widow is a beneficiary in her own right" such that it would be unjust to conclude the widow was a primary beneficiary, and the divorced survivor as merely a dependent augmentee.

The amended regulations codified these decisions, and provide the following at 20 C.F.R. § 725.212:

(b) If more than one spouse meets the conditions of entitlement prescribed in paragraph (a), then each spouse will be considered a beneficiary for purposes of section 412(a)(2) of the Act without regard to the existence of any other entitled spouse or spouses.

20 C.F.R. §§ 725.212(b) and 725.537.

B. Child

A child is not entitled to benefits as a survivor for any month for which a miner, or the surviving spouse or surviving divorced spouse, establishes entitlement to benefits. 20 C.F.R. § 725.218(b). Rather, an award of benefits to the miner, the surviving spouse, or the surviving divorced spouse may be augmented for a dependent child. 20 C.F.R. §§ 725.208 and 725.209. If there is no surviving spouse or surviving divorced spouse entitled to benefits, then the child may receive survivor's benefits if s/he meets the criteria for entitlement, including relationship and dependency.

1. Relationship to the miner

Under 20 C.F.R. § 725.220, an individual is considered a child of a beneficiary (*i.e.* a miner, or a surviving spouse or surviving divorced spouse who is entitled to benefits at the time of death) if:

(a) The courts of the State in which such beneficiary is domiciled (see § 725.231) would find, under the law that would apply in determining the devolution of the beneficiary's intestate personal property, that the individual is the beneficiary's child; or

(b) Such individual is the legally adopted child of such beneficiary; or

(c) Such individual is the stepchild of such beneficiary by reason of a valid marriage of such individual's parent or adopting parent to such beneficiary; or

(d) Such individual does not bear the relationship of child to such beneficiary under paragraph (a), (b), or (c) of this section, but would, under State law, have the same right as a child to share in the beneficiary's intestate personal property; or

(e) Such individual is the natural son or daughter of a beneficiary but does not bear the relationship of child to such beneficiary under paragraph (a), (b), or (c) of this section and is not considered to be the child of the beneficiary under paragraph (d) of this section, such individual shall nevertheless be considered to be the child of such beneficiary if the beneficiary and the mother or father, as the case may be, of such individual went through a marriage ceremony resulting in a purported marriage between them which but for the legal impediment (see § 725.230) would have been a valid marriage; or

(f) Such individual is the natural son or daughter of a beneficiary but does not have the relationship of child to such beneficiary under paragraph (a), (b), or (c) of this section, and is not considered to be the child of the beneficiary under paragraph (d) or (e) of this section, such individual shall nevertheless be considered to be the child of such beneficiary if:

(1) Such beneficiary, prior to his or her entitlement to benefits, has acknowledged in writing that the individual is his or her son or daughter, or has been decreed by a court to be the father or mother of the individual, or has been ordered by a court to contribute to the support of the individual (see § 725.233(a)) because the individual is a son or daughter; or

(2) Such beneficiary is shown by satisfactory evidence to be the father or mother of the individual and was living with or contributing to the support of the individual at the time such beneficiary became entitled to benefits.

20 C.F.R. § 725.220.

a. Paternity issues, state law controls

In *Varney v. Steven Lee Enterprises, Inc.*, 23 B.L.R. 1-213 (2006),¹ the Board held, in determining issues of paternity, the law of the state where the miner is domiciled at the time of adjudication controls the issue of determining whether paternity is established. Here, DNA testing

¹ This decision was originally issued as "unpublished." However, by *Order* dated July 28, 2006, the Board decided to publish the decision.

demonstrated the miner's son was the father of the child and, although the miner was listed as the child's father on the birth certificate as well as in a subsequent divorce decree, the Board held the child was not entitled to benefits under the Act as:

Applicable Kentucky statutory law and precedent . . . establish that genetic testing with statistical probability equal to or exceeding 99% for paternity, which is present here, . . . is dispositive of the paternity issue where, as in the instant case, claimant has proffered no evidence tending to rebut the presumption of paternity in favor of the miner's son, . . . (state citations omitted). Consequently, the Administrative Law Judge erred in finding that claimant is a 'child' of the deceased miner . . . notwithstanding the uncontroverted genetic testing evidence of record showing (the miner's son) to be claimant's father, because 'the courts have no discretion in these instances.'

Id. at 1-219.

b. Adoption

In *Blair v. R&E Coal Co.*, 20 B.L.R. 1-15 (1996) (on recon.), benefits may be augmented for the survivor of a miner who adopted a child after the miner's death. In so holding, the Board held the "relationship test" was satisfied upon legal adoption of the child and, because the child is unmarried and under 18 years of age, the child also satisfies the "dependency test."

2. Dependency on the miner

a. Generally

Once it is determined that an individual is the child of the miner, a finding must be made regarding the child's dependency. Twenty C.F.R. § 725.221 provides:

For the purposes of determining whether a child was dependent upon a deceased miner, the provisions of § 725.209 shall be applicable, except that for purposes of determining eligibility of a child who is under a disability as defined in section 223(d) of the Social Security Act, such disability must have begun 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. § 725.221.

a. Dependency status as "augmentee" not determinative

The mere fact that a child "was, or was not, a dependent for purposes of augmenting the miner's benefits . . . is not determinative of the issue of whether the individual is a dependent survivor of such miner." 20 C.F.R. § 725.227.

3. Disabled child, special issues

a. "Disabled" child, defined

A "disability" is defined as "the inability to engage in substantial gainful activity by reason of any medically demonstrable physical or mental impairment." Therefore, medical evidence must be produced to establish disability, and a claimant's statements, standing alone, are insufficient to meet the burden of proof. *Tackett v. Director, OWCP*, 10 B.L.R. 1-117 (1987). In determining eligibility for survivor's benefits for a *disabled* child, as defined at Section 223(d) of the Social Security Act, such disability must begin before the child attains the age of 22 years² or, in the case of a student, before the child ceases to be a student. *Lupasky v. Director, OWCP*, 7 B.L.R. 1-532 (1984).

b. Distinction between "augmentee" and "survivor"

In the case of an augmentee to a survivor's claim, as defined at 20 C.F.R. § 725.209, there is no age requirement for the disabled child. *Wallen v. Director, OWCP*, 13 B.L.R. 1-64 (1989).

The Board reviewed the distinction between the claim of a disabled child as a "survivor," and as an "augmentee." In *Hite v. Eastern Associated Coal Co.*, 21 B.L.R. 1-46 (1997), the Board noted "there are differing standards for the adult disabled child as an augmentee [Section 725.209] and the adult disabled child who seeks benefits in his/her own right [Section 725.221]." The provisions at 20 C.F.R. § 725.221 provide the following:

For the purposes of determining whether a child was dependent upon a deceased miner, the provisions of § 725.209 shall be applicable, except that for purposes of determining the eligibility of a child who is under a disability as defined in section 223(d) of

² The amended regulations changed the age from 18 years to 22 years. 20 C.F.R. § 725.221.

the Social Security Act, such disability must have begun before the child attained age 18,³ or in the case of a student, before the child ceased to be a student.

The Board held, "After considering the legislative history of the pertinent provisions of the Social Security Act . . . the child as a dependent and augmentee under 20 C.F.R. § 725.209 remains unfettered by the age cut-off requirement mandated in 20 C.F.R. § 725.221 for the disabled adult child who seeks benefits in his/her own right."

c. Retroactive benefit award

In *Adler v. Peabody Coal Co.*, 22 B.L.R. 1-43 (2000), Employer argued due process barred the award of retroactive benefits. Specifically, from 1981 to 1996, Employer maintained it reasonably relied on an Administrative Law Judge's 1988 finding that Claimant did not qualify as a dependent. As a result, Employer did not develop evidence between 1988 and 1996, "and thus could not present a meaningful defense thereafter regarding claimant's condition."

Citing to *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799 (4th Cir. 1998) and *Venicassa v. Consolidation Coal Co.*, 137 F.3d 197 (3rd Cir. 1998), Employer argued it was irreparably prejudiced, and it should be dismissed as the responsible operator with liability transferred to the Black Lung Disability Trust Fund (Trust Fund). The Board found Employer's arguments were without merit as Employer was "timely notified of its potential liability for benefits in the miner's and widow's claims, which listed claimant as a dependent, disabled adult child . . . and was again timely notified when claimant filed her application for survivor's benefits" The Board further noted Employer was afforded notice and an opportunity to be heard before the Administrative Law Judge, at which time Employer "fully presented its case"

**d. Remarriage of disabled child,
effect of**

In *Sullenberger v. Director, OWCP*, 22 B.L.R. 1-54 (2000), an adult disabled child of a deceased miner was awarded benefits by the District Director. The survivor subsequently informed the District Director of his marriage to another disabled individual, and the payment of black lung benefits was suspended by the District Director. Six years after the suspension of his benefits, Claimant requested, in writing, a reinstatement of benefits. The District Director denied the request as an untimely petition for

³ See footnote 2.

modification under 20 C.F.R. § 725.310 because Claimant's letter was received more than one year after the suspension of the benefits. A hearing was requested, and the Administrative Law Judge concluded, by unilaterally suspending Claimant's benefits, the District Director violated the hearing procedure requirements at 20 C.F.R. § 725.532(a). As a result, the Administrative Law Judge considered the request for reinstatement *de novo*, and not as a petition for modification. The Board agreed with the Administrative Law Judge's ruling in this regard.

After a hearing, the Administrative Law Judge determined benefits were properly suspended pursuant to 30 U.S.C. § 922(a)(3) because Claimant was married. Claimant argued, however, since his wife also was disabled, and he continued to rely on his parents for financial support, his benefits should be reinstated. The Board disagreed. It reasoned the Act's language "contains no exceptions and provides for no such inquiry; the test is simply whether or not a claimant is married." The Board further rejected Claimant's argument that Section 922(a)(3) of the Act "creates a suspect classification and violates claimant's right to freely exercise his religion" as the statutory provision is rationally based and generally applicable.

In *Adler v. Peabody Coal Co.*, 22 B.L.R. 1-43 (2000), Employer argued Claimant's marriage "forever terminated her dependency status" for purposes of augmented and survivor's benefits. The Board disagreed, and held the Act does not preclude entitlement of a disabled child "who is 'unmarried' by reason of divorce." Because Claimant in *Adler* was divorced prior to filing of the miner's claim, the Administrative Law Judge properly found she was "unmarried" at the relevant times—"from the date of the miner's and then his widow's entitlement to benefits until their respective deaths . . . and that claimant remained unmarried thereafter." Compare *Kidda v. Director, OWCP*, 7 B.L.R. 1-202 (1984), *aff'd.*, 769 F.2d 165 (3rd Cir. 1985), *cert. denied*, 475 U.S. 1096 (1986) (noting a "congressional understanding that only those children who suffer from a permanent and total disablement and thus have been continuously disabled from an age earlier than the age of their independence would be eligible for benefits"; re-entitlement to survivor's benefits under 20 C.F.R. § 725.221 by an adult disabled child not permitted when the disability of the unmarried adult child of a deceased miner reemerges after a period of substantial gainful employment).

e. How is "disability" determined?

The Board appears to apply a higher standard for establishing "disability" of a child seeking survivor's benefits as compared to a miner or survivor seeking augmented benefits for a disabled child. On review, of the

legislative history regarding benefits for disabled children, the Board in *Wallen v. Director, OWCP*, 13 B.L.R. 1-64 (1989) stated the following:

Although the reasoning for distinguishing between the disabled adult child as an augmentee and the surviving disabled child who seeks entitlement in its own right is not clearly expressed in the legislative history, various bases for this distinction may be discerned.

. . .

It would be reasonable for Congress to be willing to extend benefits to surviving children and collateral relatives with stricter requirements than had been established for such relatives as augmentees on the claim of the miner, whose benefits would be augmented to aid in his expenses incurred for maintenance of dependent augmentees.

Id. at 1-67.

In *Adler v. Peabody Coal Co.*, 22 B.L.R. 1-43 (2000), a disabled child requested benefits both: (1) as an augmentee of her mother who was receiving survivor's benefits pursuant to 20 C.F.R. § 725.209; and (2) as the disabled adult child survivor of the miner pursuant to 20 C.F.R. § 725.221. The Board held a prior Administrative Law Judge's finding of no dependency was *dicta* because he ultimately denied benefits on the merits and, as a result, collateral estoppel was inapplicable.

In determining whether Claimant was disabled, the Board noted her eligibility for, and receipt of, Social Security disability benefits was of record, and the Social Security definition of "disability" at 20 C.F.R. Part 404, Subpart P, Appendix 1 is incorporated by the black lung regulations at 20 C.F.R. §§ 725.209(a)(2)(ii) and 725.221 to determine eligibility for benefits under the Act. Upon review of the record, the Board determined the Administrative Law Judge properly credited Claimant's treating physician, who "observed claimant during examinations performed over a more than twenty-five year period," and found Claimant to be disabled, over the contrary opinion of Employer's examining physician. Specifically, the Board noted:

In the present case, while it is undisputed that claimant meets the relationship test, employer asserts that claimant is not disabled. Specifically, employer maintains that the administrative law judge mechanistically credited the opinion of claimant's family physician, Dr. Givens, over the contrary opinion of employer's expert, Dr. Dill, and also failed to give reasons for

his credibility determinations. Employer also argues that the administrative law judge discussed the evidence in general terms without explicit reference to the applicable statutory provisions, and that rather than determining *de novo* whether claimant is under a disability as defined in Section 223(d) of the Social Security Act, 42 U.S.C. § 423(d), the administrative law judge merely assumed that claimant was disabled based on the findings of the Social Security Administration (SSA), which employer maintains are not binding on it inasmuch as employer did not have the opportunity to present evidence or participate in the SSA proceedings. Employer's arguments are without merit.

Id. at 1-49. Here, the Board noted, "[C]laimant's eligibility for and receipt of Social Security disability benefits is of record, and the regulations use the Social Security definition, see 20 C.F.R. §§ 725.209(a)(2)(ii), 725.221, to determine eligibility for black lung benefits." *Id.* at 1-50.

On the other hand, in *Campbell v. Tennessee Coal Co.*, 2007 WL 7629321, BRB No. 06-0584 BLA (Apr. 27, 2007) (unpub.), a claim involving augmented benefits under 20 C.F.R. § 725.209 (and not a separate claim for survivor's benefits by the disabled child), the Administrative Law Judge properly held:

Social Security records indicate that (the miner's) son is disabled and receives Social Security benefits under the Supplemental Security Income Program. (citation omitted) I find (the miner) has two dependents for purposes of augmentation, his wife and his adult son.

Slip op. at 2. In affirming the decision of the Administrative Law Judge, the Board noted:

Employer argues initially that the administrative law judge erred in finding that claimant's benefits should be augmented on behalf of his adult son where there is no medical evidence in the record establishing that the son is disabled. This contention is without merit.

Slip op. at 2. The Board held:

Because the SSA document is of record and contains statements that SSA determined claimant's adult son to be disabled and that he is receiving SSI benefits, we affirm the administrative law judge's finding that claimant's adult son met the disability

requirement as her finding is consistent with the language of Section 725.209 and is supported by substantial evidence.

Slip op. at 2.

In *Campbell*, Employer cited to the Board's decision in *Tackett v. Director, OWCP*, 10 B.L.R. 1-117 (1987) as support for its position "that medical evidence must be produced to establish disability, and the claimant's statements, standing alone, are insufficient to meet the burden of proof." The Board disagreed and carefully noted:

Tackett concerned the administrative law judge's application of 20 C.F.R. § 725.221, which sets forth the criteria relevant to claims for survivor's benefits filed by adult children.

Because the *Campbell* claim involved augmentation of benefits in a living miner's claim for his disabled son under 20 C.F.R. § 725.209, the Board concluded, "[I]n light of the fact that the record herein contains documentary evidence of an SSA determination that claimant's adult son is under a disability as defined in section 223(d) of the Social Security Act," the miner was entitled to augmented benefits by reason of his disabled son.

C. Parent, brother, or sister

Twenty C.F.R. §§ 725.222-725.225 set forth the requirements of eligibility of parents and siblings as survivors. Surviving dependent parents are only entitled to benefits where there is no surviving spouse or child. Surviving dependent siblings are only entitled to benefits where there is no surviving spouse, child, or parent. 20 C.F.R. § 725.201(a)(4).

D. Multiple survivors

More than one child may qualify as a dependent of a miner, and may file a claim for benefits. In such cases, Section 412(a)(3) of the Act, at 30 U.S.C. § 912(a)(3), provides benefits shall be divided equally among eligible children.

Pursuant to 20 C.F.R. § 725.537, multiple survivors are not each entitled to the maximum amount of benefits, and it states the following:

Beginning with the month in which a person other than a miner files a claim and becomes entitled to benefits, the benefits of the persons entitled to benefits with respect to the same miner, are adjusted downward, if necessary, so that no more than the

permissible amount of benefits (the maximum amount for the number of beneficiaries involved) will be paid.

20 C.F.R. § 725.537.

This section was originally interpreted to mean that a surviving spouse and a surviving divorced spouse are not each entitled to the same full award of benefits on behalf of the same miner. *Kitchen v. Director, OWCP*, 11 BLR 3-270 (1988). However, the Office of Workers Compensation Programs issued a bulletin in 1992 stating it would treat both individuals "widows" entitled to full independent benefits. See *BLBA Bulletin* No. 92-4 (June 17, 1992). Eventually, the regulatory provisions at 20 C.F.R. § 725.537 were amended to provide a surviving spouse and surviving divorced spouse each are entitled to full benefits. 20 C.F.R. §§ 725.212(b) and 725.537. The remaining provisions, which apply to other types of multiple survivors, remain unchanged.

III. Entitlement to survivors' benefits—considerations beyond relationship and dependency

A. Surviving spouse or surviving divorced spouse

Under 20 C.F.R. § 725.212, entitlement to benefits where an individual is the surviving spouse or the surviving divorced spouse of a miner, if such individual:

- (a) is not married;
- (b) was dependent on the miner at the pertinent time; and
- (c) the deceased miner either:
 - (i) was receiving benefits under Section 415 or Part C of Title IV of the Act at the time of death as a result of a claim filed prior to January 1, 1982; or
 - (ii) is determined as a result of a claim filed prior to January 1, 1982, to have been totally disabled due to pneumoconiosis at the time of death or to have died due to pneumoconiosis. A surviving spouse or surviving divorced spouse of a miner whose claim is filed on or after January 1, 1982, must establish that the deceased miner's death was due to pneumoconiosis in order to establish entitlement to

benefits, except under §718.306 on a claim filed prior to June 30, 1982.

20 C.F.R. § 725.212 (emphasis added).

1. Period of entitlement

A surviving spouse or surviving divorced spouse is entitled to benefits for each month beginning with the first month in which all the conditions listed above are satisfied. 20 C.F.R. § 725.213(a). The last month for which an individual is entitled to benefits is the month in which the surviving spouse or surviving divorced spouse either: (1) marries; (2) dies; or (3) qualified as the surviving spouse of a miner under 20 C.F.R. § 725.204(d), and subsequently ceased to qualify under that paragraph. 20 C.F.R. § 725.213(b).

2. Subsequent remarriage, effect of

The subsequent remarriage of a miner's widow does not break the nexus to her entitlement. However, the widow cannot be married, and receive survivor's benefits at the same time. Consequently, where the widow of a miner remarries, and her second husband dies, she is eligible for benefits for the period after the second husband's death. *Perles v. Director, OWCP*, 7 B.L.R. 1-620 (1984); *Pendelton v. Director, OWCP*, 8 B.L.R. 1-242 (1984); *Kuhn v. Director, OWCP*, 7 B.L.R. 1-268 (1984). Eligibility revives in such a case because the term "widow" is defined at Section 402(e) of the Act, 30 U.S.C. § 902(e), as "the wife living with or dependent for support on the decedent at the time of his death . . . (and) who is not married."

The same reasoning applies where the widow of a miner remarries, and then divorces, her second husband. *Luchino v. Director, OWCP*, 8 B.L.R. 1-453 (1986); *Chadwell v. Director, OWCP*, 8 B.L.R. 1-495 (1986); *Mullins v. Director, OWCP*, 7 B.L.R. 1-156 (1984).

It is noted that the provisions at 20 C.F.R. § 725.213 were amended to add subsection (c) which provides the following:

A surviving spouse or surviving divorced spouse whose entitlement to benefits has been terminated pursuant to § 725.213(b)(1) may thereafter again become entitled to such benefits upon filing application for such reentitlement, beginning with the first month after the marriage ends and such individual meets the requirements of § 725.212. The individual shall not be required to reestablish the miner's entitlement to benefits

(§ 725.212(a)(3)(i)) or the miner's death due to pneumoconiosis
(§ 725.212(a)(3)(ii)).

20 C.F.R. § 725.213(c).

3. Predeceasing the miner

Because a survivor's entitlement under the Act depends on "surviving" the miner, neither a predeceased survivor, nor his or her estate, has any cognizable right to benefits under the Act. *Kowalchick v. Director, OWCP*, 879 F.2d 1173 (3rd Cir. 1989).

B. Child

Once an individual proves that s/he is a child who was dependent on a deceased miner, such individual will be entitled to benefits if the miner:

(a) was receiving benefits under Section 415 or Part C of Title IV of the Act as a result of a claim filed prior to January 1, 1982; or

(b) is determined as a result of a claim filed prior to January 1, 1982, to have been totally disabled due to pneumoconiosis at the time of death, or to have died due to pneumoconiosis. A surviving dependent child of a miner whose claim is filed on or after January 1, 1982, must establish that the miner's death was due to pneumoconiosis in order to establish entitlement to benefits, except where entitlement is established under § 718.306 on a claim filed prior to June 30, 1982.

20 C.F.R. § 725.218(a) (emphasis added).

1. Period of entitlement

An individual is entitled to benefits as a child for each month beginning with the first month in which all of the conditions of entitlement specified above are satisfied. 20 C.F.R. § 725.219(a). The last month for which such individual is entitled to such benefits is the month before the month in which any one of the following events first occurs:

(a) The child dies;

(b) The child marries;

(c) The child attains the age of 18 and;

(1) Is not under a disability at that time; and

(2) Is not a student (§ 725.209(b)) during any part of the month in which the child attains age 18;

(d) If the child's entitlement is based on his or her status as a student, the earlier of:

(1) The first month during no part of which the individual is a student; or

(2) The month in which the individual attains the age of 23 and is not under a disability at the time;

(e) If a child's entitlement is based on disability, the first month in no part of which such individual is under a disability.

20 C.F.R. § 725.219(b).

2. Status as student

Under the amended regulations, the following provisions were added to 20 C.F.R. § 725.219 regarding the duration of a child's entitlement:

(b) The last month for which such individual is entitled to such benefits is the month before the month in which any one of the following events first occurs:

. . .

(3) The child attains age 18; and

(i) Is not a student (as defined in § 725.209(b)) during any part of the month in which the child attains age 18; and

(ii) Is not under a disability (as defined in § 725.209(a)(2)(ii)) at that time;

(4) If the child's entitlement beyond age 18 is based on his or her status as a student, the earlier of:

(i) The first month during no part of which the child is a student; or

(ii) The month in which the child attains age 23 and is not under a disability (as defined in § 725.209(a)(2)(ii)) at that time;

(5) If the child's entitlement beyond age 18 is based on disability, the first month in no part of which such individual is under a disability.

(c) A child whose entitlement to benefits terminated with the month before the month in which the child attained age 18, or later, may thereafter (provided such individual is not married) again become entitled to such benefits upon filing application for such reentitlement, beginning with the first month after termination of benefits in which such individual is a student and has not attained the age of 23.

(d) A child whose entitlement to benefits has been terminated pursuant to § 725.219(b)(2) may thereafter again become entitled to such benefits upon filing application for such reentitlement, beginning with the first month after the marriage ends and such individual meets the requirements of § 725.218. The individual shall not be required to reestablish the miner's entitlement to benefits (§ 725.218(a)(1)) or the miner's death due to pneumoconiosis (§ 725.212(a)(2)).

20 C.F.R. § 725.219.

3. Disabled child, gainful employment precludes entitlement

There is no re-entitlement to benefits where an individual ceases to be eligible as a disabled child for a 15-year period of time due to substantial, gainful employment, but then once again qualifies as a disabled individual. *Kidda v. Director, OWCP*, 7 B.L.R. 1-202 (1984), *aff'd.*, 769 F.2d 1651 (3rd Cir.), *cert. denied*, 106 S. Ct. 1494 (1985). *See also Turkovich v. Director, OWCP*, 7 B.L.R. 1-182 (1984); *Piccin v. Director, OWCP*, 6 B.L.R. 1-616 (1983).

IV. Automatic entitlement to survivors' benefits

A. Where miner's claim filed prior to January 1, 1982

Under 20 C.F.R. § 725.212, a survivor is automatically entitled to benefits if the deceased miner, as a result of the miner's claim filed prior to

January 1, 1982, was eligible for or receiving benefits under Section 415 of the Act (§ 410.490) or Part C of title IV (Parts 718 and 727) at the time of death. The survivor also is automatically entitled to benefits if, as a result of a claim filed prior to January 1, 1982, the deceased miner is determined to have been totally disabled due to pneumoconiosis at the time of death or to have died due to pneumoconiosis. 20 C.F.R. § 725.212. See *also* 20 C.F.R. § 410.200.

B. Where miner's claim filed on or after January 1, 1982

The 1981 Amendments to the Black Lung Benefits Act eliminated automatic entitlement for a survivor, where no miner's claim was filed prior to January 1, 1982, or such a claim filed prior to January 1, 1982, did not result in entitlement. Under these circumstances, the survivor must establish independently that the miner's death was due to pneumoconiosis under 20 C.F.R. Part 718.

In sum, the regulations under 20 C.F.R. Parts 410 and 727 and § 410.490 provide automatic entitlement to survivors where the living miner's claim resulted in entitlement (*i.e.* the miner was adjudged totally disabled due to pneumoconiosis). Twenty C.F.R. Part 718 likewise affords automatic entitlement to survivors who filed claims on or after April 1, 1980, where the miner was awarded benefits based on a claim filed prior to January 1, 1982.

However, the regulations at 20 C.F.R. Part 718 dispensed with this avenue of entitlement for survivors' claims filed after April 1, 1980, where the miner was *not entitled* to benefits as the result of a claim filed prior to January 1, 1982. In particular, 20 C.F.R. Part 718 required that the survivor establish that the miner's death was due to pneumoconiosis. This change in the tenor of the regulations was designed to eliminate entitlement to a survivor where the miner was totally disabled due to pneumoconiosis during his or her lifetime, but died due to other causes.

C. Revival of automatic entitlement for survivors' claims filed after January 1, 2005, and pending on or after March 23, 2010, where the miner was finally awarded benefits in a lifetime claim

On March 23, 2010, the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556 (2010) (PPACA) was enacted. Importantly, Section 1556 revives automatic entitlement for survivors of miners who were finally awarded benefits in their lifetime claims. Said differently, if a miner is awarded black lung benefits on his or her claim (regardless of the filing date of that claim), then the survivor of this miner is automatically entitled to

benefits without having to litigate the issues of whether the miner died due to coal workers' pneumoconiosis, provided the survivor's claim was filed after January 1, 2005, and was pending on or after March 23, 2010. For additional discussion of automatic entitlement under the PPACA, see Chapter 16.