

## **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 (2000) and (2008).

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**

Survivors' benefits arise from a miner's death and must be distinguished from *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 (2000) and (2008). 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 (2000) and (2008) (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 must be considered independently. Often, a survivor's claim is consolidated with the living miner's claim for the sake of judicial economy. However, a specific finding regarding entitlement must be made for the survivor in claims 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).

Moreover, evidence is limited in claims filed after January 19, 2001. For further discussion of evidentiary limitations under the amended regulations, see Chapter 4. For discussion of the possible application of collateral estoppel to finding coal workers' pneumoconiosis in a survivor's claim, see Chapter 25.

#### **C. Entitlement precluded, special circumstances**

Despite a finding of relationship and dependency, there are rare instances where a survivor will not be entitled to benefits. Section 725.228 of the regulations 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 (2000) and (2008).

## **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 will be considered 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 (§ 725.231) at the time of his or her death would find that the individual and the miner were validly married or that the individual was the miner's surviving spouse; (2) under state law such individual would have the right of a spouse to share in the miner's intestate personal property; or (3) such individual went through a marriage ceremony with the miner resulting in a purported marriage which, but for a legal impediment (§ 725.230), would have been a valid marriage. See *also* 20 C.F.R. § 725.214 (2000) and (2008).

For a discussion of common law marriage, see *Margaret Bopp v. Canterbury Coal Co.*, 1992-BLA-511 (ALJ July 14, 1993), a decision by Administrative Law Judge Edith Barnett wherein she concluded that the evidence of record supported a finding that the "Claimant (widow) and the miner entered into a common law marriage valid under the laws of Pennsylvania" and recognized by the Social Security Administration such that the widow was entitled to file a claim for benefits under the Act upon the miner's death.

## **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 (2000) and (2008).

## **2. Spouse and divorced spouse, dependency on the miner**

### **a. The regulation**

A surviving spouse or surviving divorced spouse must also establish that s/he was dependent on the miner. Section 725.218 provides that a surviving spouse was 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.

An individual who is the miner's surviving divorced spouse shall be determined to have been 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(e) 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. § 725.218 (2000) and (2008). *See also Gala v. Director, OWCP*, 3 B.L.R. 1-809 (1981); *Dercole v. Director, OWCP*, 3 B.L.R. 1-76 (1981).

#### **b. "Support," defined**

##### Based on expenses

Under 20 C.F.R. § 725.233(g) (2000) and (2008), the term "support" is based on expenses, not income. *Putman v. Director, OWCP*, 12 B.L.R. 1-127 (1988).

##### Actual, regular contributions from miner required

Sections 725.217 and 725.233 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 (7<sup>th</sup> Cir. 1987).

##### Receipt of social security benefits from miner not count

In *Lombardy v. Director, OWCP*, 355 F.3d 211 (3<sup>rd</sup> Cir. 2004), the judge properly found that a surviving divorced spouse's reliance on social security benefits, deriving 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 (7<sup>th</sup> Cir. 1987), *Director, OWCP v. Hill*, 831 F.2d 635 (6<sup>th</sup> Cir. 1987), and *Director, OWCP v. Logan*, 868 F.2d 285, 286 (8<sup>th</sup> Cir. 1989) to hold that 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 (6<sup>th</sup> 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 (7<sup>th</sup> Cir. 1987); *Taylor v. Director, OWCP*, 967 F.2d 961 (4<sup>th</sup> 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).

### 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 (2000) and (2008).

## **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 that 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 (8<sup>th</sup> Cir. 1999), the court addressed the amount of benefits to which each of two surviving spouses are entitled. 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." The court noted that the district director had 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 by reasoning that the plain language of the Act provides that "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 that, 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 (4<sup>th</sup> Cir. 1999), on grounds that "a surviving widow is a beneficiary in her own right" such that it would be unjust to conclude that the

widow was a primary beneficiary and the divorced survivor as merely a dependent augmentee.

The amended regulations have codified these decisions and provide the following at § 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) (2008); 20 C.F.R. § 725.537 (2008).

## **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) (2000) and (2008). 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**

Section 725.220 provides that an individual is considered a child of a beneficiary (a miner or a surviving spouse entitled to benefits at the time of his or her death) if:

(a) the courts of the state in which such beneficiary is domiciled 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 adopted parent to such beneficiary; or

(d) such individual 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 fails to meet the qualifications in (a) through (d) above and the beneficiary and the mother or father of such individual went through a marriage ceremony resulting in a purported marriage which but for a legal impediment would have been a valid marriage; or

(f) such individual is the natural son or daughter of a beneficiary but fails to meet the qualifications in (a) through (e) above and;

(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 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 (2000) and (2008).

#### **a. Paternity issues, state law controls**

In *Varney v. Steven Lee Enterprises, Inc.*, 23 B.L.R. 1-213 (2006)<sup>1</sup>, the Board held that, 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 demonstrated that 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 that 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 . . .

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<sup>1</sup> This decision was originally issued as "unpublished." However, by *Order* dated July 28, 2006, the Board determined that it would be published.  
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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.*

## **b. Adoption**

In *Blair v. R&E Coal Co.*, 20 B.L.R. 1-15 (1996)(on recon.), the Board held that benefits may be augmented for the survivor of a miner who adopted a child after the miner's death. In so holding, the Board concluded that the "relationship test" was satisfied upon legal adoption of the child and that, because the child is unmarried and under 18 years of age, she 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. Section 725.221 provides that, for purposes of determining the dependency of a child, the provisions at 20 C.F.R. § 725.209 setting forth conditions for establishing dependency for purposes of augmentation, shall apply.

### **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 (2000) and (2008).

## **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 the 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 have begun before the child attained the age of 18<sup>2</sup>, or in the case of a student, before the

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<sup>2</sup> The age is changed to 22 years under the amended regulations. 20 C.F.R. § 725.221 (2008).



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

In this vein, the Board held that, "[a]fter 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 that due process barred the award of retroactive benefits. Specifically, from 1981 to 1996, Employer maintained that it reasonably relied on a prior administrative law judge's finding in 1988 that Claimant did not qualify as a dependent. Employer asserted that it 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 (4<sup>th</sup> Cir. 1998) and *Venicassa v. Consolidation Coal Co.*, 137 F.3d 197 (3<sup>rd</sup> Cir. 1998), Employer argued that it was irreparably prejudiced and 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 to be without merit as Employer had been "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 that Employer was afforded notice and an opportunity to be heard before the administrative law judge, at which time Employer "fully presented its case . . ." As a result, the Board denied Employer's request that liability be transferred to the Trust Fund.

**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 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 that, 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 that benefits were properly suspended pursuant to 30 U.S.C. § 922(a)(3) because Claimant was married. Claimant argued on appeal, however, that because his wife was also disabled and he continues to rely on his parents for financial support, his benefits should be reinstated. The Board disagreed. It reasoned that 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), a disabled child requested benefits as an augmentee of her mother who was receiving survivor's benefits. The child also filed a claim in her own right as the disabled adult child survivor of the miner pursuant to 20 C.F.R. § 725.227. The Board held that 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 that her eligibility for, and receipt of, Social Security disability benefits was of record and that 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 that 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 Employer's examining physician.

Citing to *Kidda v. Director, OWCP*, 7 B.L.R. 1-202 (1984), *aff'd.*, 769 F.2d 165 (3<sup>rd</sup> Cir. 1985), *cert. denied*, 475 U.S. 1096 (1986), Employer argued that Claimant's marriage "forever terminated her dependency status" for purposes of augmented and survivor's benefits. The Board disagreed and held that the Act does not preclude entitlement of a disabled child "who is 'unmarried' by reason of divorce." It found that, because Claimant was divorced prior to filing of the miner's claim, the administrative law judge properly found that she was "unmarried" from the dates of the miner's and widow's entitlement to benefits and Claimant's entitlement to benefits as a survivor.

### **C. Parent, brother, or sister**

Twenty C.F.R. §§ 725.222-725.225 (2000) and (2008) 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) (2000) and (2008).

### **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 that benefits shall be divided equally among such eligible children.

Section 725.537 provides that 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 (2000) and (2008).

This section was originally interpreted to mean that a surviving spouse and a surviving divorced spouse are not both 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 to state that 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 that a surviving spouse and surviving divorced spouse are each entitled to full benefits. 20 C.F.R. § 725.537 (2008). 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**

Section 725.212 provides 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 (2000) and (2008) (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) (2000) and (2008). 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 § 725.204(d), and subsequently ceased to qualify under that paragraph. 20 C.F.R. § 725.213(b) (2000) and (2008).

## **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, the Board has held that 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 § 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)(iii)).

20 C.F.R. § 725.213(c) (2008).

### **3. Predeceasing the miner**

Because a survivor's entitlement under the Act depends upon "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 (3<sup>rd</sup> Cir. 1989).

#### **B. Child**

Once an individual proves that s/he is a child dependent upon 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) (2000) and (2008) (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) (2008). 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) (2000) and (2008).

## **2. Status as student**

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

(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 (2008).

### **3. Disabled child, gainful employment precludes entitlement**

The Board has held that there is no re-entitlement to benefits where an individual ceases to be eligible as a disabled child for a 15 year period because of 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 (3<sup>rd</sup> Cir.), *cert. denied*, 106 S. Ct. 1494 (1985). *See also Turkovich v. Director, OWCP*, 7 B.L.R. 1-182 (1984) (work as school teacher is not substantial, gainful work); *Piccin v. Director, OWCP*, 6 B.L.R. 1-616 (1983) (work as an office cleaning woman and telephone receptionist is substantial, gainful work).

## **IV. Automatic entitlement to survivors' benefits**

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 is also 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 (2000) and (2008). *See also* 20 C.F.R. § 410.200.

Pursuant to the 1981 Amendments to the Black Lung Benefits Act, there



is no longer any provision for 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. Rather, the survivor must establish independently that the miner's death was due to pneumoconiosis under Part 718.

In sum, the regulations under Parts 410 and 727 and § 410.490 provide automatic entitlement to survivors where a miner's claim resulted in entitlement based upon a finding of total disability due to pneumoconiosis at the time of death. 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 Part 718 dispense 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, Part 718 requires 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.