

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 21-0308 BLA

JUSTINE BAILEY)	
(Widow of JAMES BAILEY))	
)	
Claimant-Respondent)	
)	
v.)	
)	
RONNIE ISON TRUCKING)	
)	
and)	
)	
KENTUCKY EMPLOYERS' MUTUAL)	DATE ISSUED: 03/03/2023
INSURANCE)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Awarding Continuing Benefits Under the Automatic Entitlement Provision of the Black Lung Benefits Act of Larry A. Temin, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Donna E. Sonner (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Paul E. Jones and Denise Hall Scarberry (Jones & Jones Law Office, PLLC), Pikeville, Kentucky, for Employer and its Carrier.¹

¹ On November 4, 2022, after filing Employer and Carrier's (Employer's) petition for review and brief, the Jones & Jones Law Office filed a motion to withdraw as

Olgamaris Fernandez (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Larry A. Temin's Decision and Order Awarding Continuing Benefits Under the Automatic Entitlement Provision of the Black Lung Benefits Act (2019-BLA-05516) rendered on a survivor's claim filed on November 6, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). The sole issue presented in this case is whether Claimant is entitled to augmented survivor's benefits on behalf of her disabled adult stepson, Anthony Bailey.² The ALJ found that Anthony Bailey qualifies as a dependent pursuant to 20 C.F.R. §725.209 and awarded augmented survivor's benefits.

The relevant procedural history of the case is as follows: On December 13, 2019, the Benefits Review Board affirmed the Decision and Order Awarding Benefits in the miner's claim. *Bailey v. Ronnie Ison Trucking Co.*, BRB No. 18-0550 BLA (Dec. 13, 2019) (unpub.). Claimant filed a survivor's claim on November 6, 2018, and the district director issued a Proposed Decision and Order awarding benefits on November 29, 2018. Director's Exhibits 3, 13. The Miner's adult disabled son, Anthony Bailey, filed a claim for survivor's benefits on November 27, 2018.³ Director's Exhibit 4. On January 25, 2019, the district director issued an Amended Proposed Decision and Order, augmenting Claimant's award of benefits for Anthony Bailey as an adult disabled child. Director's

Employer's counsel and requested an extension of all deadlines in this appeal by forty-five to sixty days. *See* Motion to Withdraw as Counsel and Request an Extension of all Deadlines. On November 30, 2022, Thomas L. Ferreri and Matthew J. Zanetti of Ferreri Partners, PLLC, filed an Entry of Appearance and Notice of Representation on behalf of Employer.

² Claimant is the widow of the Miner, James Bailey, who died on March 25, 2017, while his claim for black lung benefits, filed on May 13, 2005, was pending. Decision and Order at 2; Hearing Transcript at 4-5; Director's Exhibit 8.

³ On the application for benefits, Anthony Bailey wrote "Augmented 725.209a" in the section entitled "Show Your Relationship to the Miner." Director's Exhibit 4.

Exhibit 20. Employer requested a hearing, and the case was assigned to the ALJ. Director's Exhibit 21.

At the October 31, 2019 hearing, Employer agreed Claimant is entitled to automatic survivor's benefits based on the award of benefits in the miner's claim but contested that her benefits should be augmented for Anthony Bailey. Decision and Order at 2-3; Hearing Transcript at 9-10, 21, 26. Claimant's counsel moved to sever Anthony Bailey's claim from Claimant's claim. Hearing Transcript at 29-32. The ALJ denied Claimant's request but advised the parties they could brief this issue. *Id.* at 30, 32-33.

On December 2, 2019, Claimant again moved to sever Anthony Bailey's claim from her survivor's claim on the basis that Mr. Bailey is a child solely of the Miner and therefore his claim should be an augmentee solely on the miner's claim. Motion to Sever Augmentee's Claim from the Widow's Claim at 5-10. Mr. Bailey also asserted he should be an augmentee of the Miner's claim and not the survivor's claim. *Id.* at 5, 7-8. Employer responded on December 12, 2019, asserting Mr. Bailey could not be Claimant's augmentee because he is not her biological child and does not meet the relationship and dependency requirements. Employer's December 12, 2019 Brief on Dependency at 4-7.

On December 23, 2019, the ALJ issued an Order Denying Motion to Sever Augmentee's Claim from the Widow's Claim, finding the parties did not show good cause to separate Anthony Bailey's claim from Claimant's claim and that the district director's decision to augment benefits in Claimant's claim was not unreasonable.⁴ Order at 4. In his Decision and Order, which is the subject of this appeal, the ALJ found that Anthony Bailey qualifies as a dependent pursuant to 20 C.F.R. §725.209 and awarded augmented survivor's benefits.

On appeal, Employer contended that res judicata and collateral estoppel bar an award of augmented survivor's benefits. Alternatively, Employer argued that Anthony Bailey does not meet the dependency requirements to qualify as an augmentee of Claimant's survivor benefits. Claimant responded in support of her survivors' benefits and the augmentation of those benefits for Mr. Bailey.

Upon considering the parties' briefs on appeal, the Board determined it required additional briefing because the record was unclear why the Department of Labor merged Mr. Bailey's claim with Claimant's over her initial objections. In an Order issued on

⁴ Employer submitted another brief reiterating its assertion that Anthony Bailey is not entitled to benefits as a dependent disabled adult child or augmentee. Employer's March 5, 2020 Brief on Dependency at 4-10.

September 22, 2022, the Board requested the Director explain how and why the claims were merged such that Mr. Bailey became her augmentee.

In his brief, the Director argues Employer forfeited any allegations of error concerning the merger of Claimant's and Mr. Bailey's claims by failing to raise them before the ALJ. He also asserts the two claims were correctly merged to make Mr. Bailey an augmentee of Claimant and therefore the Board should affirm the ALJ's decision awarding augmented benefits and denying Claimant's motion to sever. Claimant again responds in support of her award of benefits and augmentation thereof.⁵ Employer replies, arguing that because the Director did not cite any authority for the merger of the claims, it was irrational and unsupported by law.⁶ It also asserts that since neither the Director nor any other party addressed its previous arguments concerning *res judicata*, collateral estoppel, and the dependency requirements, they should be decided in its favor.⁷

⁵ Counsel's first response refers to both the Miner, James Bailey, and his widow, Justine Bailey, as the Claimant, while counsel's second brief refers to Justine Bailey as the Claimant, yet both pleadings are signed by counsel on behalf of the augmentee, Anthony Bailey. Given the posture of this case, we appropriately refer to Justine Bailey as Claimant, and separately to Anthony Bailey in the context of his role as the augmentee.

⁶ Contrary to Employer's contention, the Director explained that the two claims were merged pursuant to 20 C.F.R. §725.401 in order "to ensure that both parties would receive the benefits they were entitled to." Director's November 21, 2022 Letter Brief at 2; 20 C.F.R. §725.401 (After the district director receives a claim, he or she "shall take such action as is necessary to develop, process, and make determinations with respect to the claim . . .").

⁷ Employer appears to be referring to the Director and district director interchangeably in its reply brief. *See* Employer's Reply Brief to the Benefits Review Board. Regardless, contrary to Employer's statement, Claimant responded asserting *res judicata* and collateral estoppel are not applicable to this case and the ALJ properly found Anthony Bailey met both the relationship and dependency requirements for a child augmentee. Claimant's Response Brief at 5-11, Claimant's Response to Director's Brief at 2-3. The Director also addressed Employer's dependency argument in his brief. Director's November 21, 2022 Letter Brief at 3 n.3. Further, as outlined below, Employer has not met its burden of proving that this claim is prohibited by the doctrines of *res judicata* or collateral estoppel. Nor are we persuaded that the ALJ erred in finding Anthony Bailey is entitled to augmented survivor's benefits.

The Board's scope of review is defined by statute. The ALJ's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.⁸ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Procedural Arguments: *Res Judicata* and Collateral Estoppel

Employer asserts that the doctrines of *res judicata* and collateral estoppel bar Anthony Bailey from claiming that he is a dependent of either Claimant or the Miner for purposes of augmented benefits and, therefore, an award of augmented survivor's benefits is barred. Employer's Brief at 6-7 (unpaginated); *see also* Employer's Reply Brief to the Benefits Review Board at 2 (unpaginated). Employer asserts Anthony Bailey is now barred from receiving benefits, either individually or as an augmentee of Claimant, because the Miner listed only his wife as a dependent in the miner's claim.⁹ *Id.* We disagree.

The doctrines of *res judicata* and collateral estoppel foreclose "the re-litigation of issues of fact or law that are identical to issues which have actually been determined and necessarily decided in prior litigation in which the party against whom [issue preclusion] is asserted had a full and fair opportunity to litigate." *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-137 (1999) (en banc), *citing Ramsey v. INS*, 14 F.3d 206 (4th Cir. 1994). Concerning *res judicata*, "[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (internal citations omitted). A party seeking to rely on the doctrine of collateral estoppel must establish four elements: (1) the precise issue was raised and actually litigated in the prior proceeding; (2) the determination of the issue was necessary to the outcome of the prior proceeding; (3) the prior proceedings resulted in a final judgment on the merits; and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 313 (6th Cir. 2014); *see also Sedlack v. Braswell Servs. Grp., Inc.*, 134 F.3d 219, 224 (4th Cir. 1998).

⁸ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the Miner performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; *see Bailey*, BRB No. 18-0550 BLA at 3-4 n.4.

⁹ Employer cites the Miner's stipulation before ALJ William Barto in conjunction with his miner's claim that he had only one dependent, Claimant, for purposes of augmentation. Employer's Brief at 6 (unpaginated). Employer states ALJ Barto accepted that stipulation and on appeal the dependency issue was not contested. *Id.* at 6-7.

Anthony Bailey was not a party to the previously adjudicated miner's claim, and the factual findings in this case regarding Claimant's eligibility for augmented survivor benefits on his behalf were not necessary to the award of benefits in the miner's claim. *See Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988) (doctrine of *res judicata* bars re-adjudication of finally denied black lung claim, even if the claim was incorrectly decided); *Lawson*, 739 F.3d at 313 (6th Cir. 2014). Moreover, Employer has not sufficiently explained how the facts of this case satisfy the requirements of these doctrines or otherwise alleged that Anthony Bailey could not have filed for augmented survivor's benefits when and how he did. 20 C.F.R. §802.211(b);¹⁰ *Cox v. Benefits Review Board*, 791 F.2d 445, 446-47 (6th Cir. 1986); *see* Employer's Brief at 6-7 (unpaginated); Employer's Reply Brief at 2 (unpaginated). Therefore, Employer has not met its burden to establish that the doctrines of *res judicata* or collateral estoppel bar augmented benefits on Anthony Bailey's behalf or bar him from receiving benefits as an augmentee.¹¹

Augmentation of Survivor's Benefits

Federal black lung benefits may be augmented if the requisite standards of relationship¹² and dependency are met. 20 C.F.R. §725.201(c). For the purpose of

¹⁰ Before the Board will consider the merits of an appeal, the Board's procedural rules impose threshold requirements for alleging specific error. In relevant part, a petition for review "shall be accompanied by a supporting brief, memorandum of law or other statement which . . . [s]pecifically states the issues to be considered by the Board." 20 C.F.R. §802.211(b). The petition for review must also contain "an argument with respect to each issue presented" and "a short conclusion stating the precise result the petitioner seeks on each issue and any authorities upon which the petition relies to support such proposed result." *Id.* To merely "acknowledge an argument" in a petition for review "is not to make an argument" and "a party forfeits any allegations that lack developed argument." *Jones Bros. v. Sec'y of Labor*, 898 F.3d 669, 677 (6th Cir. 2018), *citing United States v. Huntington Nat'l Bank*, 574 F.3d 329, 332 (6th Cir. 2009).

¹¹ Because we have rejected Employer's assertion that *res judicata* or collateral estoppel bars augmented benefits on Anthony Bailey's behalf, the ALJ's failure to address these doctrines is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Employer's March 5, 2020 Brief on Dependency at 4, 9-10.

¹² Employer asserts that Claimant and Anthony Bailey did not have a relationship beyond her marriage to his father, and that he is not her biological child. Employer's Brief at 7-8 (unpaginated). However, Employer has not challenged, and we therefore affirm, the ALJ's findings that Anthony Bailey is the Miner's son, the Miner and Claimant were

augmenting the benefits of a surviving spouse, a child will be considered a dependent if: the child is unmarried and either under eighteen years of age or under a disability as defined in Section 223(d) of the Social Security Act, 42 U.S.C. §423(d), or eighteen years or older and a student. *See* 20 C.F.R. §725.209(a); *Hite v. Eastern Assoc. Coal Co.*, 21 BLR 1-46, 1-49 n.4 (1997). The ALJ found that Anthony Bailey is unmarried and suffers from a disability as defined in Section 223(d) of the Social Security Act,¹³ and therefore satisfies the dependency requirement for augmented survivor's benefits. Decision and Order at 6-7.

Citing *Reigh v. Director, OWCP*, 20 BLR 1-44 (1996), Employer contends Anthony Bailey is not "unmarried" as he was previously married and divorced, which makes him ineligible to receive benefits pursuant to 20 C.F.R. §725.209(a). Employer's Brief at 12 (unpaginated). Contrary to Employer's assertion, and as the ALJ highlighted, the plain language of the regulations does not require that an augmentee have never been married. Decision and Order at 5, *citing* 20 C.F.R. §725.209(a); 30 U.S.C. §902(g) (defining "child"). Further, as the ALJ indicated, the preamble to the 2001 regulatory amendments addressed the *Reigh* case:

The literal language of the statute does not preclude a child's eligibility for all time based upon the existence of a marriage. . . . If a marriage terminates prior to any period of eligibility, the child is nevertheless unmarried when (s)he becomes entitled to benefits. *See Adler v. Peabody Coal Co.*, Black Lung Rep., BRB No. 98-1513 BLA (Feb. 4, 2000). If the child marries while receiving benefits, (s)he cannot continue as an eligible survivor for the duration of the marriage. *Sullenberger v. Director, OWCP*, Black Lung Rep., BRB No. 99-0449 BLA (March 8, 2000)[.] Upon cessation of the marital relationship, however, the child again "is unmarried," which complies with the statutory requirement. Assuming all other conditions for eligibility are met, an "unmarried" child retains his or her status as a "child" under the plain language of the statute notwithstanding the occurrence of the

married, and Mr. Bailey is Claimant's stepchild based on the valid marriage. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4. Consequently, we affirm the ALJ's finding that Anthony Bailey satisfies the relationship requirement, which specifically includes stepchildren. 20 C.F.R. §725.208(c); Decision and Order at 4.

¹³ Employer has not challenged, and we therefore affirm, that Anthony Bailey suffers from a disability as defined in Section 223(d) of the Social Security Act. *Skrack*, 6 BLR at 1-711.

marriage. In this regard, the Department disagrees with the broad statement in *Reigh v. Director, OWCP*, 20 Black Lung Rep. 1–44 (1996), that a surviving child of a miner cannot revive her status as the unmarried dependent of her parents upon the death of her husband. 20 Black Lung Rep. at 1–48.

65 Fed. Reg. 79,920, 79,966 (Dec. 20, 2000).¹⁴

Anthony Bailey testified he was married in 1989 and divorced around 2006. Employer’s Exhibit 1 at 16. His divorce decree, contained in the record, was entered on July 13, 2010. Director’s Exhibit 6. We therefore affirm the ALJ’s finding that Anthony Bailey was considered “unmarried” as of March 2017, when Claimant became eligible for augmentable benefits. Decision and Order at 6.

We also reject Employer’s assertion that Anthony Bailey is ineligible for benefits because he was not disabled until he was twenty-seven years old. Employer’s Brief at 13-15 (unpaginated). Employer states “it logically follows that if a child who is attending school cannot receive augmented benefits after their 23rd birthday [then] an adult child would have to attain disability status prior to the age of 23 in order to be considered a disabled adult child.”¹⁵ Employer’s Brief at 14-15 (unpaginated), *citing* 20 C.F.R. §725.209(b)(4). The clear language of the regulations, however, does not support this interpretation, and Employer has not provided any support for it. *See* 20 C.F.R. §725.209. Further, as the ALJ accurately found, Employer confused “the standards for a dependent qualifying for survivors benefits in his own right [with] the standards for a dependent qualifying as an augmentee.” Decision and Order at 6. The Board has held that “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^[16] for the disabled adult child who

¹⁴ This discussion applies to child beneficiaries and augmentees. *See* 65 Fed. Reg. at 79,963.

¹⁵ The regulation at 20 C.F.R. §725.209(4) clarifies the term “student” and indicates “[a] student whose 23rd birthday occurs during a semester or the enrollment period in which such student is pursuing a full-time course of study or training shall continue to be considered a student until the end of such period”

¹⁶ The regulation at 20 C.F.R. §725.221 states that “for purposes of determining whether a child was dependent upon the deceased miner, the provisions of 20 C.F.R. §725.209 shall be applicable, except that for purposes of determining the eligibility of a

seeks benefits in his/her own right.”¹⁷ *Hite v. Eastern Assoc. Coal Co.*, 21 BLR 1-46, 1-50 (1997). Further, the Department of Labor, in revising the regulation at 20 C.F.R. §725.209, rejected similar arguments that applying Section 725.209, without the age cut-off, is inconsistent with the Act:

In the initial notice of proposed rulemaking, the Department erroneously proposed changing §725.209(a)(2)(ii) to state that, in order to be considered a dependent, a child who is at least 18 and not a student must be under a disability that commenced before the age of 22. The purpose of the change was to reflect in the regulation itself the age by which certain children’s disabilities must commence, a requirement imposed by an incorporated provision of the Social Security Act. After further consideration, however, the Department re-proposed the regulation without the new language. Eliminating the age by which the disability must have begun for a dependent child harmonizes §725.209 with the statutory definition by preserving the distinction between a child/augmentee and a child/beneficiary. A child who claims benefits in his or her own right based on personal disability (child/beneficiary) must prove the disability arose before age 22 as required by 30 U.S.C. 902(g). A dependent child who is an augmentee of a beneficiary [under 30 U.S.C. 902(a)(1)], however, is exempt from this requirement *because the statutory definition of “dependent” explicitly exempts a “child” from the requirement that disability begin by a certain age.*

65 Fed. Reg. at 79,963 (emphasis added) (internal citations omitted).

We therefore reject Employer’s assertion that Anthony Bailey is not entitled to augmented benefits because he became disabled when he was over the age of 22. Employer’s Brief at 10-15 (unpaginated); *see* Decision and Order at 6-7. We affirm, as supported by substantial evidence, the ALJ’s finding that Anthony Bailey meets both the

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 the age of 22.”

¹⁷ Consequently, we reject Employer’s argument that the ALJ failed to consider 20 C.F.R. §725.219 as it also deals with standards for a dependent qualifying for survivor’s benefits in his own right. Although Employer asserts that because this regulation “specifically references 20 C.F.R. §725.209,” it must apply to augmentee benefits, Section 725.209 was referenced only for the definition of disability. Employer’s Brief at 15 (unpaginated).

relationship and dependency requirements for a child augmentee and that Claimant is entitled to augmented survivor's benefits.¹⁸ 20 C.F.R. §§725.208, 725.209; Decision and Order at 4, 6.

¹⁸ Contrary to Employer's contention, and as the ALJ recognized, whether Claimant and Anthony Bailey have a close personal relationship and whether Claimant believes he should be entitled to benefits do not have any bearing on the augmentation of her survivor's benefits. 20 C.F.R. §§725.208-725.211; Hearing Transcript at 29; Director's November 21, 2022 Letter Brief at 2-3; Employer's Brief at 5, 7-9 (unpaginated); Employer's Reply Brief to the Benefits Review Board at 2 (unpaginated); *see also* 20 C.F.R. §725.414(a) (providing for the direct payment of augmented benefits to a dependent when it is in the dependent's best interests). Further, although Employer alleges the ALJ "erred in failing to follow 20 C.F.R. [§]725.211 and apply the specific facts of this case[.]" it has not pointed to any relevant facts the ALJ failed to consider or shown the ALJ abused his discretion in determining Claimant is entitled to augmented survivor's benefits for her stepson. Employer's Brief at 9 (unpaginated); *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489 (6th Cir. 2012). We therefore reject Employer's contention that the ALJ erred in not severing Claimant's and Anthony Bailey's claims in his December 23, 2019 Order. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Moreover, Employer failed to oppose the merger of the claims before the ALJ but rather asserted Mr. Bailey was not a proper augmentee; it therefore has forfeited this argument. *See Joseph Forrester Trucking v. Director, OWCP [Davis]*, 987 F.3d 581 (6th Cir. 2021); *Kiyuna v. Matson Terminals, Inc.*, 53 BRBS 9, 10 (2019); Employer's December 12, 2019 Brief on Dependency.

Accordingly, the ALJ'S Decision and Order Awarding Continuing Benefits Under the Automatic Entitlement Provision of the Black Lung Benefits Act is affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge