

**PART II**  
**DEFINITIONS**

**B. SURVIVORS/DEPENDENTS**

The Act and regulations limit the definitions of survivor and dependent to spouses, including surviving divorced spouses, and children. 30 U.S.C. §902(a), (e), and (g); 20 C.F.R. §725.201 *et seq.* Sections 725.204 through 725.211 concern augmentation of the living miner's benefits for the care of dependents and Sections 725.212 through 725.227 pertain to entitlement for survivors. For the purpose of augmenting benefits, Sections 725.204 and 725.205 set forth the requirements with respect to relationship and dependency for a spouse. Sections 725.206 and 725.207 provide similar requirements with respect to augmentation in the case of a divorced spouse.

Sections 725.212, 725.213, 725.214, and 725.215 list the conditions and duration of entitlement and the relationship and dependency requirements with regard to entitlement for a surviving spouse. *Kephart v. Director, OWCP*, 8 BLR 1-185 (1985).

**1. SURVIVING SPOUSE**

Sections 725.212, 725.213, 725.216 and 725.217 set forth the conditions and duration of entitlement and the relationship and dependency requirements concerning entitlement for a surviving divorced spouse. Section 725.217 provides that a miner's surviving divorced spouse shall be determined to have been dependent upon the miner if, for the month before the month in which the miner died:

(1) one-half of the individual's support was being furnished by the miner; (2) the individual was receiving substantial contributions from the miner under a written agreement; or (3) a court order required the miner to furnish substantial contribution to the individual's support.

20 C.F.R. §725.217; see generally *Dercole v. Director, OWCP*, 3 BLR 1-76 (1981).

The eligibility of the surviving spouse when there has been a remarriage followed by a termination of the remarriage has been litigated frequently. The issue has now been resolved as a *en banc* Board decision has held that a surviving spouse is not barred from receiving benefits if her intervening remarriage has been terminated and

she is not presently remarried. The dissent in this opinion would conclude that the intervening remarriage forever bars the award of benefits. **Luchino v. Director, OWCP**, 8 BLR 1-453 (1986)(Ramsey, C.J., and Dolder, J., dissenting), *overruling* **Robinson v. Director, OWCP**, 4 BLR 1-579 (1981); *see also* **Wolf Creek Collieries v. Robinson**, 872 F.2d 1264, 12 BLR 2-259 (6th Cir. 1989); **Chadwell v. Director, OWCP**, 8 BLR 495 (1986); **Pendleton v. Director, OWCP**, 8 BLR 1-242 (1984) (Ramsey, C.J., dissenting); **Combs v. Director, OWCP**, 8 BLR 1-88 (1985)(Dolder, J., dissenting); **Henderson v. Director, OWCP**, 7 BLR 1-866 (1985)(Ramsey, C.J., dissenting); **Perles v. Director, OWCP**, 7 BLR 1-620 (1984)(Ramsey, C.J., dissenting); **Kuhn v. Director, OWCP**, 7 BLR 1-268 (1984)(Ramsey, C.J., dissenting); *but see* **Mullins v. Director, OWCP**, 11 BLR 1-132 (1988)(en banc)(Ramsey, C.J., dissenting), *overruling* 7 BLR 1-561 (1984)(Ramsey, C.J., concurring and dissenting)(Smith, J., dissenting).

The Board has held that Sections 725.217 and 725.233 contemplate actual, regular contributions from the miner's own property, and that income received from a farm purchased with property settlement proceeds does not fall within this definition. **Walker v. Director, OWCP**, 9 BLR 1-233 (1987). The Sixth and Seventh Circuits have held, however, that social security payments received by former spouses that were based on miners' earnings were not "contributions" from the miners, and thus former spouses were not "dependents" entitled to black lung benefits. *See* **Ball v. Director, OWCP**, 9 BLR 1-144 (1986), *rev'd*, 826 F.2d 603, 10 BLR 2-210 (7th Cir. 1987); **Hill v. Director, OWCP**, 9 BLR 1-126 (1986), *rev'd sub nom. Director, OWCP v. Hill*, 831 F.2d 635, 10 BLR 2-308 (6th Cir. 1987); **Holmes v. Director, OWCP**, 9 BLR 1-29 and 13 BLR 1-51 (1986), *rev'd sub nom. Director, OWCP v. Hill*, 831 F.2d 635, 10 BLR 2-308 (6th Cir. 1987).

The Board, however, reaffirmed its position taken in **Fletcher** that Social Security benefits paid to a surviving divorced spouse on her former husband's earnings record constitute support for the purpose of establishing dependency in this case arising within the jurisdiction of the Eighth Circuit. The Board noted the contrary holdings of the Sixth and Seventh Circuits in **Hill**, 831 F.2d 635, 10 BLR 2-308 (6th Cir. 1987) and **Ball**, 826 F.2d 603, 10 BLR 2-210 (7th Cir. 1987), and indicated it will apply those holdings only to cases arising within those jurisdictions. **Logan v. Director, OWCP**, 12 BLR 1-125 (1988) (*en banc*), *rev'd sub nom. Director, OWCP v. Logan*, 868 F.2d 285, 12 BLR 2-175 (8th Cir. 1989).

## CASE LISTINGS

[miner did not provide one-half of the surviving divorced spouse's support; no entitlement to benefits even without discussing Section 725.217(2), (3) - no written agreement/court order requiring miner to furnish substantial contributions] **Gala v. Director, OWCP**, 3 BLR 1-809 (1981).

[miner's wife dependent within meaning of Sections 725.204,725.205; current separation and no current support outweighed by marriage of well beyond the one-year period required by Section 725.205(e) and were living together at time of hearing; entitled to augmented benefits] **Tobin v. Pagnotti Enterprises**, 5 BLR 1-16 (1982).

[month of the miner's marriage, not the time claim was filed, is the appropriate time for determining eligibility for benefit augmentation under 20 C.F.R. §§725.204, 725.205, 725.208 and 725.209] **Lewis v. Pittsburg & Midway Coal Co.**, 6 BLR 1-643 (1983).

[state court order directing claimant to make permanent alimony payments to former wife does not establish *per se* her status as a dependent for augmentation of benefits pursuant to Section 725.207] **Velegolla v. North American Coal Corp.**, 6 BLR 1-868 (1984).

[claimant not surviving divorced spouse where no settlement agreement, no provisions regarding support in divorce decree and where only evidence of record relevant to miner's obligation to pay support consisted of claimant's testimony of oral agreement, but no support ever paid] **McCoy v. Director, OWCP**, 7 BLR 1-789 (1985).

[constitutionality of Section 725.217(a)(2) upheld] **McCoy v. Director, OWCP**, 7 BLR 1-789 (1985).

[money received as support for children not counted in determining whether miner contributed one-half support to surviving divorced spouse] **Trevena v. Director, OWCP**, 7 BLR 1-799 (1985).

[claimant established her dependency by testifying to the existence of court order compelling miner to contribute to her support; no contradictory evidence or allegation of inability to procure order was made by employer; admissibility of hearsay affirmed] **Simila v. Bethlehem Mines Corp.**, 7 BLR 1-535 (1984), *vacated in part on other grounds sub nom. Bethlehem Mines Corp. v. Simila*, 766 F.2d 128, 8 BLR 2-4 (3d Cir. 1985).

[only support that is received from miner himself, not his family, may be counted in determining whether surviving divorced spouse is a dependent] **Bunchalk v. Director, OWCP**, 8 BLR 1-415 (1985).

### DIGESTS

A miner's continued entitlement to benefits under Part B at the time of death establishes the necessary determination that he was totally disabled due to pneumoconiosis at the time of death to meet the requirement of 20 C.F.R. §725.212. **Hill v. Director, OWCP**,

9 BLR 1-126 (1986), *rev'd sub nom. Director, OWCP, v. Hill*, 831 F.2d 635, 10 BLR 2-308 (6th Cir. 1987).

In a survivor's claim, lay evidence alone can be sufficient to support a finding that the deceased miner was totally disabled due to a respiratory impairment. ***Dobbins v. Schweiker***, 641 F.2d 1354 (9th Cir. 1981); *see also Rapier v. Secretary of Health and Human Services*, 808 F.2d 456, 9 BLR 2-191 (6th Cir. 1986).

The Social Security Administration benefits received by a miner's surviving divorced spouse based on the miner's earnings record, a derivative form of support falling within the regulatory definition of "contributions," establish dependency pursuant to 20 C.F.R. §725.233(b), (g). ***Fletcher v. Director, OWCP***, 10 BLR 1-11 (1986), *aff'd on recon.*, 10 BLR 1-13 (1986)(*en banc*), *appeal dismissed*, No. 86-2610 (4th Cir. 1987)(*unpublished*).

Following the Seventh Circuit's holding in ***Dempsey v. Director, OWCP***, 811 F.2d 1154, 9 BLR 2-226 (7th Cir. 1987), the Third Circuit held that a claimant who does not have sufficient medical evidence to invoke the presumption of pneumoconiosis, may rely on affidavits to establish the presumption. Therefore, a death certificate alone, absent an autopsy, may not be used to preclude invocation. *See Hillibush v. Benefits Review Board*, 853 F.2d 197, 11 BLR 2-223 (3d Cir. 1988).

A surviving spouse who filed on or after January 1, 1982 must show that the deceased miner's death was due to pneumoconiosis except if Section 718.306 entitlement is established for a claim filed prior to June 20, 1982. *See generally, Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); ***Pothering v. Parkson Coal Co.***, 861 F.2d 1321, 12 BLR 2-60 (3d Cir. 1988); ***Smith v. Camco Mining, Inc.***, 13 BLR 1-17 (1989); *see also Freeman United Coal Mining Co. v. Benefits Review Board, [Jones]*, 879 F.2d 245 (7th Cir. 1989), 988 F.2d 706 (7th Cir. 1993), [affirming award following remand to administrative law judge], *pet. for reh'r'g denied*, 17 BLR 2-195 (7th Cir. 1993).

The Board held 30 U.S.C. §902(e) and 20 C.F.R. §725.217, which provide for the determination of dependency of a surviving divorced spouse, to be constitutional, finding that the sections do not create improper distinctions between classes of surviving divorced spouses. ***Gabbard v. Director, OWCP***, 12 BLR 1-35 (1988).

Section 725.305 requires a written statement by the eligible claimant indicating an intent to file a survivor's claim. Without such, the provisions of that section are unavailable to the claimant's estate. ***Bianco v. Director, OWCP***, 12 BLR 1-94 (1989).

The administrative law judge's findings regarding whether claimant satisfied the dependency requirement for a surviving spouse pursuant to 20 C.F.R. §725.215 were sufficient to support a finding of dependency for a surviving divorced spouse, and the Board applied the findings to 20 C.F.R. §725.217 even though that regulation was not discussed by the administrative law judge. Inasmuch as claimant's relationship as a

surviving divorced spouse was not disputed, the Board held that the record established her eligibility pursuant to 20 C.F.R. §§725.216, 725.217 and thus declined to address the issue of whether claimant was a surviving common law spouse under state law, 20 C.F.R. §725.214. **Zyskoski v. Director, OWCP**, 12 BLR 1-159 (1989).

In a survivor's claim, collateral estoppel does not apply to the issue of a miner's total disability due to pneumoconiosis that was previously adjudicated in the miner's claim. **Alexander v. Island Creek Coal Co.**, 12 BLR 1-44 (1988), *aff'd sub nom. Island Creek Coal Co. v. Alexander*, No. 88-3863 (6th Cir., Aug. 29, 1989)(unpublished).

Testimony of a survivor of a miner who had died before the black lung compensation program existed was sufficient to prove disability. Since claimant did not know and could not specifically compare the physical requirements of the miner's usual coal mine employment with his actual capabilities, the administrative law judge properly found that claimant's burden in demonstrating a totally disabling respiratory impairment would be too onerous since the compensation program did not exist and claimant could not anticipate and preserve evidence to prove disability, and thus properly resolved doubts in claimant's favor. **Mikels v. Director, OWCP**, 870 F.2d 1407, 12 BLR 2-245 (8th Cir. 1989); see also **Haywood v. Secretary of Health and Human Services**, 699 F.2d 277, 281, 5 BLR 2-30 (6th Cir. 1983)[legislative spirit of the Act is to compensate the survivors of miners whose lives and health have been sacrificed in the production of coal].

The Board held that the definition of "support" does not encompass the surviving divorced spouse's earnings, but follows the plain meaning of the regulations that define "one-half support" as "... one-half of the total cost of the individual's support." See 20 C.F.R. §725.233(a) and (g) (emphasis added). The Board held that total cost pertains to the expenses of the individual, not the income. **Putman v. Director, OWCP**, 12 BLR 1-127 (1988).

In finding the miner's deserted spouse entitled to benefits, the administrative law judge did not make an independent finding with regard to the dependency element and, more specifically, did not address the issue of whether, under 20 C.F.R. §725.215(c), there existed the conjugal nexus required by **Thompson v. Lawson**, 347 U.S. 555 (1954). The Board remanded the case to the administrative law judge for reconsideration pursuant to 20 C.F.R. §725.214(a) to determine the validity of the miner's previous marriage under Ohio law since the administrative law judge did not discuss the law of that state and the parties disagreed on the controlling legal precedent and interpretation thereof. **Cole v. Director, OWCP**, 13 BLR 1-60 (1989).

The Board overruled its holding in **Fletcher v. Director, OWCP**, 10 BLR 1-11 (1986), *aff'd on recon.*, 10 BLR 1-13 (1986)(*en banc*), *appeal dismissed*, No. 86-2610 (4th Cir. 1987), and adopted the position of the Sixth, Seventh and Eighth Circuits, see **Director, OWCP v. Logan**, 868 F.2d 285, 12 BLR 1-175 (8th Cir. 1989), *rev'q* 12 BLR 2-175

(1988)(*en banc*); **Director, OWCP v. Ball**, 826 F.2d 603, 10 BLR 2-210 (7th Cir. 1987); *rev'g* 9 BLR 1-144 (1986); **Director, OWCP v. Hill**, 831 F.2d 635, 10 BLR 2-308 (6th Cir. 1987), *rev'g Hill v. Director, OWCP*, 9 BLR 1-29 (1986), that Social Security benefits received by the claimant, as the divorced spouse of the miner, constitute contributions from the miner within the meaning of 20 C.F.R. §725.233(g) and, thus, may be considered in determining whether claimant was dependent on the miner within the meaning of 20 C.F.R. §725.209(a). Judge Neusner dissented, stating that he would retain the Board's position in **Fletcher**, based on the Board's reasoning expressed therein. **Taylor v. Director, OWCP**, 15 BLR 1-4 (1991)(Neusner, J., dissenting).

Where a miner is survived by two dependent “widows,” *i.e.*, a surviving spouse and a surviving divorced spouse, each surviving “widow” is entitled to compensation under Section 412(a)(2) of the Act as a primary beneficiary, thereby each receiving 100% of a basic benefit. **Mays v. Piney Mountain Coal Company, Inc.**, 21 BLR 1-59 (1997)(Dolder, J., dissenting in part and concurring in part), *aff'd sub nom. Piney Mountain Coal Co. v. Mays*, 176 F.3d 753 (4th Cir. 1999); see **Peabody Coal Co. v. Director, OWCP [Ricker]**, 182 F.3d 637, 21 BLR 2-663 (8th Cir. 1999).

The Third Circuit held that the receipt of Social Security benefits by the miner's surviving divorced spouse, based on the miner's earnings, does not establish dependency on the miner under 20 C.F.R. §§725.217(a), 725.233(b), (g). The Third Circuit rejected claimant's argument that Social Security benefits she received based on the miner's earnings were “contributions” within the meaning of 20 C.F.R. §725.233 (b), (g), and endorsed the reasoning in **Director, OWCP v. Ball**, 826 F.2d 603, 10 BLR 2-210 (7th Cir. 1987) and **Director, OWCP v. Hill**, 831 F.2d 635, 10 BLR 2-308 (6th Cir. 1987). The Third Circuit thus affirmed the Board's decision affirming the administrative law judge's finding that claimant was not dependent on the miner and is not entitled to benefits. **Lombardy v. Director, OWCP**, 355 F.3d 211, 23 BLR 2-37 (3d Cir. 2004).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §725.204 is impermissibly retroactive as applied to pending claims, but may be applied to new claims filed after January 19, 2001, the revised regulations' effective date. **Nat'l Mining Ass'n v. Department of Labor**, 292 F.3d 849, 866-867, 23 BLR 1-24 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §725.212(b) is impermissibly retroactive as applied to pending claims, but may be applied to new claims filed after January 19, 2001, the revised regulations' effective date. **Nat'l Mining Ass'n v. Department of Labor**, 292 F.3d 849, 866-867, 23 BLR 1-24 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §725.213(c) is impermissibly retroactive as applied to pending claims, but may be applied to new

claims filed after January 19, 2001, the revised regulations' effective date. **Nat'l Mining Ass'n v. Department of Labor**, 292 F.3d 849, 866-867, 23 BLR 1-24 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §725.214(d) is impermissibly retroactive as applied to pending claims, but may be applied to new claims filed after January 19, 2001, the revised regulations' effective date. **Nat'l Mining Ass'n v. Department of Labor**, 292 F.3d 849, 866-867, 23 BLR 1-24 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

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