

BRB No. 88-1054 BLA
Case No. 85-BLA-6150

EDITH BLAIR)
(Widow of MERIDA E. BLAIR))
)
Claimant-Respondent)
)
v.)
)
R & E COAL COMPANY)
)
and)
)
OLD REPUBLIC INSURANCE) DATE ISSUED:
COMPANY)
)
Employer/Carrier-)
Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
) DECISION and ORDER
Party-in-Interest) on RECONSIDERATION

Appeal of the Decision and Order of John H. Bedford, Administrative Law Judge, United States Department of Labor.

Catherine A. Wible (Arter and Hadden), Washington, D.C., for employer/carrier.

Barry H. Joyner (J. Davitt McAteer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, DOLDER and McGRANERY, Administrative Appeals
Judges.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), has filed a timely Motion for Reconsideration requesting the Board to reconsider its Decision and Order of July 28, 1992, in the captioned case which arises under Title IV of the Federal Coal

Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). In that decision, the Board affirmed the administrative law judge's finding that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). *Blair v. R & E Coal Co.*, 16 BLR 1-113 (1992). The Board also affirmed the administrative law judge's findings that the evidence was insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(1), (b)(2) and (b)(4). *Id.* The Board, however, vacated the administrative law judge's finding pursuant to 20 C.F.R. §727.203(b)(3) and remanded the case for further consideration. *Id.* The Board further held that the administrative law judge erred in adjudicating the survivor's claim pursuant to 20 C.F.R. Part 727 rather than pursuant to 20 C.F.R. Part 718. *Id.* Finally, the Board held that should the administrative law judge find claimant entitled to survivor's benefits on remand, claimant would not be entitled to augmented benefits on behalf of her child adopted after the miner's death. *Id.*

In her Motion for Reconsideration, the Director presently argues that the Board erred in holding that claimant is precluded from receiving augmented benefits on behalf of a child adopted after the miner's death. Employer responds in support of the Board's holding that a surviving spouse is not entitled to augmented benefits based upon the adoption of a child after a miner's death. Claimant has not filed a response to the Director's Motion for Reconsideration. After consideration of the Director's contention, we grant the Director's Motion for Reconsideration.

The Director argues that the Board erred in holding that claimant is precluded from receiving augmented benefits on behalf of a child adopted after the miner's death. In our initial decision, we noted that the Director interpreted the regulations pertaining to the augmentation of benefits, 20 C.F.R. §725.208 *et seq.*, to permit a surviving spouse to receive augmented benefits on behalf of an adopted child regardless of whether the child is adopted after the miner's death. *Blair*, 16 BLR at 119. However, we further noted that the Act's stated statutory purpose is to provide benefits only "to coal miners who are totally disabled due to pneumoconiosis and to the *surviving dependents of miners* whose death was due to such disease...." *Blair*, 16 BLR at 119 (citing 30 U.S.C. §901(a) (emphasis added)). Insofar as we concluded that the Director's interpretation of the regulations provided for greater coverage than that provided in the statute, we held that it was inconsistent with the Act, and hence, deserved no deference. *Blair*, 16 BLR at 119. Inasmuch as the evidence of record did not establish any relationship between the miner and claimant's adopted child, we held that claimant had failed to establish that her adopted child qualified as the miner's dependent. *Id.* We, therefore, held that claimant was not entitled to augmented benefits on behalf of her child adopted after the miner's death. *Id.*

The Director contends that the Board erred in relying upon language in the preamble of the Act. The Director contends that where the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble. See generally *Jurgensen v. Fairfax County, Va.*, 745 F.2d 868, 885 (4th Cir. 1984); see also *Coosaw Mining Co. v. South Carolina*, 144 U.S. 550, 563 (1892). Upon further consideration, we agree with the Director that the relevant language of the Act and the regulations is unambiguous.

Section 412(a)(4) of the Act provides that where an individual entitled to benefit payments has one or more dependents, the benefit payments shall be increased at certain stated rates depending upon the number of dependents. 30 U.S.C. §922(a)(4). Claimant, as the miner's widow, falls within the definition of individuals entitled to receive benefit payments. 30 U.S.C. §922(a)(2). The relevant inquiry in the instant case is whether claimant's adopted daughter satisfies the definition of a dependent. The definition of a dependent under the Act includes a "child" of the widow who is unmarried and under eighteen years of age. 30 U.S.C. §902(a)(1), (g).

The Act provides that the determination of an individual's status as the "child" of the widow shall be made in accordance with Section 416(h)(2) or (3) of Title 42 as if the widow were the "insured individual" referred to therein. 30 U.S.C. §902(g). Section 416(h)(2) recognizes an individual as a "child" if that individual could inherit the insured's personal property as his or her natural child under the relevant State inheritance laws.¹ See 42 U.S.C. §416(h)(2)(A); 20 C.F.R. §404.355(a). In the instant case, the adoption decree issued by a Virginia court specifically provides that claimant's adopted child is entitled to all the rights and privileges of a child born in lawful wedlock. Director's Exhibit 22. Inasmuch as claimant's adopted daughter is eligible to inherit claimant's personal property as her natural child under the Virginia intestacy statutes, the adopted daughter qualifies as claimant's child. Because claimant's adopted child is unmarried and under eighteen years of age, she qualifies as claimant's dependent under the Act.² 30 U.S.C. §902(a)(1), (g). The regulations

¹Employer, citing 20 C.F.R. §404.362(c), notes that the Social Security regulations preclude an adopted child of an insured's surviving spouse from receiving benefits unless the child was living in the insured's household at the time of the insured's death. The Black Lung Benefits Act, and its implementing regulations, however, do not incorporate or otherwise adopt 20 C.F.R. §404.362.

²The Director accurately notes that there is no requirement in the Act that a widow's child must have been dependent upon the miner at the time of the miner's death.

also provide for augmented benefits to a miner's widow on behalf of a child adopted after the miner's death. Section 725.520(c)(1) provides that when a surviving spouse is entitled to benefits for a month for which she has one or more dependents, the amount of her benefits is increased. See 20 C.F.R. §725.520(c)(1). However, in order for a surviving spouse to receive augmented benefits on behalf of an individual, that individual is required to satisfy both a relationship and a dependency test. Section 725.208 provides that an individual will be considered to be the child of a beneficiary³ if the individual is the legally adopted child of the beneficiary. 20 C.F.R. §725.208(b). Claimant's legally adopted daughter satisfies the relationship test under 20 C.F.R. §725.208.

In order to receive augmented benefits on behalf of her child, a surviving spouse must also establish that the child is dependent upon her. Section 725.209 provides that a child of a surviving spouse will be determined to be dependent upon such spouse if the child is unmarried and under 18 years of age. See 20 C.F.R. §725.209(a)(1) and (a)(2)(i). Consequently, claimant's adopted child satisfies this dependency test under 20 C.F.R. §725.309.

Claimant has established that her adopted child qualifies as her dependent under the Act and that the adopted child satisfies both the relationship and dependency tests set out in the regulations. Consequently, to the extent that the administrative law judge finds claimant entitled to survivor's benefits on remand, she is entitled to augmented benefits on behalf of her child adopted after the miner's death.

³Section 725.208 provides that the term "beneficiary" includes "a surviving spouse entitled to benefits at the time of death." 20 C.F.R. §725.208. Claimant, the surviving spouse, satisfies the definition of a "beneficiary."

Accordingly, we grant the Director's Motion for Reconsideration and modify our Decision and Order in *Blair v. R & E Coal Co.*, 16 BLR 1-113 (1992). The administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

Desk Book Section: PART II.B.2

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