

PART III

PROCEDURAL ISSUES

H. COMMENCEMENT OF BENEFITS

1. DATE OF ONSET OF TOTAL DISABILITY DUE TO PNEUMOCONIOSIS

As a general rule, once claimant's entitlement to benefits has been demonstrated, the date for commencement of those benefits is determined by the date of onset, *i.e.*, the month in which the occupational pneumoconiosis progressed to the stage of total disability. 20 C.F.R. §§725.503, 727.302, 727.303; **Rochester & Pittsburgh Coal Co. v. Krecota**, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); **Curse v. Director, OWCP**, 843 F.2d 456, 11 BLR 2-139 (11th Cir. 1988); **Lykins v. Director, OWCP**, 12 BLR 1-181 (1989). If the date of onset is not ascertainable from all the relevant evidence of record, then benefits commence with the month during which the claim was filed or review was elected under Section 435 of the Act. 30 U.S.C. §945; 20 C.F.R. §§725.503(b), 727.302(c)(1); **Green v. Director, OWCP**, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); **Gardner v. Consolidation Coal Co.**, 12 BLR 1-184 (1989); **Larioni v. Director, OWCP**, 6 BLR 1-1276 (1984). Where the miner's disability clearly occurred prior to January 1, 1974, the administrative law judge need not make a specific finding as to the actual month of onset, but shall provide for commencement of benefits as of January 1, 1974, as a matter of law. **Velasquez v. Director, OWCP**, 835 F.2d 262, 11 BLR 2-19 (10th Cir. 1987); **Director, OWCP v. Rochester & Pittsburgh Coal Co., [Kislak]**, 678 F.2d 17, 4 BLR 2-74 (3d Cir. 1982); **Smith v. Director, OWCP**, 12 BLR 1-156 (1989). Otherwise, the administrative law judge must determine whether the evidence of record establishes the onset date, and failure to do so requires remand. **Williams v. Director, OWCP**, 13 BLR 1-28 (1989); **McFarland v. Peabody Coal Co.**, 8 BLR 1-163 (1985); **Hall v. Director, OWCP**, 7 BLR 1-696 (1985).

The onset date is not established by the first medical evidence of record indicating total disability or by medical evidence sufficient to invoke the interim presumption at 20 C.F.R. §727.203(a). Rather, such medical evidence indicates only that the miner became totally disabled at some time prior to the date of such medical evidence. See **Merashoff v. Consolidation Coal Co.**, 8 BLR 1-105 (1985)[qualifying clinical studies do not establish the onset date]; **Henning v. Peabody Coal Co.**, 7 BLR 1-753 (1985)[qualifying pulmonary function studies do not establish onset of total disability]; **Tobrey v. Director, OWCP**, 7 BLR 1-407 (1984)[qualifying x-ray interpretations, standing alone, cannot establish the onset date]; **Hall v. Consolidation Coal Co.**, 6 BLR 1-1306 (1984)[physician's report indicating total disability does not establish onset date]; **Gottke v. Director, OWCP**, 6 BLR 1-1300 (1984)[positive x-rays may, combined with other medical evidence, be relevant to the determination of the onset date]; see also **White v. Dana Coal Co.**, 3 BLR 1-220 (1981); **Pawlus v. The**

New River Co., 3 BLR 1-450 (1981); **Gurule v. Director, OWCP**, 2 BLR 1-772 (1979), *aff'd sub nom.*, **Director, OWCP v. Gurule**, 653 F.2d 1368, 3 BLR 2-26 (10th Cir. 1981); *cf.* **Stumfoll v. Director, OWCP**, 7 BLR 1-566 (1984)[reliance on one report diagnosing total disability to determine onset date affirmed since it was preceded by three reports, within a four month period, finding no total disability].

Lay testimony of record, when combined with other evidence, may be sufficient to establish the date of onset of total disability. See **Zettler v. Director, OWCP**, 886 F.2d 831 (7th Cir. 1988)[Court held that qualifying x-ray evidence of pneumoconiosis in conjunction with claimant's testimony was sufficient to establish the onset date]; **Rochester & Pittsburgh Coal Co. v. Krecota**, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989) [Court ruled that claimant's retirement, which coincided with the month of filing, was insufficient to establish the onset date in the face of uncontradicted medical reports indicating claimant was not totally disabled until years later]; **Cantrell v. United States Steel Corp.**, 6 BLR 1-1003 (1984)[administrative law judge's onset date finding supported by substantial evidence, including lay testimony and evidence of retirement from coal mine employment after collapse at work]; **Witt v. P & P Coal Co.**, 6 BLR 1-480 (1983)[retirement alone does not establish the miner's onset date].

Where the administrative law judge finds the existence of complicated pneumoconiosis demonstrated, then the month in which complicated pneumoconiosis was first diagnosed generally governs the onset date. If complicated pneumoconiosis occurred prior to January 1, 1974, then benefits commence as of January 1, 1974. 30 U.S.C. §921(c)(3); 20 C.F.R. §§725.503(e), 725.503A(b); **Williams, supra**; **Truitt v. North American Coal Corp.**, 2 BLR 1-199 (1979). If the evidence does not reflect when claimant's simple pneumoconiosis became complicated pneumoconiosis, the onset date for payment of benefits is the month during which the claim was filed or during which the claimant filed his election card, unless the evidence affirmatively establishes that claimant had only simple pneumoconiosis for any period subsequent to the date of filing or election, in which case benefits must commence following the period of simple pneumoconiosis. 20 C.F.R. §725.503(b); **Williams, supra**.

For Part C claims, *i.e.*, those filed after December 31, 1973 or adjudicated upon election of review pursuant to Section 415 of the Black Lung Benefits Reform Act of 1977, benefits cannot, as a matter of law, commence earlier than January 1, 1974, regardless of the date of onset. 30 U.S.C. §945; 20 C.F.R. §§725.503(c), (d), (e), 727.302, 727.303; **Smith v. Director, OWCP**, 12 BLR 1-156 (1989). For a discussion of Part B and transitional period claims, see Part III.C.2., *infra*.

CASE LISTINGS

DIGESTS

An autopsy report may be considered in determining the appropriate onset date in a miner's claim and may, in conjunction with hospital records, establish the date of onset. **Ives v. Jeddo Highlands Coal Co.**, 9 BLR 1-167 (1986); see also **Simila v. Bethlehem Mines Corp.**, 7 BLR 1-535 (1984), *vacated in part on other grounds sub nom.*, **Bethlehem Mines Corp. v. Director, OWCP**, 766 F.2d 128, 8 BLR 2-4 (3d Cir. 1985)[Board held that availability of Section 411(c)(3) presumption is not limited to survivor's claims; the administrative law judge could properly consider the autopsy report when determining onset of disability date].

To establish the date of onset, claimant must show when he became totally disabled due to pneumoconiosis, not simply when he became totally disabled. 20 C.F.R. §§725.503(b), 727.302(c)(1); **Ridings v. C & C Coal Co., Inc.**, 6 BLR 1-227 (1983); **Carney v. Director, OWCP**, 11 BLR 1-32 (1988).

Where the uncontradicted medical evidence of record indicates that claimant was not totally disabled following his election of Section 435 review, the Board vacated the administrative law judge's finding that benefits were payable from the date of election. The Board remanded the case to the administrative law judge for a determination of the onset date based on the medical evidence of record. **Lykins v. Director, OWCP**, 12 BLR 1-181 (1989).

If medical evidence does not establish the date on which claimant became totally disabled, then claimant is entitled to benefits as of his filing date, unless uncontradicted medical evidence indicates that claimant was not totally disabled at some point subsequent to his filing date. **Edmiston v. F & R Coal Co.**, 14 BLR 1-65 (1990); see also **Gardner v. Consolidation Coal Co.**, 12 BLR 1-184 (1989); **Lykins v. Director, OWCP**, 12 BLR 1-181 (1989).

The administrative law judge must consider all the relevant evidence of record in determining the onset date of disability and must assess the credibility of that evidence. **Lykins v. Director, OWCP**, 12 BLR 1-181 (1989); **Williams v. Director, OWCP**, 13 BLR 1-28 (1989).

The miner cannot receive benefits for any period during which he was not totally disabled. **Lykins v. Director, OWCP**, 12 BLR 1-181 (1989); **Williams v. Director, OWCP**, 13 BLR 1-28 (1989).

The administrative law judge's finding regarding the date for the commencement of benefits was vacated where the administrative law judge merely chose the earliest report finding the miner totally disabled, see **Owens v. Jewell Smokeless Coal Corp.**, 14 BLR 1-47 (1990), without inquiring whether the total disability diagnosed was due to pneumoconiosis, see **Carney v. Director, OWCP**, 11 BLR 1-32 (1987), ignored all other relevant evidence on this issue, see **Williams v. Director, OWCP**, 13 BLR 1-28 (1989); **Lykins v. Director, OWCP**, 12 BLR 1-181 (1989), and did not explain his finding, as required by the APA, see **Wojtowicz v. Duquesne Light Co.**, 12 BLR 1-162 (1989). **Cole v. East Kentucky Collieries**, 20 BLR 1-50 (1996).

Where the administrative law judge did not attempt to ascertain when claimant became totally disabled due to pneumoconiosis, but instead automatically selected the month of filing without assessing the medical evidence or making specific findings, a remand was necessary for the administrative law judge to address the relevant evidence and ascertain, if possible, the month in which claimant became totally disabled due to pneumoconiosis. If such analysis did not establish the month of onset, then benefits would be payable beginning with the month during which the claim was filed, as provided at 20 C.F.R. §725.503(b). **Dempsey v. Sewell Coal Corp.**, 23 BLR 1- , BRB Nos. 03-0615 BLA, 03-0615 BLA-A (Jun. 28, 2004)(*en banc*).

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