

BRB No. 99-0168 BLA

HARRY L. REBUCK)		
)		
Claimant-Petitioner)		
)		
v.)		
)	DATE	ISSUED:
DIRECTOR, OFFICE OF WORKERS')		
COMPENSATION PROGRAMS, UNITED)		
STATES DEPARTMENT OF LABOR)		
)		
Respondent)	DECISION and ORDER	

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for claimant.

Barry H. Joyner (Henry L. Solano, 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: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-01585) of Administrative Law Judge Robert D. Kaplan awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge determined that claimant established ten and one-half years of qualifying coal mine employment and, based on the date of filing, considered entitlement pursuant to the provisions of 20 C.F.R. Part 718.¹ Decision and Order at 3-4. The administrative

¹Claimant filed his claim for benefits on January 11, 1995. Director's Exhibit 1.

law judge found, and the parties stipulated to, the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 4. The administrative law judge further concluded that the evidence of record was sufficient to establish that the miner's pneumoconiosis arose out of coal mine employment and that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.203, 718.204(b), (c). Decision and Order at 4-7. The administrative law judge then determined that based on the date of the first qualifying pulmonary function study, claimant's benefits should commence as of May, 1996. Decision and Order at 7-8. Accordingly, benefits were awarded beginning May 1, 1996. On appeal, claimant contends that the administrative law judge erred in setting the onset date for the payment of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds asserting that the administrative law judge's onset determination is incorrect and should be modified to April 1995. Claimant responds agreeing with the Director's position that benefits should begin as of April 1995.²

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

²This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was employed in the coal mine industry in the Commonwealth of Pennsylvania. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we agree with the Director and claimant that the administrative law judge's onset determination is not in accordance with law.³ In an award of benefits, the administrative law judge must determine when the miner became totally disabled. See 20 C.F.R. §725.503. 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 credited medical evidence indicates that claimant was not totally disabled at some point subsequent to his filing date. *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); see also *Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). In that event, benefits can not be awarded for the period of non-disability subsequent to the filing date. *Krecota, supra*.

In the instant case, the administrative law judge properly noted that claimant filed his claim on January 11, 1995 and that Dr. Green issued an opinion on March 7, 1995, stating that claimant was not totally disabled. Decision and Order at 7-8; Director's Exhibits 1, 10. The administrative law judge then concluded that since the first evidence that claimant was totally disabled was the qualifying pulmonary function study performed on May 21, 1996, benefits should commence as of May 1996. Decision and Order at 8; Claimant's Exhibit 10. The record, however, in the instant case, is devoid of any evidence which definitely establishes when claimant's total disability began. Moreover, the earliest credible evidence of total disability does not establish the onset date for benefits, but only that the disability began at some prior point. *Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105 (1985). A review of the record indicates that there is evidence indicating that the minor was not totally disabled as of March 7, 1995. Thus, claimant is not entitled to benefits prior to March 7, 1995, the date of Dr. Green's opinion. *Krecota, supra*. Consequently, we modify the administrative law judge's onset determination to April 1995 as there is no definite evidence of when claimant's total disability began and claimant is not entitled to benefits for periods of non-disability subsequent to the filing date. See 20 C.F.R. §725.503(b); *Krecota, supra*; *Lykins, supra*; *Witt v. P & P Coal Co.*, 6 BLR 1-480 (1983).

³ Inasmuch, as the Director concedes that claimant suffers from pneumoconiosis arising out of coal mine employment and a totally disabling respiratory impairment due to his coal mine employment, we affirm the award of benefits by the administrative law judge as it is supported by substantial evidence and is in accordance with law. Director's Brief at 1; *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part, and modified in part, to reflect a commencement date for the payment of benefits of April 1995.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge