

BRB No. 95-1397 BLA

WOODROW WILSON)
)
 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 L. Hillyard, Administrative Law Judge, United States Department of Labor.

Leslie Ann Jones (Johnson, Jones, Snelling & Gilbert), Chicago, Illinois, for claimant.

Before: HALL, Chief Administrative Law Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ appeals the Decision and Order (95-BLA-541) of Administrative Law Judge Robert L. Hillyard 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). This case is before the Board for the second time. Initially, the administrative law judge credited claimant with twenty-four and one-half years of qualifying coal mine employment, determined that claimant's second claim was a request for modification pursuant to 20 C.F.R. §725.310, found that claimant failed to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a), entitlement pursuant to 20 C.F.R. §410.490, total disability due

¹Claimant is Woodrow Wilson, the miner, whose initial claim for benefits was filed on May 4, 1973 and denied on May 22, 1980. Director's Exhibit 26. This claim was filed on June 22, 1981. Director's Exhibit 1.

to pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and 718.204(c). Accordingly, benefits were denied.

On appeal, the Board affirmed the administrative law judge's finding regarding claimant's coal mine employment, pursuant to Sections 725.310, 727.203(a)(1)-(3), 718.202(a)(1), and 718.204(c)(1)-(3), and vacated the denial of benefits and remanded the case for further consideration pursuant to Sections 727.203(a)(4), 718.202(a)(4) and 718.204(c)(4). *Wilson v. Director, OWCP*, BRB No. 91-1153 BLA (Apr. 27, 1993)(unpub.).

On remand, the administrative law judge found that claimant established total disability due to pneumoconiosis and a change in conditions pursuant to Section 725.310. Accordingly, benefits were awarded. The administrative law judge then found that claimant was entitled to benefits commencing October, 1993, the month in which disability was established pursuant to 20 C.F.R. 725.503(b).

On appeal, claimant contends that the administrative law judge erred in determining the date of entitlement to benefits. Claimant's counsel (counsel) has also filed an attorney's fee petition requesting a fee in the amount of \$3,312.90 for eighteen hours of service performed at an hourly rate of \$180.00 and costs in the amount of \$72.90. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response to this appeal.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).

On appeal, claimant contends that the administrative law judge erred in failing to determine that he was entitled to benefits as of May 24, 1980, the date that claimant's first claim was closed. Claimant's Brief at 13-14. The administrative law judge stated: "I find that entitlement is established by virtue of Dr. Combs' medical

²We affirm the administrative law judge's finding pursuant to Section 725.310 and the award of benefits as unchallenged on appeal. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

examination which occurred on October 12, 1993. Therefore, I find that the claimant is entitled to benefits commencing October, 1993, the month in which disability was established." Decision and Order at 2.

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). Also, the onset date is not established by the first medical evidence of record indicating total disability. 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); *Henning v. Peabody Coal Co.*, 7 BLR 1-753 (1985); *Tobrey v. Director, OWCP*, 7 BLR 1-407 (1984); *Hall v. Consolidation Coal Co.*, 6 BLR 1-1306 (1984).

Further, if the 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. See *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); see also *Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1989); *Lykins*; *supra*.

Inasmuch as the date of entitlement is not determined by the first medical evidence which indicates that the miner is totally disabled due to pneumoconiosis, see *Merashoff*, *supra*; *Henning*, *supra*; *Tobrey*, *supra*; *Hall*, *supra*, and because a change in condition pursuant to Section 725.310 entitles claimant to benefits from the date of the change, *Eifler v. Director, OWCP*, 926 F.2d 633, 15 BLR 2-1 (7th Cir. 1991), we vacate the administrative law judge's finding that the date of entitlement is October, 1993 and remand the case to the administrative law judge for further consideration of this issue pursuant to Section 725.503.

Finally, counsel requests a fee in the amount of \$3,312.90 for eighteen hours of service performed at an hourly rate of \$180.00 and costs in the amount of \$72.90. No objections to counsel's fee petition have been received. We find the fee requested to be reasonable and commensurate with the work performed before the Board and award counsel a fee of \$3,312.90 for eighteen hours of service performed at an hourly rate of \$180.00 and costs in the amount of \$72.90.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in-part and vacated in-part, the case is remanded for further consideration consistent with this opinion, and counsel is awarded attorney's fees in the amount of \$3,312.90 to be paid directly to her by the Black Lung Disability Trust Fund.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge