

BRB No. 01-0110 BLA

DOWELL BAILEY)
)
 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 Determining Date of Onset of Total Disability Due to Coal Workers' Pneumoconiosis of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Edward Waldman (Howard M. Radzely, 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: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order Determining Date of Onset of Total Disability Due to Coal Workers' Pneumoconiosis (99-BLA-1350) of Administrative Law Judge Robert J. Lesnick, holding that July 1, 1995 is the correct date of onset of total disability due to pneumoconiosis, and thus, the date for the commencement of 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.*² The case is before the Board for the second time. The administrative law judge found that the evidence established that claimant was not totally disabled due to pneumoconiosis prior to July 1, 1995. Judge Lesnick concluded, therefore, that benefits could not commence prior to that date and thus found that July 1, 1995 was the correct date for commencement of benefits.

¹Claimant is Dowell Bailey, the miner, who filed his original claim with the Social Security Administration on February 18, 1975. Director's Exhibit 1. Following the request of the Director, Office of Workers' Compensation Programs (the Director), the case was remanded for benefit payments on September 13, 1996. Director's Exhibit 54. The district director determined that July 1, 1995 was the appropriate date from which benefits should commence. Director's Exhibit 61. Claimant then challenged this determination. Director's Exhibits 62, 70, 78.

²The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and they are found at 65 Fed. Reg. 80,045-80, 107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). The new regulations are not applicable to the instant case inasmuch as claimant filed his claim prior to March 31, 1980.

The relevant procedural history of this case is as follows: the miner filed his first claim for benefits with the Social Security Administration (SSA) on February 18, 1975. Director's Exhibit 1. After claimant received his election card, he elected to have his claim reviewed by the Department of Labor (DOL) on March 30, 1978. Director's Exhibit 28. This claim was informally denied by the district director on September 16, 1980. Director's Exhibit 17. Following a hearing, Administrative Law Judge Ainsworth H. Brown denied benefits under 20 C.F.R. Part 727 because he found rebuttal established at 20 C.F.R. §727.203(b)(2) in a Decision and Order dated September 26, 1991. Director's Exhibit 38. Following claimant's appeal, the Board affirmed Judge Brown's denial, albeit pursuant to 20 C.F.R. §727.203(b)(3) rebuttal. *Bailey v. Director, OWCP*, BRB No. 92-0302 BLA (Dec. 10, 1992)(unpub.); Director's Exhibit 39. Claimant then appealed to the United States Court of Appeals for the Fourth Circuit. The court vacated the Board's Decision and Order and remanded the case to the administrative law judge to reconsider the medical evidence. *Bailey v. Director, OWCP*, No. 93-1157 (4th Cir. Nov. 7, 1994)(unpub.); Director's Exhibit 40. Subsequently, Judge Brown remanded the case to the district director for further development of the evidence by Order dated February 1, 1995. Director's Exhibit 41. Following informal proceedings, the parties filed a joint motion requesting that the claim be decided on the record, without an additional hearing. Director's Exhibit 46. Administrative Law Judge Edward J. Murty, Jr. cancelled the hearing, and subsequently, the Director, Office of Workers' Compensation Programs (the Director), requested that the case be remanded to the district director for the payment of benefits. Director's Exhibits 47, 54. Judge Brown remanded the case to the district director for payment of benefits by Order dated October 3, 1996. Director's Exhibit 56. On November 6, 1996, the district director awarded benefits to the claimant with an onset date of July 1, 1995. Director's Exhibit 61. Claimant contested the onset date finding. Director's Exhibit 62. By Decision and Order dated September 26, 2000, Administrative Law Judge Robert J. Lesnick (the administrative law judge) found that the correct onset date was July 1, 1995. Claimant then filed the instant appeal with the Board.

On appeal, claimant challenges the administrative law judge's finding that the evidence fails to establish an onset date earlier than July 1, 1995. The Director, in response, urges affirmance of the administrative law judge's finding that Dr. Zaldivar's April 17, 1991 report opining that claimant is not totally disabled, precludes an earlier onset date. The Director, however, urges the Board to identify an onset date of May of 1991, the month after Dr. Zaldivar's April 17, 1991 report.

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’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

If a miner is found to be entitled to benefits, he is entitled to benefits beginning with the month of onset of his total disability due to pneumoconiosis. *See* 20 C.F.R. §725.503(b); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). Consequently, should an administrative law judge find a miner entitled to benefits, he must determine whether the medical evidence establishes when the miner became totally disabled due to pneumoconiosis. *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989). If the medical evidence does not establish the date from which the miner became totally disabled, then the miner is entitled to benefits as of his filing date, unless there is credited evidence which establishes that the miner was not totally disabled at some point subsequent to his filing date. *Lykins, supra*. In the instant case, the administrative law judge found that the evidence established the date of the onset of total disability as July 1, 1995. Decision and Order at 4-5.

Claimant asserts that the administrative law judge erred in his determination that the correct onset date in the instant case is July 1, 1995. Claimant contends that the administrative law judge incorrectly found that the report dated July 21, 1995 was written by Dr. Zaldivar, whom the administrative law judge credited, when it was actually written by Dr. Walker. Director’s Exhibit 42. The administrative law judge permissibly credited the opinion dated July 21, 1995, actually authored by Dr. Walker, as the best reasoned opinion.³ The administrative law judge also permissibly credited Dr. Zaldivar’s opinion dated April 17, 1991, finding that claimant was not totally disabled at that time, and thus precluding an onset date prior to that date, based upon Dr. Zaldivar’s superior credentials as a Board-certified physician in pulmonary disease and internal medicine. Director’s Exhibits 30, 35; *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); Decision and Order at 4. Thus, as the Director concedes, the earliest possible onset date in the instant case is May 1, 1991. *See* 20 C.F.R. §727.302(c); *Pendley v. Director, OWCP*, 13 BLR 1-23 (1989)(*en banc*); Director’s Brief at 2. In light of the foregoing, we modify the administrative law judge’s finding of onset to reflect an onset date of May 1, 1991, consistent with the Director’s position and the evidence of record. *Id.*

³The Director concedes the administrative law judge’s error in identifying Dr. Zaldivar as the author of the July 21, 1995 opinion. Director’s Exhibit 42; Director’s Brief at 2.

Accordingly, the administrative law judge's Decision and Order Determining Date of Onset of Total Disability Due to Coal Workers' Pneumoconiosis is modified to reflect that benefits commence on May 1, 1991.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge