



BRB Nos. 15-0456 BLA
and 16-0129 BLA
Case Nos. 2012-BLA-5992
and 2013-BLA-5671

NITA K. WILSON)
(o/b/o and Widow of WAYNE L. WILSON))

Claimant-Respondent)

v.)

MIDWEST COAL COMPANY,)
(formerly known as AMAX COAL)
COMPANY))

Employer-Petitioner)

DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED: 09/29/2016

ORDER

On July 25, 2016, counsel for employer filed a Notice of Withdrawal of Counsel, stating that employer's parent company, Alpha Natural Resources (Alpha), filed for reorganization under Chapter 11 of the Federal Bankruptcy Code, and that its bankruptcy plan has been confirmed. Counsel further states that Alpha instructed counsel to withdraw in claims where Alpha was self-insured, and specifically instructed counsel to withdraw in this case.

In response, on September 28, 2016, the Director, Office of Workers' Compensation Programs (the Director), filed the Director's Acknowledgement that the Black Lung Disability Trust Fund is Liable for Benefits in the Miner's and Survivor's Claims. The Director states that the Black Lung Disability Trust Fund (Trust Fund) accepts liability for the miner's and survivor's claims and does not contest the miner's or claimant's entitlement to benefits. However, the Director, references his April 11, 2016

response to employer's appeal, and again asserts that the administrative law judge erred in her determination of April 2008 as the commencement date for benefits in the miner's claim because she relied on Dr. Repsher's opinion that did not diagnose total

disability due to pneumoconiosis arising out of coal mine employment. Therefore, the Director requests that the Board modify the administrative law judge's benefits commencement date to reflect that benefits are payable from October 2010, the month in which the miner filed the present subsequent claim. Accordingly, the Director requests that the Board affirm the award of benefits in the miner's claim, but modify the benefits commencement date and hold that the Trust Fund is liable for the benefits awarded. In addition, the Director requests that the Board dismiss employer's appeal in the survivor's claim and that her case be remanded to the district director for payment of benefits by the Trust Fund.

There is merit to the Director's argument that the administrative law judge erred in finding that the miner was entitled to benefits commencing in April 2008, the month in which the denial of his prior claim became final. The regulation at 20 C.F.R. §725.503(b) specifically provides that benefits commence the month in which claimant establishes that the miner's totally disabling respiratory impairment *due to pneumoconiosis* began. Simply establishing a disabling impairment at that time is not enough. *See Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603-04, 12 BLR 2-178, 2-184-85 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182-83 (1989). Consequently, the administrative law judge's onset determination cannot be affirmed based on her reliance on Dr. Repsher's 2006 opinion that the miner's severe respiratory impairment was due to smoking and heredity, not pneumoconiosis. 20 C.F.R. §725.503(b); *see Krecota*, 868 F.2d at 603-04, 12 BLR at 2-184-85; *Lykins*, 12 BLR at 1-182-83; Miner's Claim Director's Exhibit 3. Further, because the record does not contain evidence establishing that the miner was totally disabled due to pneumoconiosis prior to the filing of his subsequent claim on October 29, 2010, we modify the date that benefits commence in the miner's claim to October 2010. 20 C.F.R. §725.503(b); *see Green v. Director, OWCP*, 790 F.2d 1118, 1119 n.4, 9 BLR 2-32, 2-36 n.4 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). Furthermore, we hold that the Trust Fund is liable for the benefits awarded in the miner's claim.

In view of the above, the administrative law judge's Decision and Order Awarding Benefits in the miner's claim is modified to reflect October 1, 2010, as the date from which benefits commence and this case is remanded to the district director for payment of benefits by the Trust Fund. The Board also dismisses the appeal in the survivor's claim, and remands this case to the district director for payment of benefits by the Trust Fund. *See* 26 U.S.C. §9501(d)(1)(B); 20 C.F.R. §725.1(c), (e).

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge