

# Chapter 17

## Onset, Augmentation, Termination, and Interest

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### I. Commencement of the payment of benefits

Once it is determined a claimant is entitled to benefits under the Act, the fact-finder must determine the date benefit payments should begin. Benefits are paid in monthly increments, beginning with the first month in which a claimant satisfies all conditions of entitlement. 30 U.S.C. § 932(d); 20 C.F.R. § 725.203(a).

#### A. Claims filed before July 1, 1973 (Part B claims)

Claims filed between December 30, 1969 and June 30, 1974 are known as "Part B claims" as they are filed, processed, and paid according to the provisions of Part B of title IV of the Act. 20 C.F.R. § 725.1(b); 20 C.F.R. Part 410. For Part B claims, absent clear evidence establishing the date of onset of disability, the date of disability is presumed to be the date of filing the claim. *McCoy v. Valley Camp Coal Co.*, 2 B.L.R. 1-243, 1-247 to 1-248 (1979).

The 1977 amendments allow a claimant to elect review under 20 C.F.R. Part 727, upon filing an election card, when benefits have been denied under Part B of title IV of the Act as implemented at 20 C.F.R. Part 410. In these claims, which were denied by the Social Security Administration and subsequently granted after a claimant elected review by the Department of Labor under 30 U.S.C. § 945(c), benefits should commence with the month during which the claimant elected review under 20 C.F.R. Part 727 of the regulations (if the onset date cannot be ascertained based on the medical evidence). 20 C.F.R. § 725.503(b). See *Gottke v. Director, OWCP*, 6 B.L.R. 1-1300, 1-1302 (1984). Benefits can be awarded retroactively under 20 C.F.R. Parts 727 and 718, but not for any period prior to January 1, 1974.

#### B. Claims filed on or after July 1, 1973 (Part C claims)

Claims filed on or after January 1, 1974 are known as "Part C claims" because they are filed, adjudicated, and paid according to the provisions of Part C of title IV of the Act. 20 C.F.R. § 725.1(d). Claims filed between July 1, 1973 and December 31, 1973 (inclusive of those dates) are known as

"Section 415 transition claims," as they are adjudicated and paid according to that section of the Act. 20 C.F.R. § 725.1(c). According to the regulations, Section 415 transition claims are considered Part C claims.

For Part C claims, if the miner is totally disabled due to pneumoconiosis, then s/he is paid benefits beginning with the month of onset of total disability due to pneumoconiosis. 33 U.S.C. § 906(a), as incorporated at 30 U.S.C. § 932(a). See also 20 C.F.R. § 725.503; *Carney v. Director, OWCP*, 11 B.L.R. 1-32 (1987). If the month of onset of total disability due to pneumoconiosis cannot be deduced from the medical evidence of record, a claimant should be paid beginning with the month during which the claim was filed. 20 C.F.R. § 725.503(b). See *Owens v. Jewell Smokeless Coal Corp.*, 14 B.L.R. 1-47 (1990). However, the filing date should not be used if un-contradicted medical evidence establishes the miner was not totally disabled at some point after the claim was filed. See *Edmiston v. F & R Coal Co.*, 14 B.L.R. 1-65 (1990).

For all Part C claims (20 C.F.R. Parts 727 and 718), regardless of date of onset, no benefits are payable for any period of eligibility before January 1, 1974. 20 C.F.R. § 725.503. For Section 415 transition claims (20 C.F.R. § 410.490), no benefits are payable for any period of eligibility prior to July 1, 1973. 20 C.F.R. § 725.503(e).

The date of onset of benefits in survivors' claims is discussed, *infra*.

## **1. Onset of disability**

### **a. Claimant's burden to establish**

Claimant bears the burden of proof for establishing the date of onset of total disability. *Johnson v. Director, OWCP*, 1 B.L.R. 1-600 (1978). In determining the onset date, the Administrative Law Judge must consider all relevant evidence of record, and assess the credibility of the evidence. *Lykins*, 12 B.L.R. at 1-183.

### **b. Based on medical evidence**

Once a claimant proves entitlement to benefits, benefits should be paid commencing at the date of onset of total disability due to pneumoconiosis. 20 C.F.R. § 725.503. To establish date of onset of disability, the miner must demonstrate the date of total disability due to pneumoconiosis. *Edmiston*, 14 B.L.R. at 1-69. The miner cannot receive benefits for any month during which he or she was not totally disabled. *Lykins v. Director, OWCP*, 12 B.L.R. 1-181, 1-183 (1989).

### **c. Initial evidence of disability**

The date of the first medical evidence of record indicating total disability does not necessarily establish the onset date. Rather, such evidence only indicates the miner became totally disabled at some prior point in time. *Tobrey v. Director, OWCP*, 7 B.L.R. 1-407, 1-409 (1984); *Hall v. Consolidation Coal Co.*, 6 B.L.R. 1-1306, 1-1310 (1984).

### **d. Use of lay testimony**

Lay testimony, in combination with other evidence of record, may be used to establish Claimant's onset date. *Cantrell v. United States Steel Corp.*, 6 B.L.R. 1-1003, 1-1007 (1984).

### **e. X-ray reading of simple pneumoconiosis, insufficient standing alone**

Chest x-ray interpretations of simple pneumoconiosis are probative of the existence of pneumoconiosis, and not the extent of disability, *Short v. Westmoreland Coal Co.*, 10 B.L.R. 1-127, 1-129 n.4 (1987). Said differently, x-ray readings of simple pneumoconiosis, standing alone, are insufficient to prove onset of disability. However, a positive x-ray interpretation may be used in conjunction with other medical evidence to determine when pneumoconiosis has progressed to a totally disabling stage. *Gottke*, 6 B.L.R. at 1-1302.

### **f. Complicated pneumoconiosis**

If the miner establishes that s/he has complicated pneumoconiosis according to 30 U.S.C. § 921(c)(3), the onset date is the month during which complicated pneumoconiosis was first diagnosed. *Truitt v. North American Coal Corp.*, 2 B.L.R. 1-199, 1-203 to 1-204 (1979). In *Truitt*, the miner was entitled to benefits from the first month the evidence established the presence of complicated pneumoconiosis (in this case, the earliest x-ray study interpreted as positive for complicated pneumoconiosis), notwithstanding the fact that the study was interpreted as positive two years after it was taken.

In *Williams v. Director, OWCP*, 13 B.L.R. 1-28 (1989), the Board held, "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 . . . , unless the evidence affirmatively establishes that claimant had only simple pneumoconiosis for any period subsequent to the date of filing . . . ." The Board noted, however,

the Administrative Law Judge committed error when she did not consider a series of early chest x-rays, which were interpreted as positive for the existence of complicated pneumoconiosis.

### **g. Not based on retirement date**

In *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882 (7<sup>th</sup> Cir. 2002), the date of onset for the payment of benefits is not the date on which the miner retired from working in the coal mines. Rather, the court cited to 20 C.F.R. § 725.503, which requires, if the date of onset cannot be determined from the medical evidence, then it is the date on which the miner filed his claim (August 1978). The court then noted the miner returned to coal mine work in September 1981 for a period of one year. Pursuant to 20 C.F.R. § 725.504,<sup>1</sup> the court determined the payment of benefits would be suspended for that period of time. Employer argued the regulatory provisions regarding onset were invalid because they were in conflict with Section 7(c) of the Administrative Procedures Act (APA). The court disagreed, and held, under the express language of the Black Lung Benefits Act, the APA "does not trump the regulation."

## **2. Effect of continuing employment**

Generally, a miner is not entitled to benefits for any period during which s/he engaged in coal mine employment or comparable gainful work. 20 C.F.R. § 725.504. However, if the miner suffers from complicated pneumoconiosis under 30 U.S.C. § 921(c)(3), continued employment does not preclude the commencement of benefits. 20 C.F.R. § 725.504(c).

In order to retain entitlement to benefits under the Act, the miner must end all coal mine employment within one year from the date of final disposition of his or her claim. 20 C.F.R. § 725.504. Since engaging in any comparable or gainful work indicates the miner is not totally disabled, compensation payments are suspended for any period during which s/he engages in comparable, gainful employment. 20 C.F.R. § 725.504.

## **3. Petitions for modification**

### **a. The regulation**

The amended regulations at 20 C.F.R. § 725.503(d) codify case law related to determining onset dates in claims involving modification petitions:

(d) If a claim is awarded pursuant to section 22 of the Longshore

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<sup>1</sup> Formerly 20 C.F.R. § 725.503A (2000).

Act and § 725.310, then the date from which benefits are payable shall be determined as follows:

(1) Mistake in fact. The provisions of paragraphs (b) or (c) of this section, as applicable, shall govern the determination of the date from which benefits are payable.

(2) Change in conditions. Benefits are payable to a miner beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment provided that no benefits shall be payable for any month prior to the effective date of the most recent denial of the claim by a district director or administrative law judge. Where the evidence does not establish the month of onset, benefits shall be payable to such miner from the month in which the claimant requested modification.

20 C.F.R. § 725.503(d).

**b. Section 1556 of the PPACA; the 15-year presumption**

By unpublished decision in *Sweeney v. Jim Walter Resources, Inc.*, BRB No. 11-0346 BLA (Feb. 16, 2012)(unpub.), the Board held revival of the 15-year presumption under Section 1556 of the Patient Protection and Affordable Care Act, Pub. L. 111-148 (Mar. 23, 2010)(PPACA) is applicable to a miner's claim filed after January 1, 2005, and pending on modification on March 23, 2010. Turning to the date of onset for the payment of benefits, the Board held the following:

Since the administrative law judge found that there was no mistake of fact, but that claimant had now 'established the presence of pneumoconiosis' through invocation of the Section 411(c)(4) presumption, and employer did not rebut the presumption, it follows that claimant established a change in conditions. (citations omitted).

. . .

Since a change in conditions was established, benefits are payable to claimant as of the month of onset of total disability due to pneumoconiosis or, if the evidence does not establish the month of onset, as of the month during which he requested

modification, unless medical evidence that was credited by the administrative law judge establishes that he was not totally disabled due to pneumoconiosis at any subsequent time. (citations omitted). Here, the medical evidence credited by the administrative law judge establishes only that claimant became totally disabled due to pneumoconiosis at some time prior to the date of that evidence. (citation omitted). Further, the administrative law judge did not credit any evidence that claimant was not totally disabled due to pneumoconiosis at any time subsequent to the filing date of his request for modification. Since the medical evidence does not reflect the date upon which claimant became totally disabled due to pneumoconiosis, benefits are payable from the month in which he requested modification. Consequently, we modify the administrative law judge's determination and hold that benefits shall commence as of December 2008, the month and year in which claimant requested modification. (citations omitted).

*Slip op.* at 5-6.

### **C. Survivors' claims**

#### **1. Generally**

If the claimant is an eligible survivor of a miner entitled to benefits under the Act, benefits generally are payable beginning with the month of the miner's death. 20 C.F.R. § 725.503(c). However, if the miner died before January 1, 1974, benefits are payable commencing January 1, 1974. 20 C.F.R. § 725.503.

#### **2. Automatic entitlement under the PPACA**

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1556 (2010) (PPACA) provides automatic entitlement to benefits for survivors meeting the following threshold requirements: (1) the survivor's claim is filed after January 1, 2005, and is pending on or after March 23, 2010; and (2) the miner was finally awarded benefits in his or her lifetime claim (regardless of the date of filing of the miner's claim).

For the date of onset of the payment of benefits in survivors' claims governed by the automatic entitlement provisions of the PPACA, see Chapter 16. At the time of issuance of this revision to the *Benchmark*, the Board applied the automatic entitlement provisions of the PPACA to originally-filed survivors' claims, subsequent survivors' claims, and survivors' claims pending on modification.

## **II. Augmentation of benefits**

### **A. Generally**

A claimant's award of benefits under Part C of the Act should be augmented on behalf of the following dependents who meet certain conditions: (1) spouse; (2) divorced spouse; or (3) child. 20 C.F.R. § 725.210. For miner's benefits to be augmented, the individual must establish "relationship" and "dependency" under the regulations.

### **B. Date of commencement**

Augmentation of benefits commences with the first month in which the dependent satisfies all of the conditions applicable to that particular relationship according to the regulations at 20 C.F.R. §§ 725.204-725.209. Augmentation continues through the month before the month in which the dependent ceases to qualify under any of the enumerated conditions. 20 C.F.R. § 725.211.

### **C. "Augmentee" and "survivor," a distinction**

Although the conditions for establishing entitlement due to dependency as an augmentee parallel the requirements for survivors' claims, the two types of benefits are functionally distinct. Augmented benefits are paid to the miner on behalf of qualifying individuals who are dependent on the living miner for support. Survivors' claims are paid to qualifying dependents on the death of a miner. Unlike claims for augmentation of benefits, which are inexorably linked to the miner's lifetime claim, the survivor's claim is separate and functionally distinct from the miner's claim.

For further discussion of "survivor," "augmentee," "relationship," and "dependency," see Chapter 12.

### **D. Special rules for Part B claims**

For special regulations regarding the augmentation of benefits for successful Part B claimants (*i.e.* claimants who filed for benefits before July 1, 1973), see 20 C.F.R. §§ 410.300-410.395.

## **III. Interest on overdue benefits**

After making an initial determination that a claimant is eligible for benefits under the Act, and after the District Director concludes an employer is properly named as the responsible operator, the employer should

commence the payment of benefits within 30 days in accordance with 20 C.F.R. § 725.522. If the employer does not pay any portion of the benefits due the claimant under the District Director's initial determination of eligibility, an Administrative Law Judge's decision and order, a decision of the Benefits Review Board, or a decision by a United States circuit court of appeals, or the United States Supreme Court, then the employer is liable to the beneficiary for simple annual interest on all past due benefits. 20 C.F.R. § 725.608(a). This amount includes any penalties for non-payments assessed pursuant to 20 C.F.R. § 725.607. See Chapter 21 regarding interest assessed on past due medical benefits.

#### **A. Assessed against employer, not Trust Fund**

Interest may be assessed against an employer. On the other hand, the Trust Fund cannot be held liable for the payment of interest to a claimant. *Marple v. Jones & Laughlin Steel Corp.*, 7 B.L.R. 1-580, 1-581 (1984).

#### **B. Date of accrual**

For claims filed after December 31, 1981, interest begins to accrue 30 days after the initial determination of eligibility. 20 C.F.R. § 725.608(a). See also *Baldwin v. Oakwood Red Ash Coal Corp.*, 14 B.L.R. 1-23, 1-27 to 1-28 (1990). This rule also holds for claims filed on or before that date. But see *Clinchfield Coal Co. v. Cox*, 611 F.2d 47, 48 (4<sup>th</sup> Cir. 1979) (following an earlier Benefits Review Board interpretation). For survivors' claims, interest begins to accrue as of the month of the miner's death. *Harkey v. Alabama By-Products Corp.*, 7 B.L.R. 1-26, 1-29 (1984).

And, it is noted, in *Greene v. Director, OWCP*, 892 F.2d 1385 (8<sup>th</sup> Cir. 1990), interest did not accrue on benefits awarded to a miner's widow during the period between the Board's reversal of the Administrative Law Judge's award, and the circuit court's reversal of the Board.

#### **C. Payments made by the Trust Fund**

If benefits due are paid from the Black Lung Disability Trust Fund, Employer is liable for simple interest on the amount that must be reimbursed to the Trust Fund. 20 C.F.R. § 725.608(b). Employer's liability for this interest begins on the date that the benefits were due and payable. *Harkey*, 7 B.L.R. at 1-29.

#### **D. The interest rate**

The applicable interest rate for all amounts due for years after 1982 is the rate in effect for that calendar year according to Internal Revenue Code § 6621. 20 C.F.R. § 725.608(d).

#### **IV. Termination of benefits**

The miner is entitled to receive benefits through the month before the month in which the miner dies, or total disability otherwise ceases. 20 C.F.R. § 725.203(b).