

Chapter 17

Onset, Augmentation, Termination, and Interest

I. Commencement of the payment of benefits

Once it is determined that the claimant is entitled to benefits under the Act, the fact-finder must determine from what date benefit payments should begin. Benefits are paid in monthly increments, beginning with the first month in which claimant satisfies all conditions of entitlement. 30 U.S.C. § 932(d); 20 C.F.R. § 725.203(a) (2000) and (2008).

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 the 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 and the regulations found at 20 C.F.R. Part 410. For these claims that were denied by the Social Security Administration and were subsequently granted after 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 Part 727 of the regulations (if the onset date cannot be ascertained based on the medical evidence). 20 C.F.R. § 725.503(b) (2000) and (2008). *See also Gottke v. Director, OWCP*, 6 B.L.R. 1-1300, 1-1302 (1984). Benefits can be awarded retroactively under 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) (2000) and (2008). 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 the same as 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 (2000) and (2008); *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, the claimant should be paid beginning with the month during which the claim was filed. 20 C.F.R. § 725.503(b) (2000) and (2008). See *Owens v. Jewell Smokeless Coal Corp.*, 14 B.L.R. 1-47 (1990). However, the filing date should not be used if uncontradicted medical evidence establishes that the claimant was not totally disabled at some point after the claim was filed. See, e.g., *Edmiston v. F & R Coal Co.*, 14 B.L.R. 1-65 (1990).

For all Part C claims (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 (2000) and (2008). 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) (2000) and (2008).

1. Onset of disability

a. Claimant's burden to establish

The claimant bears the burden of proof in establishing the date of onset of total disability. See, e.g., *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 that 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 (2000) and (2008). 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 that the miner became totally disabled at some point prior to when the

medical tests revealed claimant's disability. *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

As x-ray readings of simple pneumoconiosis are probative only to the existence of pneumoconiosis and not to the extent of disability, *Short v. Westmoreland Coal Co.*, 10 B.L.R. 1-127, 1-129 n.4 (1987), x-ray readings, standing alone, are insufficient to prove onset of disability. However, x-rays 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 Board held that the miner was entitled to benefits from the first month the evidence established that he suffered from 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.

Moreover, it is noted that, in *Williams v. Director, OWCP*, 13 B.L.R. 1-28 (1989), the Board held that, "[i]f 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 or during which the claimant filed his election card, unless the evidence affirmatively establishes that claimant had only simple pneumoconiosis for any period subsequent to the date of filing or date of election." The Board noted, however, that the administrative law judge committed error when she did not consider a series of early chest x-rays that 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 (7th Cir. 2002), the court held that the date of onset for the payment of benefits was 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 (2008), which requires that, 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 that the miner returned to coal mine work in September 1981 for a period of one year. Pursuant to 20 C.F.R. § 725.504 (2008) (formerly 20 C.F.R. § 725.503A), the court determined that the payment of benefits would be suspended for that period of time. Employer argued that 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 that the regulation was valid. The court concluded that, under the express language of the Black Lung Benefits Act, the APA "does not trump the regulation."

2. Effect of continuing employment

Generally, the claimant 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 (2008). However, if claimant has shown that he or she has 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) (2008).

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 (2008). As engaging in any comparable gainful work indicates that claimant is in fact not totally disabled, compensation payments are suspended for any period during which claimant engages in comparable, gainful employment. 20 C.F.R. § 725.504 (2008).

3. Petitions for modification

The amended regulations at 20 C.F.R. § 725.503(d) (2008) 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 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) (2008).

C. Survivors' claims

If the claimant is an eligible survivor of a miner entitled to benefits under the Act, benefits are payable beginning with the month of the miner's death. 20 C.F.R. § 725.503(c) (2000) and (2008). However, if the miner died before January 1, 1974, benefits are payable commencing January 1, 1974. 20 C.F.R. § 725.503 (2000) and (2008).

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 the conditions set out in the regulations: (1) spouse; (2) divorced spouse; or (3) child. 20 C.F.R. § 725.210 (2000) and (2008). 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 (2008). 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 (2008).

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, 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 that the employer has been 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 (2008). 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 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) (2008). This amount includes any penalties for non-payments assessed pursuant to 20 C.F.R. § 725.607 (2008). See Chapter 21 regarding interest assessed on past due medical benefits.

A. Assessed against employer, not Trust Fund

Interest may only be assessed against an employer; 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)

(2008). 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 (4th 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).

However, in *Greene v. Director, OWCP*, 892 F.2d 1385 (8th Cir. 1990), the government was not required to pay interest 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, the employer is liable for simple interest on the amount that must be reimbursed to the Trust Fund. 20 C.F.R. § 725.608(b) (2008). The 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) (2008).

IV. Termination of benefits

The miner is entitled to receive benefits through the month before the month in which the miner dies or his total disability otherwise ceases. 20 C.F.R. § 725.203(b) (2008).