

BRB No. 01-0763 BLA

SHIRLEY LANKAS)
(Widow of LEONARD J. LANKAS))

Claimant - Respondent)

v.)

DATE ISSUED: _____

BUFFALO MINING COMPANY)

Employer- Petitioner)

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

Party - in - Interest)

DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of Gerald M. Tierney,
Administrative Law Judge, United States Department of Labor.

Mary Rich Malloy (Jackson & Kelly, PLLC), Charleston, West Virginia, for
employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (00-BLA-0526) of
Administrative Law Judge Gerald M. Tierney (the administrative law judge) in both a
modification of a miner's claim and a survivor's 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). The administrative law judge found that the newly submitted
evidence established a mistake in a determination of fact in the miner's claim pursuant to
20 C.F.R. §725.310(a)(2000).¹ The administrative law judge then found that all of the

¹The Department of Labor has amended the regulations implementing the Federal
Coal Mine Health and Safety Act of 1969, as amended. These regulations became

evidence of record established the existence of complicated pneumoconiosis sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis in the miner's claim and death due to pneumoconiosis in the survivor's claim pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits on both claims with benefits payable as of October 1991.

On appeal, employer challenges only the administrative law judge's determination that October 1991 is the appropriate month from which benefits should commence. Employer argues that the administrative law judge failed to properly weigh all of the relevant evidence to determine the applicable onset date. Claimant² has not responded to

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). All citations to the regulations, unless other wise noted, refer to the amended regulations.

While 20 C.F.R. §725.310 was amended, the amended regulation only applies to claims filed after January 19, 2001, and thus, is inapplicable to the instant claim.

²Claimant is Shirley Lankas , surviving spouse of the miner, Leonard J. Lankas.

the instant appeal. The Director, Office of Workers' Compensation Programs, (the Director) has filed a letter indicating that he will not file a response brief. The Director states, in a footnote, that the amended regulations should not affect the outcome of the case.³

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).

The miner filed a claim with the Department of Labor (DOL) on September 30, 1991. Director's Exhibit (Miner's Claim) 1. The miner died on September 7, 1999. Director's Exhibit (Miner's Claim) 119; Director's Exhibit (Widow's Claim) 9. Claimant filed a survivor's claim with DOL on October 12, 1999. Director's Exhibit (Widow's Claim) 1.

³Inasmuch as no party challenges the administrative law judge's findings that the newly submitted evidence establishes a mistake in a determination of fact sufficient to allow modification of the miner's claim pursuant to Section 725.310(a)(2000), that the evidence of record establishes the existence of complicated pneumoconiosis sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis in the miner's claim and death due to pneumoconiosis in the survivor's claim pursuant to Section 718.304, or that the evidence of record establishes that the miner's pneumoconiosis arose out of coal mine employment pursuant to Section 718.203, we affirm these findings. See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Coal Co.*, 6 BLR 1-710 (1983).

Initially, employer challenges the administrative law judge's determination that October 1991 is the appropriate date from which benefits commence. Employer argues that the administrative law judge is required to reweigh the evidence of record in order to determine whether the miner's complicated pneumoconiosis developed when it was first diagnosed in October 1991, when it was discovered on autopsy in September 1999, or at some time between those two dates. Employer asserts that the administrative law judge failed to adequately weigh all of the relevant evidence of record. We disagree. The administrative law judge initially considered the newly submitted evidence of record, in order to determine whether modification of the miner's claim was established. The administrative law judge found that Dr. Harnsbarger's autopsy report dated September 8, 1999, clearly established the presence of complicated pneumoconiosis. Director's Exhibit (Miner's Claim) 115; Director's Exhibit (Widow's Claim) 17; Decision and Order at 18-20. The administrative law judge then considered all of the evidence of record, including the x-ray interpretations of Drs. Gaziano and Franke, taken on October 10, 1991,⁴ which diagnosed complicated pneumoconiosis, 2/2, with size A large opacities. Director's Exhibits (Miner's Claim) 13, 14. The administrative law judge found that while these two interpretations were originally found to have been outweighed by other evidence, the addition of the autopsy evidence led him to believe that Drs. Franke and Gaziano, along with Dr. Bellum, were correct. Decision and Order at 20. The administrative law judge, thus, found that the evidence established the existence of complicated pneumoconiosis at Section 718.304. The administrative law judge then relied, in part, upon these findings to make an onset date determination. The administrative law judge stated: "If, as here, the presence of complicated pneumoconiosis has been established, the onset date is the month during which complicated pneumoconiosis was first diagnosed. *See Truitt v. North American Coal Co.*, 2 BLR 1-199, 1-203, 1-204 (1979). Since the first diagnosis of complicated pneumoconiosis arises from a chest x-ray administered on October 10, 1991, I find that the date of onset of total disability due to pneumoconiosis is October 1991." Decision and Order at 21.

If a miner is found to be entitled to benefits, he is entitled to benefits beginning in 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

⁴The administrative law judge initially stated incorrectly that the date the x-ray was taken was October 14, 1991. The administrative law judge subsequently corrected his error.

pneumoconiosis. *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F. 2d 600, 12 BLR 2-178 (3rd Cir.1989). In the case of a miner whose entitlement is established pursuant to 20 C.F.R. §718.304 and Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), total disability is established by proof of complicated pneumoconiosis. *Williams v. Director, OWCP*, 13 BLR 1-28 (1989).

The administrative law judge found that the newly submitted evidence established a mistake in a determination of fact pursuant to Section 725.310(a)(2000), as he permissibly credited the interpretations of Drs. Gaziano and Franke, based upon his finding that they were sufficient, when weighed together with Dr. Harnsberger's autopsy report and Dr. Bellum's 1996 report, to establish a mistake in a determination of fact pursuant to Section 725.310(a)(2000). *See* 20 C.F.R. §§725.310 , 725.503(d)(1); *Cole v. Director, OWCP*, 13 BLR1-60(1989); *Wojtowicz v. Duquesne Light Co.*, 12 BLR1-162(1989); Director's Exhibits (Miner's Claim) 70, 115; Director's Exhibit (Widow's Claim) 17. Further, the administrative law judge properly concluded that, with respect to a miner's claim wherein complicated pneumoconiosis is established, the onset date is properly determined by the date in which complicated pneumoconiosis is first diagnosed. *Truitt, supra*. The administrative law judge correctly found that October 1991 was the month in which complicated pneumoconiosis was first diagnosed via the x-ray interpretations of Drs. Gaziano and Franke, which the administrative law judge clearly credited on modification. Director's Exhibits (Miner's Claim) 13, 14; Decision and Order at 21. We affirm, therefore, the administrative law judge's finding that October 1991 is the date from which benefits commence in the miner's claim.

With respect to the survivor's claim, although the administrative law judge initially recognized that there were two separate claims before him, he neglected to find two independent onset dates. We hold that the date from which benefits commence in the survivor's claim is, as a matter of law, September 1999, the month in which the miner died. *Ives v. Jeddo-Highland Coal Co.*, 9 BLR 1-167 (1986); *Mihalek v. Director, OWCP*, 9 BLR 1-157 (1986); 20 C.F.R. §725.503(c); Director's Exhibit (Miner's Claim) 119; Director's Exhibit (Widow's Claim) 9. We modify, therefore, the administrative law judge's Decision and Order to reflect that survivor's benefits commence as of September 1999, the month in which the miner died. *Ives, supra; Mihalek, supra*

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and modified in part, to reflect that benefits in the survivor's claim commence in September 1999, the month in which the miner died.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge