

BRB No. 92-1779 BLA

FRANK PENSULE)
)
 Claimant-Petitioner)
)
 v.)
)
 KEYSTONE SERVICE INDUSTRIES,)
 INCORPORATED)
) DATE ISSUED:
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Revised Decision and Order of Robert S. Amery, Administrative Law Judge, United States Department of Labor.

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

Gina K. Karpinski (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for employer.

Before: , , and , Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (90-BLA-0365) of Administrative Law Judge Robert S. Amery awarding 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.* (the Act). Additionally, claimant's counsel has

filed an attorney's fee petition. Claimant filed a claim for benefits on March 9, 1989. In a Decision and Order dated April 30, 1992, the administrative law judge found that claimant established entitlement to benefits pursuant to 20 C.F.R. Part 718 commencing April, 1990, the month Dr. Jose Floresca found claimant to be totally disabled due to pneumoconiosis. On appeal, claimant contends that the administrative law judge erred in determining the date of onset of total disability due to pneumoconiosis. In his fee petition, claimant's counsel requests a fee of \$600 for three hours of services performed at an hourly rate of \$200 per hour. Employer responds in support of the administrative law judge's Decision and Order and the Director, Office of Workers' Compensation Programs (the Director), has chosen not to respond to this appeal. Neither employer nor the Director has chosen to respond to claimant's attorney's fee petition.

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On appeal, claimant contends that the administrative law judge erred in failing to find that the onset date of disability is March 1, 1989, the month in which he filed his application for benefits. In making his finding, the administrative law judge states that the date of onset of total disability due to pneumoconiosis is April, 1990, the

month in which Dr. Floresca found claimant to be totally disabled due to pneumoconiosis. See Decision and Order at 8. Claimant contends that this medical report does not establish that he first became disabled in April of 1990 but that it merely establishes that he became disabled some time prior to that date. However, in his Decision and Order, the administrative law judge listed all of the evidence of record and discussed all of the medical findings. See Decision and Order at 3-8. Included in the record is the medical opinion of Dr. Daniel, dated February 21, 1990, which states that claimant is capable of performing his usual coal mine employment. See Director's Exhibit 30. The administrative law judge did not question the credibility of this evidence. See Decision and Order at 8. Thus, as the record contains evidence which establishes that claimant was not totally disabled due to pneumoconiosis subsequent to March 1, 1989, the administrative law judge properly found that March 1, 1989 was not the date of the onset of total disability due to pneumoconiosis. See *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990). Further, the next report in the record is Dr. Floresca's report of April 17, 1990, which diagnoses total disability due to pneumoconiosis. See Director's Exhibit 30. As the administrative law judge considered all of the evidence of record and relied upon the first report of record which diagnosed total disability due to pneumoconiosis, the administrative law judge permissibly determined that the date of onset of total disability due to pneumoconiosis is April, 1990. See *Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). As a result, the

administrative law judge's finding as to the onset date of total disability due to pneumoconiosis is affirmed as it is supported by substantial evidence.

Regarding the attorney's fee petition, claimant's counsel has filed a complete, itemized statement requesting a fee for services performed in the captioned case pursuant to 20 C.F.R. §802.203. Counsel requests a total fee of \$600.00 for three hours of legal services at an hourly rate of \$200.00. No objections to the fee petition have been filed.

After review of the fee petition, the Board considers the requested hourly rate of \$200.00 to be excessive in view of the nature and complexity of the case, and therefore, reduces the allowable hourly rate to \$150.00. In all other respects the fee is awarded as requested.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed and claimant's counsel is awarded a total fee of \$450.00 to be paid directly to claimant's counsel by employer.

SO ORDERED.

Administrative Appeals Judge

Administrative Appeals Judge

Administrative Appeals Judge