

BRB No. 97-0253 BLA

LOLA M. HOSKINS)		
(Widow of JOHN HENRY HOSKINS))		
)		
Claimant-Respondent)		
)		
v.)		
)		
EASTERN ASSOCIATED COAL)		
CORPORATION)		
)	DATE	ISSUED:
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 upon Remand of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Terri L. Bowman (Arter & Haden), Charleston, West Virginia, for employer.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order upon Remand (88-BLA-2641) of Administrative Law Judge Stuart A. Levin determining the date of entitlement to 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). This claim is before the Board for the third time. In the initial Decision and Order, Administrative Law Judge Peter

McC. Giesey credited the miner¹ with more than twelve years of qualifying coal mine employment, found that he established total disability due to pneumoconiosis which arose from his coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), 718.204(b), (c)(1), (4). Accordingly, benefits were awarded on both the miner's and the survivor's claims. On appeal, the Board rejected employer's arguments that the administrative law judge's Decision and Order violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a), affirmed the administrative law judge's findings that the miner was totally disabled due to pneumoconiosis and the award of benefits on the miner's and survivor's claims, vacated the administrative law judge's finding as to the entitlement date and remanded the case for further consideration of that issue. *Hoskins v. Eastern Assoc. Coal Corp.*, BRB No. 91-1094 BLA (Apr. 28, 1993)(unpub.). On reconsideration, the Board rejected employer's arguments regarding the administrative law judge's findings pursuant to Section 718.204(b), (c)(1) and 20 C.F.R. §725.310. *Hoskins v. Eastern Assoc. Coal Corp.*, BRB No. 91-1094 BLA (Jun. 8, 1995)(unpub.).

On remand, Judge Levin considered the entitlement date issue and found that benefits shall be awarded commencing January 1983, the month following the termination of the miner's employment. On appeal, employer contends that the administrative law judge's failure to make findings pursuant to Section 725.310 violates the APA, that the

¹Claimant is Lola M. Hoskins, the miner's widow. The miner, John H. Hoskins, filed a claim for benefits on August 21, 1981 and died on August 31, 1983. Director's Exhibit 1; 5. Claimant filed a survivor's claim on December 1, 1983. Director's Exhibit 1.

administrative law judge erred in finding that the miner was totally disabled due to pneumoconiosis pursuant to Section 718.204(b), and that the administrative law judge erred in determining the date of entitlement. Claimant responds urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds declining to participate in this appeal.

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).

After consideration of the administrative law judge's Decision and Order upon Remand, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence and contain no reversible error therein. Initially we note that employer's arguments regarding the administrative law judge's failure to make findings pursuant to Section 725.310 and regarding the administrative law judge's finding that the miner was totally disabled due to pneumoconiosis pursuant to Section 718.204(b) have been previously considered, and rejected, by the Board. Employer's Brief at 16-27; *Hoskins*, slip op. of Apr. 28, 1993; *Hoskins*, slip op. of Jun. 8, 1995. Thus, because the Board previously affirmed those findings and because no exception to the law of the case doctrine has been established, we decline to address the administrative law judge's findings pursuant to Sections 725.310 and 718.204(b). See *Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

Employer also contends that the administrative law judge erred in finding that claimant is entitled to benefits prior to August 1983. Employer's Brief at 27-28. In making his finding regarding the date of claimant's entitlement to benefits, the administrative law judge noted that while a miner is on sick leave, he is still considered to be employed in coal mine work and not eligible for benefits. Decision and Order upon Remand at 2. Employer contends that the administrative law judge erred in finding that the evidence does not support a finding that the miner was on sick leave, and thus an employee, until the time of his death in August of 1983. Employer's Brief at 27. Employer supports this contention by referring to a letter from the mine's accountant, dated December 2, 1982, which states that the miner was drawing "sickness and accident insurance" as of the date of the letter, and to claimant's hearing testimony which states that the miner worked at the mine until "he got sick and died in '83". Employer's Brief at 27-28; Director's Exhibit 1; Hearing Transcript at 11.

Upon considering this evidence, the administrative law judge permissibly found claimant's hearing testimony to be ambiguous because, after stating that the miner worked at the mine until 1983, she testified that the miner left the job in July of 1982 because he got sick. Decision and Order upon Remand at 3; Hearing Transcript at 11-12; see *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). The administrative law judge further noted that the accountant's letter was evidence that the miner was on sick leave as of December 2, 1982, but that it was not evidence that the miner remained on sick leave beyond that point. Decision and Order upon Remand at 3; Director's Exhibit 1. The administrative law judge then properly found that the record does not contain evidence which indicates that the miner remained on sick leave beyond December of 1982 and

rationality concluded that the miner did not receive sick leave benefits after December of 1982. Decision and Order upon Remand at 3; see *Lafferty, supra*. The administrative law judge further found that the record does not contain, and employer does not cite to, medical evidence which would establish a date or month of the onset of total disability later December of 1982. Decision and Order upon Remand at 3. The administrative law judge then rationally found that benefits shall be awarded commencing January 1983, the month following the termination of the miner's employment. Decision and Order upon Remand at 3; see *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Curse v. Director, OWCP*, 843 F.2d 456, 11 BLR 2-139 (11th Cir. 1988); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989); *Shaw v. Bradford Coal Co.*, 7 BLR 1-462 (1984).

The administrative law judge is empowered to weigh the evidence and to draw his own inferences therefrom, see *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Thus, we affirm the administrative law judge's finding that benefits shall be awarded commencing January 1983.

Accordingly, the administrative law judge's Decision and Order upon Remand awarding benefits as of January 1983 is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge