BRB No. 00-0140 BLA

OTTIS BENTLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KENTUCKY ELKHORN COALS, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Granting Benefits, the Order Denying Employer's Motion for Recusal and Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney Fees of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

W. William Prochot and Jonathan W. Lipshie (Arter & Hadden LLP), Washington, D.C., for employer.

Barry H. Joyner (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Granting Benefits, the Order Denying Employer's Motion for Recusal and Motion for Reconsideration, and the Supplemental Decision and Order Awarding Attorney Fees (96-BLA-1477) of Administrative Law Judge Pamela Lakes Wood (the administrative law judge) in a duplicate claim[1] 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).[2] This case is before the Board for the second time. In the original Decision and Order, the administrative law judge credited claimant with at least ten years of coal mine employment based on the parties' stipulation, and adjudicated this duplicate claim pursuant to the regulations contained in 20 C.F.R. Part 718. Although the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(2) and (a)(3)(2000), she found the newly submitted evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4)(2000). Consequently, the administrative law judge found the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(2000). The administrative law judge also found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4)(2000) and 718.203(b)(2000) on the merits. Further, the administrative law judge found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(2000) on the merits and total disability due to

[1]Claimant's initial claim was filed on April 11, 1989. Director's Exhibit 41. On February 24, 1992, Administrative Law Judge Samuel J. Smith issued a Decision and Order denying benefits because claimant failed to establish the existence of pneumoconiosis. *Id*. Claimant appealed Judge Smith's denial and the case was forwarded to the Board. *Id*. However, claimant subsequently filed a request to have his appeal dismissed, which the Board granted. *Bentley v. Kentucky-Elkhorn Coals, Inc.*, BRB No. 92-1324 BLA (Aug. 14, 1992)(unpub.). Inasmuch as claimant did not pursue this claim any further, the denial became final. Claimant's most recent claim was filed on July 25, 1995. Director's Exhibit 1.

[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and 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 otherwise noted, refer to the amended regulations.

pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2000) on the merits.[3] Accordingly, the administrative law judge awarded benefits. In a Supplemental Decision and Order, the administrative law judge awarded claimant's counsel an attorney's fee of $4,850.00.

In response to employer's appeal, the Board declined to address employer's arguments challenging the administrative law judge's weighing of the x-ray evidence at 20 C.F.R. §718.202(a)(1)(2000), since the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis thereunder. Further, the Board affirmed the administrative law judge's findings at 20 C.F.R. §§718.202(a)(2) and (a)(3)(2000) and 718.204(c)(2000). However, the Board vacated the administrative law judge's findings at 20 C.F.R. §§718.202(a)(4)(2000) and 725.309(2000), and remanded the case for further consideration. The Board instructed the administrative law judge to reconsider her findings pursuant to 20 C.F.R. §§718.202(a)(4)(2000) and 718.204(b)(2000) based on a consideration of all of the record evidence, if she again found a material change in conditions established on remand. Lastly, the Board vacated the administrative law judge's award of attorney's fees. *Bentley v. Kentucky Elkhorn Coals, Inc.*, BRB No. 98-1142 BLA (May 21, 1999)(unpub.).

On remand, the administrative law judge found the newly submitted evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4)(2000), and thus, she found the evidence sufficient to establish a material change in conditions at 20 C.F.R. §725.309(2000). The administrative law judge also found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4)(2000) and 718.203(b)(2000) on the merits. Additionally, the administrative law judge found the evidence sufficient to establish total disability at 20 C.F.R. §718.204(c)(2000) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(b)(2000). Accordingly, the administrative law judge again awarded benefits, which she ordered to commence as of July 1995. Furthermore, the administrative law judge awarded claimant's counsel an attorney's fee of $2,143.75 in a Supplemental Decision and Order.

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[3]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

On appeal, employer challenges the administrative law judge's issuance of a decision on remand without providing the parties with notice that she had reacquired jurisdiction of the case. Employer also challenges the administrative law judge's finding that the evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309(2000). Employer further challenges the administrative law judge's weighing of the medical opinion evidence at 20 C.F.R. §§718.202(a)(4)(2000) and 718.204(b)(2000). Additionally, employer challenges the administrative law judge's refusal to recuse herself from the case. Lastly, employer challenges the administrative law judge's onset date of disability determination. Claimant has not filed a brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, noting her continuing disagreement with *Flynn v. Grundy Mining Co.*, 21 BLR 1-40 (1997), but contending that, pursuant to *Flynn*, the administrative law judge erred in failing to make a finding on whether claimant's condition actually worsened since the denial of his prior claim.[4]

[4]In a reply brief, employer contends that the Director, Office of Workers' Compensation Programs (the Director), failed to sufficiently explain her argument, and thus, the Director failed to properly exhaust her administrative remedies and preserve the issue for appeal.

With regard to the administrative law judge's award of attorney's fees, claimant's counsel filed an Application For Approval of a Representative's Fee for work performed before the administrative law judge at an hourly rate of $200.00.[5] In her decision, the administrative law judge awarded claimant's counsel a fee of $2,143.75 for 12.25 hours of legal services at an hourly rate of $175.00. On appeal, employer contends that the administrative law judge erred in finding that claimant's counsel is entitled to an hourly rate of $175.00 for legal services. Claimant's counsel responds, urging affirmance of the administrative law judge's Supplemental Decision and Order. Alternatively, claimant's counsel contends that the administrative law judge should not have reduced his hourly rate from $200.00 to $175.00.[6]

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which claimant, employer and the Director have responded.[7] Based on the briefs submitted by the parties, and our review,

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[5]Claimant's counsel requested a fee of $6,250.00 for 31.25 hours of legal services at an hourly rate of $200.00. Administrative Law Judge Pamela Lakes Wood (the administrative law judge) disallowed 12.75 hours of legal services that claimant's counsel claimed for work performed before Judge Smith, which was related to claimant's first claim, from March 7, 1990 through February 26, 1992. [2000] Supplemental Decision and Order at 3-4, 8. The administrative law judge also disallowed 6.25 hours of legal services that claimant's counsel claimed for work performed before the Board from July 1, 1998 through January 1, 1999. *Id*. at 4, 8.

[6]Employer filed a brief in reply reiterating its assertions regarding the hourly rate claimant's counsel requested for his legal services.

[7]In a brief dated March 14, 2001, although employer noted that it contests the retroactive application of the revised regulations to pending claims, employer asserted that the revised regulations at issue in the lawsuit do not affect the outcome of the case. Employer also stated that if the Board believes that the administrative law judge's award of benefits should be affirmed based on the new regulations, the case must be stayed for the duration of the briefing, hearing and decision schedule set by United States District Court for the District of Columbia in the preliminary injunction. Further, employer stated that if the challenged regulations are upheld following litigation, the Board may not adjudicate this

we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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appeal in any event since remand would be required for the administrative law judge to afford the parties an opportunity to respond to the changes in the law with new proof and for further fact-finding under the revised regulations. In a brief dated March 8, 2001, the Director asserted that the regulations at issue in the lawsuit do not affect the outcome of the case. However, in a brief dated March 5, 2001, claimant asserted that the amended regulations would affect the outcome of the case. The amendments to the regulation cited by claimant at 20 C.F.R. §718.104(d) apply only to claims filed after January 19, 2001. Consequently, this regulation does not apply to the instant claim. Further, inasmuch as the definition of pneumoconiosis is not a material issue in this case, the revised regulations at 20 C.F.R. §718.201(a)(2) and (c) do not affect the outcome of this case. Lastly, inasmuch as the administrative law judge's finding that the evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309(2000) is not affirmable, the revisions to the regulations at 20 C.F.R. §718.204(a) do not affect the outcome of this case.

We will first address the administrative law judge's award of benefits under 20 C.F.R. Part 718. Initially, employer asserts that its due process rights were violated by the administrative law judge's failure to provide the parties with notice that she had reacquired jurisdiction of the case on remand. The administrative law judge was not required to provide the parties with notice that the case had returned to her. Rather, the administrative law judge was required to follow the Board's instructions on remand. *See Hall v. Director, OWCP*, 12 BLR 1-80 (1988). The Board's decision provided the parties with notice that the case would be remanded to the administrative law judge. 20 C.F.R. §802.403. Moreover, when the record of a case is transferred to the Office of Administrative Law Judges (OALJ), it is the practice of the Board to send the parties a letter notifying them of the transfer. Employer does not assert that it did not receive a copy of the Board's decision or letter. Upon receipt of the Board's decision and letter notifying it of the transfer of the case to the OALJ, employer could have filed a request with the administrative law judge for additional briefing on remand.[8] 20 C.F.R. §725.459A(2000). Thus, we reject employer's assertion that its due process rights were violated by the administrative law judge's failure to provide the parties with notice that she had received the case on remand.

[8]Employer had at least two months to file a motion to the administrative law judge on remand. While the Board issued its decision on May 21, 1999, the administrative law judge did not issue her decision on remand until August 4, 1999.

Employer next contends that the administrative law judge erred in failing to consider whether the evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309(2000) in accordance with *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). In *Ross*, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him to assess whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000). *See Ross*, 42 F.3d at 997, 19 BLR at 2-18. The Sixth Circuit, in *Ross*, also held that a miner must show that the new evidence differs qualitatively from the evidence submitted with the previously denied claim.[9] *See Ross*, 42 F.3d at 999, 19 BLR at 2-21; *see also Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80 (2000).

Claimant's previous claim was denied because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 41. In her decision on remand, the administrative law judge stated, "I find, as I did before, that a preponderance of the new medical opinion evidence establishes the existence of pneumoconiosis under [S]ection 718.202(a)(4), and that the new evidence establishes the existence of pneumoconiosis under [S]ection 718.202(a) as a whole." Decision and Order on Remand at 6. The administrative law judge also stated that "[c]laimant has established one of the elements of entitlement previously adjudicated against him and has therefore established a material change in conditions as a matter of law under [S]ection 725.309 and [*Ross*]." *Id.* However, as employer argues, and the Director agrees, the administrative law judge did not render a determination of how the newly submitted evidence differs qualitatively from the previously submitted evidence with regard to the issue of the existence of pneumoconiosis. Thus, in light of the foregoing, we vacate the administrative law judge's finding that the evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309(2000), and remand the case for further consideration of the evidence in accordance with *Ross*.

[9]In *Sharondale Corp. v. Ross*, 42 F.3d 993, 999, 19 BLR 2-10, 2-21 (6th Cir. 1994), the United States Court of Appeals for the Sixth Circuit observed that the administrative law judge never discussed how the later evidence differed qualitatively from the evidence previously submitted which had been deemed insufficient to establish the requisite element of entitlement in the first claim.

Further, employer contends that the administrative law judge erred in her evaluation of the medical opinion evidence. In finding the newly submitted evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4)(2000), the administrative law judge considered the medical opinions of Drs. Branscomb, Broudy, Fino, Fritzhand, Hill and Sundaram. Whereas Drs. Fritzhand and Sundaram opined that claimant suffers from pneumoconiosis, Director's Exhibit 11; Claimant's Exhibits 2, 5, Drs. Branscomb, Broudy and Fino opined that claimant does not suffer from pneumoconiosis, Director's Exhibits 13, 39; Employer's Exhibits 1, 4, 9, 10, 13. Dr. Hill listed black lung in the history of present illness section of his report. Claimant's Exhibits 3, 4. The administrative law judge stated, "I find, as I did before, that the opinions of Drs. Fritzhand and Sundaram, who diagnosed coal workers' pneumoconiosis based upon their examinations of the [c]laimant and clinical and laboratory test results, outweigh those of Dr. Broudy, who also examined the [c]laimant, and Drs. Branscomb and Fino, who reviewed the evidence." Decision and Order on Remand at 4. The administrative law judge also stated that Dr. Hill's "diagnosis is at least corroborative of that of Drs. Sundaram and Fritzhand, with which it is consistent." Decision and Order on Remand at 4 n.7.

Employer specifically asserts that the administrative law judge mechanically relied on Dr. Sundaram's opinion because of Dr. Sundaram's status as claimant's treating physician. Although the Sixth Circuit has held that the opinions of treating physicians are entitled to greater weight than those of nontreating physicians, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993), the Sixth Circuit has also indicated that this principle does not alter the administrative law judge's duty, as trier of fact, to evaluate the credibility of the treating physician's opinion, *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). In the instant case, the administrative law judge stated that "Dr. Sundaram was identified by the [c]laimant as one of his treating physicians and his opinion is entitled to additional weight on that basis, even though he may lack the credentials of Drs. Fino and Broudy, as he is only [B]oard-certified in internal medicine and not in the subspecialty of pulmonary disease."[10] Decision and Order on Remand at 5. However, the

[10]Employer asserts that the administrative law judge erred by taking judicial notice of Dr. Sundaram's qualifications and not considering the evidence of record regarding the credentials of Drs. Branscomb, Broudy and Fino. The administrative law judge stated that "[w]here credentials are not otherwise indicated, I have consulted the website of the American Board of Medicine Specialties (www.certifieddoctor.org) of which I take official notice." Decision and Order on Remand at 5 n.10. Further, as mentioned above, the administrative law judge also stated that "Dr. Sundaram was identified by the [c]laimant as one of his treating physicians and his opinion is entitled to additional weight on that basis, even though he may lack the credentials of Drs. Fino and Broudy, as he is only [B]oard-certified in internal medicine and not in the subspecialty of pulmonary disease." *Id.* at 5. Inasmuch as the administrative law judge did not accord greater weight to the opinion of Dr.

administrative law judge further stated, "[i]n assessing the persuasiveness of Dr. Sundaram's opinion, I note that in addition to what he may have stated in his report, he has had the benefit of treating the [c]laimant for his respiratory problems over a period of time."[11] *Id*. In addition, the administrative law judge stated, "I find Dr. Sundaram's opinion, as corroborated by Dr. Fritzhand, to be better documented and reasoned." *Id*. The administrative law judge observed that "the opinions of Drs. Sundaram and Fritzhand are more supported by the clinical evidence of record and the [c]laimant's history of dust exposure in the underground coal mines." *Id*. Thus, we reject employer's assertion that the administrative law judge mechanically relied on Dr. Sundaram's opinion because of Dr. Sundaram's status as claimant's treating physician.

Employer also asserts that the administrative law judge mechanically credited Dr. Fritzhand's opinion because Dr. Fritzhand examined claimant. The administrative law judge stated, "I...disagree with the Board that a physician who actually examines a patient is not in a better position to diagnose his condition than someone who merely reviews the record." Decision and Order on Remand at 5. Nonetheless, the administrative law judge did not credit Dr. Fritzhand's opinion solely on the basis that Dr. Fritzhand examined claimant. Rather, the administrative law judge observed that "Dr. Fritzhand, who had the advantage of examining the [c]laimant, corroborated Dr. Sundaram's opinion." *Id*. Further, as previously noted, the administrative law judge observed that Dr. Fritzhand's opinion is better supported by the clinical evidence of record and the claimant's history of dust exposure in the underground coal mines. *Id*. Thus, we reject employer's assertion that the administrative law judge mechanically credited Dr. Fritzhand's opinion because Dr. Fritzhand examined claimant.

Citing *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), and *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994), employer asserts that the opinions of Drs. Fritzhand and Sundaram are not reasoned because their diagnoses of pneumoconiosis are based on claimant's coal mine employment history. In *Hicks*, the United States Court of Appeals for the Fourth Circuit held that "the length of a miner's coal mine employment does not compel the conclusion that the miner's disability was solely respiratory." *Hicks*, 138 F.3d at 533, 21 BLR at 2-366. Further, the United States Court of

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Sundaram than to the contrary opinions of Drs. Branscomb, Broudy and Fino based on Dr. Sundaram's credentials, we hold that any error by the administrative law judge in this regard is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[11]The administrative law judge stated, "[c]ertainly, the treating physician rule is premised upon an understanding that someone who examines a patient for treatment purposes over a period of time is better equipped to assess that individual's condition than someone who sees the patient once or reviews records." Decision and Order on Remand at 5.

Appeals for the Seventh Circuit declared that "[o]ccupational exposure is not evidence of pneumoconiosis, but merely a reason to expect that evidence might be found." *Fitts*, 39 F.3d at 783, 18 BLR at 2-387. In the instant case, however, the opinions of Drs. Fritzhand and Sundaram are based on physical examinations, x-ray evidence and coal mine employment histories. Director's Exhibit 11; Claimant's Exhibits 2, 5. Thus, we reject employer's assertion that the opinions of Drs. Fritzhand and Sundaram are not well reasoned because their diagnoses of pneumoconiosis are based on claimant's coal mine employment history.

Moreover, employer asserts that the administrative law judge erred by relying on the opinion of Dr. Hill because she failed to explain how Dr. Hill's opinion is reasoned and documented. Contrary to employer's assertion, the administrative law judge did not rely on Dr. Hill's opinion to establish the existence of pneumoconiosis. Rather, the administrative law judge merely noted that Dr. Hill was one of three physicians to diagnose pneumoconiosis. The administrative law judge observed that "in the Whitesburg Appalachian Regional Hospital record, Dr. Hill, who is also a treating physician, included 'black lung' in the history of present illness section." Decision and Order on Remand at 4 n.7. The administrative law judge also observed that "[w]hile [Dr. Hill] may have provided little if any rationale for its inclusion among the diagnosed conditions, his diagnosis is at least corroborative of that of Drs. Sundaram and Fritzhand, with which it is consistent." *Id*. Thus, we reject employer's assertion that the administrative law judge erred in her consideration of Dr. Hill's opinion.

Employer further asserts that the administrative law judge erred by relying upon Dr. Sundaram's opinion because it is based upon an inaccurate cigarette smoking history. The administrative law judge did not render a finding with regard to claimant's cigarette smoking history. Claimant did not testify about his cigarette smoking history during the most recent hearing held on August 20, 1997. During a prior hearing held on July 20, 1991, claimant testified that he smoked about six or eight cigarettes per day for seven or eight years. 1991 Hearing Transcript at 12-13. Further, during a deposition dated October 27, 1995, claimant testified that he smoked for seven or eight years. Director's Exhibit 21 (Claimant's Deposition at 7). Dr. Sundaram relied upon a smoking history of two to three cigarettes per day for eight to nine years. Claimant's Exhibits 2, 5. Inasmuch as the discrepancy between claimant's testimony about his smoking history and the smoking history relied upon by Dr. Sundaram is not significant enough to undermine the credibility of Dr. Sundaram's opinion, we reject employer's assertion that the administrative law judge erred by relying upon Dr. Sundaram's opinion because it is based upon an inaccurate cigarette smoking history. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988). The Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985).

In addition, employer asserts that the administrative law judge impermissibly shifted the burden of proof from claimant to employer to establish not only that claimant did not have pneumoconiosis but that some other disease process explains claimant's complaints. Employer's Brief at 26. In its prior decision, the Board considered the conflicting medical opinion evidence with regard to the issue of the existence of pneumoconiosis and observed that "the consultative opinions of Drs. Branscomb and Fino corroborate the opinion of Dr. Broudy." *Bentley v. Kentucky Elkhorn Coals, Inc.*, BRB No. 98-1142 BLA, slip op. at 4 (May 21, 1999)(unpub.). Further, the Board stated, "[w]e agree...with employer's argument that it is not employer's burden at Section 718.204(b) to establish a 'cohesive theory of the etiology of the [c]laimant's pulmonary impairment so as to undermine the conclusions of Drs. Sundaram and Fritzhand.'" *Bentley*, slip op. at 4 n.3.

In her decision on remand, however, the administrative law judge stated that "[w]hile [Drs. Branscomb, Broudy and Fino] apparently agreed that the [c]laimant's problems were due to 'anything but' coal workers' pneumoconiosis, I do not find that to be particularly persuasive or corroborative."[12] Decision and Order on Remand at 4 n.9. The administrative law judge observed that "Drs. Broudy, Branscomb, and Fino disagreed as to the possible contribution of factors such as cigarette smoking, a predisposition to asthma, and hereditary factors, as well as the extent to which the symptoms were related to emphysema, asthma, bronchitis, or asthmatic bronchitis." *Id.* The administrative law judge additionally stated, "[d]espite the Board's admonition that the [e]mployer is under no burden to establish a

[12]The administrative law judge stated, "I also disagree that the opinions of Drs. Branscomb and Fino 'corroborate' that of Dr. Broudy, as the Board states at page 4 of its decision, when they are inconsistent with Dr. Broudy's opinion." Decision and Order on Remand at 4. The administrative law judge additionally stated, "[w]hile the Board apparently feels that, in assessing the credibility of these physicians, it is not relevant that their reasoning is inconsistent, I am not bound by the Board's weighing of the evidence, particularly where, as here, it is not reasoned." *Id.*

'cohesive theory of the etiology of the [c]laimant's pulmonary impairment', it would be absurd to suggest that the credibility of the three physicians retained by the [e]mployer is not undermined at all by the fact that they disagree with each other on the material issues." *Id*. at 4. Hence, the administrative law judge stated, "[e]mployer may feel that it need not come up with a 'cohesive theory', but its failure to do so certainly makes the cohesive theory submitted by the [c]laimant more persuasive to the undersigned administrative law judge and suggests that the opinions of these three physicians are undocumented and unreasoned."[13] *Id*. at 4-5.

[13]The administrative law judge stated that "the [e]mployer's admission that it cannot come up with a cohesive theory of the case because its physicians disagree suggests that the physicians are wrong." Decision and Order on Remand at 5.

Contrary to the administrative law judge's findings, it is claimant's burden to establish the existence of pneumoconiosis. *See Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986). As previously stated by the Board in its instructions to the administrative law judge, it is not employer's burden to establish a "cohesive theory" of the case with regard to issues related to claimant's burden of proof. Furthermore, the administrative law judge's analysis of employer's expert opinions is obviously flawed when she asserts that the differences in their conclusions "suggest[] that the opinions of these three physicians are undocumented and unreasoned." Decision and Order on Remand at 4-5. A determination of whether an opinion is documented or reasoned requires analysis of the document within its four corners. Therefore, we vacate the administrative law judge's finding that the newly submitted evidence is sufficient to establish the existence of pneumoconiosis, and remand the case to the administrative law judge for further consideration of the newly submitted evidence thereunder. 20 C.F.R. §718.202(a)(4). On remand, the administrative law judge must consider the conflicting evidence in accordance with this holding. *See Hall, supra*. The administrative law judge, on remand, must also consider all of the evidence of record on the merits under 20 C.F.R. Part 718,[14] if

[14]In its previous decision, the Board held that Dr. Fritzhand's opinion is insufficient to establish disability causation at 20 C.F.R. §718.204(b)(2000) pursuant to *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989), because Dr. Fritzhand diagnosed two pulmonary conditions, pneumoconiosis and COPD due to smoking, and did not indicate whether claimant's pneumoconiosis was a contributing cause of his total respiratory disability. *Bentley v. Kentucky Elkhorn Coals, Inc.*, BRB No. 98-1142 BLA, slip op. at 4 n.3 (May 21, 1999)(unpub.). In her decision on remand, however, the administrative law judge stated, "while the Board suggests that they are not sufficient to establish causation, the

the administrative law judge finds the evidence sufficient to establish a material change in conditions at 20 C.F.R. §725.309(2000). *See Ross, supra*.

In the event the administrative law judge determines that claimant has established a material change in conditions and entitlement, she must reconsider the onset of total disability date. Employer correctly argues that the administrative law judge designated the first of the month in which the claim was filed, July 1, 1995, pursuant to 20 C.F.R. §725.503(b) without discussing evidence which, if credited, may show that he was not totally disabled at a later time, including Dr. Fritzhand's September 1995 opinion and Dr. Broudy's October 1995 opinion. Accordingly, we vacate the administrative law judge's onset determination on remand. The administrative law judge must reconsider and discuss the evidence with respect to the issue of onset date of disability, if reached.

Finally, employer contends that the administrative law judge erred in failing to recuse herself from the case. Employer's contention is based on the premise that the administrative law judge is biased. Charges of bias must be supported by concrete evidence. *See Zamora v. C. F. & I. Steel Corp.*, 7 BLR 1-568 (1984). There is no evidence of record to support employer's assertion of bias by the administrative law judge. Therefore, we reject employer's contention that the case should be transferred to a new administrative law judge on remand. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

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gravamen of Dr. Fritzhand's report is that both of the pulmonary conditions mentioned are significant contributing factors that act together in producing the pulmonary disability." Decision and Order on Remand at 7. Hence, the administrative law judge relied on Dr. Fritzhand's opinion to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b)(2000). We are not persuaded by the administrative law judge's finding that the Board previously erred in holding that Dr. Fritzhand's opinion is insufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b)(2000). *See Hall v. Director, OWCP*, 12 BLR 1-80 (1988).

With regard to the administrative law judge's award of attorney's fees, employer contends that the administrative law judge erred in finding that claimant's counsel is entitled to an hourly rate of $175.00 for legal services that he performed before her.[15] In so finding, the administrative law judge stated, "I note that (1) the quality of the representation was good, and [claimant's counsel] was diligent in furthering the interests of his client; (2) [claimant's counsel] is a seasoned, qualified attorney in the area of Black Lung claims; (3) the legal issues involved are complex, in that there was a threshhold (sic) issue of whether the [c]laimant established a material change in conditions in accordance with 20 C.F.R. §718.309(d) under the Sixth Circuit's ruling in [*Ross*] (with the difficulties inherent in overcoming a prior adverse determination), in addition to the medical issues inherent in all Black Lung claims; (4) the case went up to the level of the Benefits Review Board and was remanded back; and (5) [claimant's counsel] has been involved throughout, and he was even involved in the prior, unsuccessful claim." [2000] Supplemental Decision and Order at 7-8; 20 C.F.R. §725.366(b)(2000).[16] Hence, the administrative law judge determined that "[t]hese factors justify a fee on the high end of the reasonable range." Supplemental Decision and Order at 8. Nonetheless, the administrative law judge stated that "[o]n balance, even taking into consideration all of these factors, as well as the fact that I have approved an hourly fee of $200.00 for [claimant's counsel] in the past, I agree with the [e]mployer that the hourly rate claimed is somewhat excessive for the geographical area in which [claimant's counsel] practices (Pikeville, Kentucky and environs) and should be reduced." *Id.* The administrative law judge determined that "because of the factors mentioned above, the fee will only be reduced by the amount of $25.00 hourly, and an hourly fee of $175.00 will be approved." *Id.*

Employer asserts that the administrative law judge erred in awarding claimant's counsel an hourly rate of $175.00 because it is not reasonable in this case. Specifically, employer asserts that the administrative law judge erred in disregarding evidence that $95.00 was the market rate for black lung cases in the local community of claimant's counsel. The administrative law judge observed that "[i]n support of the fee claimed, [claimant's counsel] notes that...his usual billing rate for Black Lung cases is $200.00 per hour and that he

[15]When a claimant wins a contested case, the Act provides that the employer, its insurer, or the Black Lung Disability Trust Fund shall pay a "reasonable attorney's fee" to claimant's counsel. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928(a).

[16]The pertinent regulations provide that "[a]ny fee approved under...this section shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of fee requested." 20 C.F.R. §725.366(b).

averages in excess of $200.00 per hour for the other matters he works on, whether contingency or non-contingency (primarily 'flat fee') cases." Supplemental Decision and Order at 6. The administrative law judge additionally observed that claimant's counsel "also notes that the undersigned administrative law judge has awarded him $200.00 hourly in other Black Lung cases, as have other judges and the Benefits Review Board." *Id*. Based on the foregoing, the administrative law judge determined that claimant's counsel "has made a ***prima facie*** showing that the rate claimed is reasonable, based upon [the] fact that it is the amount he has been awarded for such cases on multiple occasions." *Id*. Consequently, the administrative law judge found that "[e]mployer's argument that [claimant's counsel] has failed to meet his burden of proof...lacks merit." *Id*.

However, the administrative law judge also found that "[e]mployer's showing that it pays its own attorneys practicing in the same area less than 50% of the amount claimed by [claimant's counsel] is more compelling."[17] *Id*. Nonetheless, the administrative law judge stated that "while it is a factor to be considered, there is no requirement that any rate approved be consistent with the rate obtained by the general legal community in the area of law."[18] *Id*. at 7. The administrative law judge observed that "given the fact that [c]laimant's counsel do not receive fees unless they win, they may as a group charge higher hourly rates than [e]mployer's counsel, in order to stay in business." Supplemental Decision and Order at 7. The administrative law judge further observed that "[i]n this regard, risk of loss is a constant factor in Black Lung litigation which is deemed incorporated into the hourly rate, and a fee so low that it would preclude an attorney from recouping his risk of loss would be

[17]Employer asserts that the administrative law judge found its evidence to be more compelling than the evidence submitted by claimant's counsel with respect to hourly rate for attorneys in Pikeville, Kentucky. Contrary to employer's assertion, the context of the administrative law judge's decision indicates that the administrative law judge found employer's argument that the hourly rate awarded by the administrative law judge of $175.00 is not reasonable to be more compelling than employer's argument that claimant's counsel has failed to meet his burden of proof.

[18]The administrative law judge observed that "[e]mployer notes that its own retained counsel in Pikeville, who represented [e]mployer at the hearing in the instant case (Baird, Baird, Baird & Jones, P.S.C., and specifically Lois Kitts) is only paid $95.00 per hour for Black Lung matters." [2000] Supplemental Decision and Order at 6. The administrative law judge stated, "while I would have preferred to have more evidence on the rates charged by attorneys in Pikeville, [the] fact that Ms. Kitts has appeared before me on other occasions and handles a significant portion of the Black Lung cases for employers in the Pikeville area indicates to me that the rate charged by her firm is a good indicator of the going rate for [e]mployer's attorneys in the Pikeville area for Black Lung cases." *Id*. at 7.

manifestly inadequate." *Id*. Thus, we reject employer's assertion that the administrative law judge's award of an hourly rate of 175.00 to claimant's counsel was not reasonable.

Employer also argues that the administrative law judge erroneously awarded claimant's counsel an hourly rate of $175.00 based on a contingency enhancement. The United States Supreme Court has held that fee-shifting statutes do not permit enhancement of a fee award beyond the lodestar amount to reflect the fact that a party's attorneys were retained on a contingent-fee basis.[19] *See City of Burlington v. Dague*, 112 S.Ct. 2638 (1992); *see also Broyles v. Director, OWCP*, 974 F.2d 508, 17 BLR 2-1 (4th Cir. 1992); *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91 (1995). In the instant case, the administrative law judge stated, "[t]o say that the usual fee claimed includes risk of loss and delay of payment is not the same as saying that there has been either a fee enhancement due to unusual delay...or a contingency multiplier to compensate for risk of loss." Decision and Order on Remand at 7 n.6. The administrative law judge further stated that "[s]uch an enhancement or multiplier is not being sought here." *Id*. The administrative law judge therefore concluded that "it is appropriate for a usual fee claimed to take into consideration the innate risk of loss and delay in payment[20] encountered by a claimant's attorney in every Black Lung case." *Id*. at 7. In a statement submitted in support of his attorney's fee petition, claimant's counsel stated that "[t]he fees derived from the attorney's practice are generally on a contingent basis and the undersigned attorney averages normally in excess of $200.00 per hour for worker's compensation, social security and automobile accidents cases." September 29, 1999 Statement at 1. Although claimant's counsel also stated that "[t]he risk of winning a federal black lung case should be taken into consideration," *id*. at 2, there is no indication from the Statement that the requested fee of claimant's counsel was enhanced by a contingency multiplier. In a subsequent letter dated October 18, 1999, claimant's counsel indicated that $200.00 per hour has been his regular customary fee in federal black lung cases for a number of years. Thus, since claimant's counsel's hourly rate was not improperly enhanced with a contingency multiplier, we reject employer's argument that the administrative law judge erred in granting claimant's counsel an hourly rate of $175.00. *See Dague*, *supra*. Therefore, we will not disturb the administrative law judge's award of an hourly rate of

[19]In determining the amount of attorney's fees to award under a fee-shifting statute, a fact-finder must determine the lodestar amount, which is the number of hours reasonably expended in preparing and litigating the case times a reasonable hourly rate. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986).

[20]An enhancement of an attorney's fee to compensate for delay in payment, if raised at the time a fee petition is filed, is an appropriate factor in determining what constitutes a reasonable attorney's fee. *See Missouri v. Jenkins*, 109 S.Ct. 2463 (1989); *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91 (1995); *Bennett v. Director, OWCP*, 17 BLR 1-72 (1992).

$175.00 for claimant's counsel's legal services.[21]

Accordingly, the administrative law judge's Decision and Order on Remand Granting Benefits, and Order Denying Employer's Motion for Recusal and Motion for Reconsideration are vacated and the case is remanded for further proceedings consistent with this opinion. The administrative law judge's Supplemental Decision and Order Awarding Attorney Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[21]We note that an attorney's fee award does not become effective, and is thus unenforceable, until there is a successful prosecution of the claim. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-17 (1995).

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge