BRB Nos. 00-0841 BLA
and 00-0841 BLA/A

DAVID L. CUNNINGHAM	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
BETHENERGY MINES, INCORPORATED	)	
	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order - Awarding Benefits and Supplemental Decision and Order - Granting Attorney's Fees of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Robert F. Cohen, Jr. (Cohen, Abate & Cohen, L.C.), Fairmont, West Virginia, for claimant.

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Dorothy L. Page (Howard M. Radzely, 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, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.
PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order - Awarding Benefits (99-BLA-0411) of Administrative Law Judge Michael P. Lesniak 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).[1] Employer also appeals the administrative law judge's Supplemental Decision and Order - Granting Attorney's Fees in this case. The administrative law judge considered the instant claim, a duplicate claim which was filed on July 21, 1997, pursuant to the applicable regulations at 20 C.F.R. Part 718 (2000).[2] After crediting claimant with at least twenty-eight years of coal mine employment based upon the stipulation of the parties, the administrative law judge found that the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000) and, that therefore, claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Considering the claim on the merits, the administrative law judge found the x-ray evidence and medical opinion evidence of record sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) (2000), respectively. The administrative law judge then found claimant entitled to

[1]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.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would 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). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2]Claimant previously filed a claim on July 10, 1986, which was finally denied by the district director on December 19, 1986 for claimant's failure to establish the existence of pneumoconiosis, total disability and total disability due to pneumoconiosis. Director's Exhibit 34. Claimant took no further action thereafter until filing the instant duplicate claim on July 21, 1997. Director's Exhibit 1.

the rebuttable presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that the presumption was not rebutted. The administrative law judge also determined that the evidence of record was sufficient to establish total disability under Section 718.204(c) (2000), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge awarded benefits. In addition, the administrative law judge determined that the evidence was unclear as to the date of onset of claimant's total disability due to pneumoconiosis. The administrative law judge thus found that claimant was entitled to benefits commencing on July 1, 1997, the first day of the month in which claimant filed the instant claim. In a Supplemental Decision and Order dated July 7, 2000, the administrative law judge awarded claimant's counsel a total fee of $28,389.29 for 110 hours of legal services at an hourly rate of $210.00 and $5,131.79 in expenses.

On appeal, employer challenges the administrative law judge's findings on the merits under Sections 718.202(a)(1) and (a)(4) (2000), and 718.204(b) (2000). Employer also challenges the administrative law judge's attorney's fee award. Claimant has filed a response brief in support of the administrative law judge's decision awarding benefits, but has also filed a cross-appeal, challenging the administrative law judge's finding as to the date of onset of total disability due to pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief indicating he does not presently intend to respond to the arguments raised in these appeals.[3]

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

[3]We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment finding, his finding under 20 C.F.R. §725.309 (2000), and his findings on the merits at 20 C.F.R. §§718.203(b) (2000) and 718.204(c)(1)-(4) (2000). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); 20 C.F.R. §§718.203(b), 718.204(b)(2)(i)-(iv); Decision and Order at 18-21, 24.

In challenging the administrative law judge's finding that the x-ray evidence of record is sufficient to establish the existence of pneumoconiosis, employer contends that the administrative law judge erred by mechanically relying upon the positive readings submitted by B reader/Board-certified radiologists. Employer argues that there is no valid reason to assume that a B reader/Board-certified radiologist is any more proficient than a B reader in interpreting x-rays for pneumoconiosis. Employer further contends that, regardless, substantial evidence does not support the administrative law judge's finding that the x-ray evidence taken as a whole, and in particular the readings from the most qualified readers of record, is sufficient to establish the presence of pneumoconiosis. Employer's contentions lack merit. In weighing the conflicting x-ray evidence of record, the administrative law judge properly considered both the quantity of positive and negative interpretations as well as the qualifications of the physicians submitting them, and properly accorded greatest weight to the interpretations of dually-qualified physicians. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Roberts v. Bethlehem Mining Corp.*, 8 BLR 1-211 (1985); Decision and Order at 21-23. Specifically, the administrative law judge properly credited the positive readings of record from Drs. Bassali and Ahmed, both of whom are B reader/Board-certified radiologists, upon correctly noting that the record does not contain negative readings from similarly qualified physicians.[4] *Id*.; Director's Exhibits 7, 17, 19;

[4]The administrative law judge correctly found that Dr. Bassali read a film dated January 13, 1997 as positive for pneumoconiosis, as did Dr. Ahmed. Decision and Order at 22; Director's Exhibit 19; Claimant's Exhibit 2. The administrative law judge further correctly found that Dr. Ahmed interpreted the films dated January 30, 1995 and August 15, 1997 as positive for pneumoconiosis, and that Dr. Patel, an A reader and Board-certified radiologist, also read the film dated January 30, 1995 as positive for the disease. Decision and Order at 22; Director's Exhibit 17; Claimant's Exhibit 2. The administrative law judge also properly found that the record did not include negative readings of any of the films of

Claimant's Exhibit 2. We affirm, as in accordance with law and supported by substantial evidence, the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1) (2000). *See* 20 C.F.R. §718.202(a)(1).

Employer also argues that the administrative law judge erred by mechanically relying upon Dr. Rasmussen's medical opinion at Section 718.202(a)(4) (2000), which indicates that claimant suffers from pneumoconiosis, on the basis that Dr. Rasmussen was claimant's treating physician. Employer contends that the administrative law judge's discounting of the remaining medical opinion evidence under Section 718.202(a)(4) (2000) was thus improper. We disagree. Employer's contentions amount to a request that the Board reweigh the evidence, which the Board is not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). In considering the medical opinion evidence regarding the existence of pneumoconiosis, the administrative law judge properly considered the relevant factors bearing on the credibility of the medical opinions, including the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); Decision and Order at 23-24. Specifically, the administrative law judge correctly found that Drs. Devabhaktuni and Keefover, while opining that claimant suffered from chronic obstructive pulmonary disease, obstructive sleep apnea and obesity, gave no opinion as to whether claimant has pneumoconiosis, and did not indicate whether claimant's conditions are attributable to any degree to coal dust exposure. Decision and Order at 23; Director's Exhibits 25, 34. The administrative law judge also properly determined that Dr. Magunia provided only a terse diagnosis of pneumoconiosis, without adequate explanation for the basis of the diagnosis. Decision and Order at 23; Director's Exhibit 24.

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record from dually-qualified physicians. Decision and Order at 22. We note that employer suggests that the administrative law judge erred in failing to provide a reason as to why positive interpretations from Dr. Speiden of films dated May 8, 1991, June 7, 1991 and August 19, 1992 supported a finding of pneumoconiosis. Employer's argument is misplaced, as the administrative law judge explicitly discounted Dr. Speiden's positive readings as equivocal. Decision and Order at 21-22.

The administrative law judge further considered that Drs. Renn, Castle, and Branscomb, who indicated that claimant does not have pneumoconiosis, are highly qualified, Board-certified pulmonary specialists, whose opinions were well-reasoned and documented. Decision and Order at 23; Director's Exhibits 20, 28; Employer's Exhibits 3, 4. The administrative law judge properly accorded greater weight to Dr. Rasmussen's contrary opinion that claimant has pneumoconiosis, however, on the basis that he too is well-qualified as a pulmonary specialist, gave a well-reasoned opinion which was corroborated by the opinions of Drs. Schroering and Koenig, and had the benefit of an historical perspective because he treated claimant over an eight year period. Decision and Order at 23; Director's Exhibits 7, 30; Employer's Exhibit 2. Contrary to employer's contention, the administrative law judge thus did not *mechanically* accord determinative weight to Dr. Rasmussen's opinion. To the contrary, the administrative law judge acted within his discretion in crediting Dr. Rasmussen's opinion on several bases. The administrative law judge rationally determined that the distinguishing basis for crediting Dr. Rasmussen's opinion over the contrary opinions of Drs. Renn, Castle and Branscomb was that Dr. Rasmussen had a more thorough and personal knowledge of claimant's condition by virtue of having been claimant's treating physician on a repeat and regular basis over an eight year period. *See Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994)*; Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); Decision and Order at 23-24; Director's Exhibits 7, 30; Employer's Exhibit 2. Accordingly, we affirm the administrative law judge's finding that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4) (2000). *See* 20 C.F.R. §718.202(a)(4).

Employer further contends that the administrative law judge erred by not weighing all of the different types of evidence together at Section 718.202(a) before determining that claimant established the existence of pneumoconiosis, in contravention of the holding of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000).[5] We disagree. The court in *Compton* held that all relevant evidence on the existence of pneumoconiosis must be considered together, rather than merely within discrete subsections of Section 718.202(a), where evidence under one subsection at Section 718.202(a) conflicts with unlike evidence within another discreet subsection at Section 718.202(a). In its decision, the court stated:

...[w]eighing all of the relevant evidence together makes common sense.

[5]Because the miner's coal mine employment occurred in West Virginia, the instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

> Otherwise, the existence of pneumoconiosis could be found even though the evidence as a whole clearly weighed against such a finding. For example, suppose x-ray evidence indicated that a miner had pneumoconiosis, but autopsy evidence established that the miner did not have any sort of lung disease caused by coal dust exposure. In such a situation, if each type of evidence were evaluated only within the particular subsection of § 718.202(a) to which it related, the x-ray evidence could support an award for benefits in spite of the fact that more probative evidence established that benefits were not due.

Compton, supra, at 209. As discussed *supra*, the administrative law judge properly weighed and found the x-ray evidence and medical opinion evidence in the instant case sufficient to establish the existence of pneumoconiosis under Section 718.202 (2000) at subsections (a)(1) and (a)(4), respectively. In addition, the record in this case does not include evidence which is relevant under Section 718.202(a)(2) and (a)(3). Therefore, contrary to employer's contention, the administrative law judge's finding that claimant established the presence of pneumoconiosis comports with the court's holding in *Compton.*

In addition, employer contends that the administrative law judge erred in finding the evidence sufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(b) (2000). We disagree. For the reasons discussed *supra*, the administrative law judge properly accorded determinative weight to Dr. Rasmussen's opinion. Furthermore, contrary to employer's contention, Dr. Rasmussen's opinion is sufficient as a matter of law to establish total disability due to pneumoconiosis. Although Dr. Rasmussen testified that he could not separate out on a percentage basis the contributions claimant's cigarette smoking and coal dust exposure made to his totally disabling pulmonary impairment, Dr. Rasmussen further testified that claimant's coal dust exposure was a significant contributing factor. Employer's Exhibit 2 at 32-34, 84, 87-98, 101-122, 153-155. *See* 20 C.F.R. §718.204(c); *DeHue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304, (4th Cir. 1995); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). Accordingly, we affirm the administrative law judge's finding pursuant to Section 718.204(b) (2000).[6] *See* 20 C.F.R. §718.204(c); *Ballard, supra; Robinson, supra*.

On cross-appeal, claimant contends that the administrative law judge improperly determined that the date from which benefits commence was the filing date of claimant's

[6]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).

claim. If a miner is found entitled to benefits, he is entitled to benefits beginning with the month of onset of his total disability due to pneumoconiosis. *See* 20 C.F.R. §725.503(b)[7]; *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 pneumoconiosis. *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989). If the medical evidence does not establish the date on which the miner became totally disabled, then the miner is entitled to benefits as of his filing date, unless there is credited evidence which establishes that the miner was not totally disabled at some point subsequent to his filing date. *Lykins*, *supra*.

[7]With the exception of providing guidelines for determining the date of onset of total disability due to pneumoconiosis for benefits awarded based upon a modification petition, the amended regulations do not substantively change the old regulation at 20 C.F.R. §725.503 (2000). *See* 20 C.F.R. §725.503.

In the instant case, the administrative law judge summarily determined, without weighing or discussing the relevant evidence, that the evidence is unclear as to the date of onset of claimant's total disability from pneumoconiosis. Decision and Order at 25. Claimant contends correctly that this summary determination does not satisfy 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 30 U.S.C. §932(a). *See McCune v. Central Appalachian Coal* Co., 6 BLR 1-996, 1-998 (1984); *Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981). As claimant notes, the record includes evidence which, if credited, would establish an onset date of total disability due to pneumoconiosis earlier than the date of the instant duplicate claim's filing, perhaps as early as 1991.[8] Specifically, claimant was treated in February of 1991 by Dr. Schroering, who indicated at that time that claimant had severe chronic obstructive pulmonary disease making it questionable whether claimant would be able to continue his work as a coal miner. Director's Exhibit 25. Moreover, Dr. Rasmussen indicated in June1991 that claimant was totally disabled from a pulmonary standpoint, and that coal workers' pneumoconiosis was a major contributor to his pulmonary impairment. Director's Exhibits 17, 24. We remand the case for the administrative law judge to discuss the relevant evidence and determine whether the medical evidence establishes when claimant became totally disabled due to pneumoconiosis.[9] *Krecota, supra.*

Finally, we address employer's argument that the administrative law judge erred in awarding claimant's counsel an attorney's fee based upon an hourly rate of $210.00. An award of an attorney's fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious or an abuse of discretion. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989); *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

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[8]As noted in footnote 2, *supra*, claimant filed a prior claim, on July 10, 1986. Director's Exhibit 34.

[9]We note that the onset date is not established, in and of itself, by the first medical opinion establishing total disability due to pneumoconiosis, since the first such medical opinion only indicates that the miner became totally disabled due to pneumoconiosis at some point prior to it. *See Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105 (1985).

Employer contends that the administrative law judge failed to consider sufficiently its arguments in support of its opposition to the requested hourly rate, and failed to explain adequately why he found that the $210.00 hourly rate was reasonable. We disagree. In determining that the $210.00 hourly rate was reasonable in this case, the administrative law judge acknowledged claimant's counsel's expertise in black lung litigation, noting that claimant's counsel has twenty-five years of experience in black lung litigation and is repeatedly contacted by lawyers, lay representatives and claimants from around the country regarding black lung litigation. Supplemental Decision and Order at 2. The administrative law judge noted that employer itself acknowledged counsel's expertise. *Id*. Moreover, the administrative law judge acted within his discretion in crediting Altman and Weil's *Survey of Law Firm Economics*, and specifically rejected employer's argument that this evidence does not accurately reflect the economics or hourly rates for federal black lung cases or attorneys situated in rural West Virginia. *Id*. The administrative law judge noted that the Altman and Weil survey submitted by claimant's counsel reports that an average hourly billing rate for attorneys with twenty-one or more years of experience practicing law in the northeast region, which includes West Virginia, was, in 1994, the year of the survey, $155.00 to $245.00, and that the median hourly rate was $195.00. *Id*. Furthermore, the administrative law judge considered the fact that claimant's counsel had been awarded fees based upon an hourly rate of $210.00 in other black lung cases before other administrative law judges. *Id*. Thus, contrary to employer's contentions, it is evident that the administrative law judge did not abuse his discretion or make an arbitrary or capricious decision in finding that the requested $210.00 hourly rate was reasonable. Accordingly, we affirm the administrative law judge's allowance of the $210.00 hourly rate requested by claimant's counsel. See Abbott, supra. Employer does not otherwise challenge the attorney's fee award. We, therefore, affirm the administrative law judge's attorney's fee award.[10]

[10]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).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed in part and vacated in part, the Supplemental Decision and Order - Granting Attorney's Fees is affirmed, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge