BRB No. 06-0368 BLA

WILLIAM A. VENESKY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PENN ALLEGHENY COAL COMPANY, INCORPORATED	)	DATE ISSUED: 02/26/2007
	)	
and	)	
	)	
INTERNATIONAL BUSINESS AND MERCANTILE REASSURANCE COMPANY	)	
	)	
Employer/Carrier-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 and the Attorney Fee Order of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Michelle S. Gerdano (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits (2004-BLA-6688) of Administrative Law Judge Richard A. Morgan on a subsequent 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] In addition, employer appeals the administrative law judge's June 9, 2006 Attorney Fee Order awarding fees to claimant's counsel. In a decision dated January 17, 2006, the administrative law judge credited claimant with thirteen years of coal mine employment,[3] as stipulated by the parties, and found that the subsequent claim was timely filed. The administrative law judge noted that employer had also stipulated that claimant "has established total disability pursuant to [20 C.F.R.] §718.204(b)(2)(iv)." Decision and Order at 18; Employer's Closing Brief at 44 n.12. The administrative law judge therefore found that claimant had demonstrated

[1] This claim, claimant's third, was filed on April 14, 2003 and is considered a "subsequent claim for benefits" because it was filed after January 19, 2001 and more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 4. Claimant's initial application for benefits, filed on November 10, 1992, was finally denied on September 14, 1995 by Administrative Law Judge Gerald M. Tierney because the evidence did not establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000), or the requisite causal connection between claimant's mild respiratory impairment and his pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Director's Exhibit 1. Claimant took no further action on this prior claim. Claimant's second application for benefits, filed on September 26, 1996, was denied by the district director on February 10, 1997 on the ground that claimant failed to establish a material change in condition since the denial of his first claim. Director's Exhibit 2. Claimant took no further action on this prior claim.

[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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] The record indicates that claimant's coal mine employment occurred in Pennsylvania. Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995) (holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004); Decision and Order at 18. Reviewing the entire record, the administrative law judge found that the weight of the evidence, including the x-ray, biopsy and medical opinion evidence, established the existence of clinical coal workers' pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (a)(2), (a)(4); 718.203(b), and further established the existence of legal pneumoconiosis, in the form of asbestosis arising out of coal mine employment, pursuant to Section 718.202(a)(4). Finally, the administrative law judge found that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b), and that both clinical and legal pneumoconiosis combined to render pneumoconiosis a substantially contributing cause of claimant's total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits as of May 16, 2003, based on the medical evidence of record. Following the award of benefits, in an Attorney Fee Order dated June 9, 2006, the administrative law judge granted claimant's counsel's petition for attorney's fees, approving the hourly rate, the number of hours, and the costs requested. Attorney Fee Order, issued June 9, 2006.

On appeal, employer contends that the administrative law judge erred in his analysis of the medical opinion evidence relevant to both the existence of legal pneumoconiosis at Section §718.202(a)(4), and disability causation at Section 718.204(c). Employer further contends that it may not be held liable for claimant's benefits as the responsible operator. Finally, employer contests the administrative law judge's award of attorney's fees. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has submitted a limited response disputing employer's denial of its responsible operator status, but expressing no opinion as to claimant's entitlement to benefits. Employer submitted a joint reply brief to both claimant's and the Director's briefs.[4]

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

[4] The administrative law judge's findings that claimant established the existence of clinical pneumoconiosis and that it arose out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (a)(2); 718.203(b), are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Employer generally challenges the administrative law judge's finding that claimant's total disability is due to pneumoconiosis pursuant to Section 718.204(c). Employer's primary contention is that asbestosis, unrelated to coal mine employment, is the only substantially contributing cause of claimant's disability, and that therefore, the administrative law judge erred in finding claimant entitled to benefits. We disagree.

The administrative law judge properly began his entitlement analysis by addressing claimant's history of dust exposure. The administrative law judge initially found, based on claimant's uncontradicted testimony, that prior to his coal mine employment claimant worked for approximately twelve to thirteen years at Pittsburgh Mills foundry, during which time he was exposed to silica dust, binder dust, limestone dust, and asbestos. Hearing Tr. at 11, 18; Decision and Order at 15, 22-23. Thereafter, claimant worked for thirteen years in underground coal mine employment. Decision and Order at 4 n.10, citing the parties' stipulation. The administrative law judge found that claimant first worked for five years in a coal mine operated by Republic Steel, also known as LTV Steel, where he was exposed to coal dust, while working as a shuttle car operator, and for three of those years, he was also exposed to asbestos, while working as a mechanic and an electrician. According to claimant's uncontradicted testimony, this work entailed, *inter alia*, changing the contractor insulators and separators, which were made of asbestos. Hearing Tr. at 10-11, 19-20; Decision and Order at 15, 22-23. The administrative law judge properly noted the contrary testimony by Dr. Fino, who stated in an August 31, 2005 deposition, that claimant had denied asbestos exposure in the mines, but the administrative law judge identified the evidence which persuaded him that claimant had asbestos exposure in his coal mine employment: claimant's sworn testimony describing his work as a mechanic with Republic/LTV Steel; the July 28, 2005 deposition testimony of Dr. Cohen, that claimant had reported a history of working in LTV Steel's coal mine from 1977 to 1982, during which time he had been exposed to coal dust and that he had also been exposed to asbestos when he had worked "on insulators that he noted had significant asbestos insulation . . . a couple hours a day"; and three treatment notes by Dr. Karen Rendt, dated December 4, 1992, March 10, 1993, and June 23, 1993, documenting claimant's "[history] of asbestos exposure from coal mining" for ten years. Decision and Order at 22. Thus, substantial evidence supports the

administrative law judge's finding that claimant was exposed to asbestos for three years while engaged in coal mine employment for Republic/LTV Steel.[5] *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Elswick v. Eastern Associated Coal Corp.*, 2 BLR 1-1016 (1980); *see Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-85 (3d Cir. 2004); Claimant's Exhibit 6 at 14; Director's Exhibit 1; Decision and Order at 22-23.

There is no merit to employer's assertion that Dr. Cohen conceded he had no actual knowledge of claimant's coal dust exposure. Employer's Brief at 7-8. In his deposition, Dr. Cohen explained that while he had not been in employer's coal mines, he had visited coal mines with similar geology, and based on his experience, together with his knowledge of claimant's job duties in the mines, it was his conclusion that claimant's exposure to coal dust had been extremely heavy. Claimant's Exhibit 6 at 63-64. Finally, the administrative law judge permissibly credited claimant's undisputed testimony that during his eight years as a mechanic for employer, he worked at the face of the mine where the dust was "thick." Hearing Tr. at 11; Decision and Order at 22. Thus, we affirm the administrative law judge's conclusion that the evidence of record establishes that claimant was exposed to both coal dust and asbestos while engaged in coal mine employment.

Turning to the issue of whether claimant established the existence of pneumoconiosis arising out of his coal mine-related dust exposures, we note that employer does not dispute the administrative law judge's finding that claimant has clinical, simple pneumoconiosis arising out of thirteen years of coal mine employment. Decision and Order at 20-21. Nor does employer dispute that claimant has totally disabling asbestosis, or that he was exposed to asbestos during his coal mine employment with Republic/LTV Steel. Employer's Brief at 3, 4, 11. Rather, employer contends, in part, that because the administrative law judge "did not make" a finding that claimant has legal pneumoconiosis at Section 718.202(a)(4), there is no support for the administrative law judge's ultimate conclusion that both forms of pneumoconiosis, clinical and legal, combined to render the disease a substantially contributing cause of claimant's totally disabling respiratory impairment. Employer's Brief at 12-16. Again, we disagree.

[5] In finding three years of asbestos exposure in coal mine employment, the administrative law judge relied in part on Dr. Cohen's statement that while with Republic/LTV Steel, claimant worked as a shuttle car operator from 1977-1979, and as a mechanic from 1979-1982. The administrative law judge then noted that while claimant did not testify to his exact years of asbestos exposure with Republic/LTV, he did testify that the exposure occurred while working as a mechanic. The administrative law judge permissibly concluded that claimant was exposed to asbestos with Republic/LTV from 1979-1982. Decision and Order at 23 n. 65.

Prior to concluding that claimant's totally disabling respiratory impairment is due, in part, to pneumoconiosis, the administrative law judge correctly stated that the primary dispute in this case is specifically which dust exposure precipitated claimant's total disability. Decision and Order at 22. The administrative law judge properly found that the regulatory definition of pneumoconiosis includes any "chronic dust disease of the lung" which is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment," and that this definition includes asbestosis arising out of dust exposure in coal mine employment. 20 C.F.R. §718.201(a); *Shaffer v. Consolidation Coal Co.*, 17 BLR 1-56 (1992); *Pershina v. Consolidation Coal Co.*, 14 BLR 1-55 (1990); *see Williamson Shaft Contracting Co. v. Phillips*, 794 F.2d 865, 9 BLR 2-79 (3d Cir. 1986); Decision and Order at 23. The administrative law judge permissibly relied on claimant's sworn testimony, together with the evidence provided by Drs. Cohen and Rendt, to conclude that claimant's "coal dust exposure from his thirteen years of coal mine employment and asbestos exposure from his three years of coal mine work as a mechanic for Republic Steel constitute his pneumoconiosis as defined by the Regulations," and that "[c]laimant's pneumoconiosis is of both the clinical and legal varieties." Decision and Order at 22-23, 25 n.68. Thus, there is no merit to employer's assertion that the administrative law judge failed to make a finding regarding the existence of legal pneumoconiosis. Employer attempts to undermine the administrative law judge's finding that claimant's asbestosis was, in part, legal pneumoconiosis by pointing to Dr. Cohen's testimony that it would be correct to state that claimant does not have "legal pneumoconiosis." Employer's Brief at 8; Claimant's Exhibit 6 at 106. That testimony followed the doctor's statement that claimant's chronic obstructive pulmonary disease was not caused by coal dust exposure. Claimant's Exhibit 6 at 106. Dr. Cohen did not testify that claimant's asbestosis was unrelated to his coal mine employment. He testified to the opposite: that claimant's disabling respiratory impairment was due to a combination of coal dust exposure and asbestos exposure in both coal mining and claimant's previous employment. Claimant's Exhibit 6 at 25. The administrative law judge rationally relied on Dr. Cohen's opinion that claimant's coal mine employment-related asbestos exposure contributed to his disabling pulmonary impairment. Therefore, we affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis, in the form of asbestosis arising out of coal mine employment.[6]

[6] In addition, we note that the record contains no contrary probative medical evidence relevant to the existence of legal pneumoconiosis. By deposition dated July 28, 2005, Dr. Cohen, a B reader and Board-certified pulmonologist, testified that the cause of claimant's pneumoconiosis is "multi-factorial," stating: "I believe that there is a very significant contribution by his coal mine employment, and that he has both significant coal mine dust and some asbestos exposure from his coal mine job" in addition to previous asbestos exposure. Claimant's Exhibit 6 at 25-6.

We further reject employer's argument that the administrative law judge erred in finding that clinical pneumoconiosis contributes to claimant's total disability pursuant to Section 718.204(c). Employer's Brief at 12. Again, employer does not challenge the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment, nor does it dispute claimant's testimony that he worked for employer for approximately eight years, repairing equipment and mining coal at the face, where the dust was thick. Employer's Brief at 4; Hearing Tr. at 11; Decision and Order at 20-21.

In evaluating the medical opinion evidence on the issue of disability causation, the administrative law judge permissibly gave the greatest weight to the medical opinions submitted with the most recent claim, from Drs. Cohen, Paul, Raffensperger, Fino and Pickerill, in part because these opinions were formulated after claimant's March 2, 1998 biopsy, which resulted in a diagnosis of asbestosis, and thus took into consideration the

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In a report dated May 16, 2003, Dr. Paul, whose qualifications are not in the record, diagnosed coal workers' pneumoconiosis due to coal dust inhalation, but did not address claimant's asbestos exposure or discuss its possible role in his disease. Director's Exhibit 15.

In a consultative report dated February 5, 2005, Dr. Raffensperger stated that he was aware of claimant's smoking history and his "past exposures to mineral dust in the form of coal dust and asbestos sustained over decades of employment," and further stated that both claimant's coal dust and asbestos exposure played substantial roles in his disability, but did not name the disease caused by asbestos exposure. Director's Exhibit 21.

The record also contains several reports and a deposition from Dr. Fino, a Board-certified pulmonologist and B reader, who diagnosed simple coal workers' pneumoconiosis and asbestosis. Employer's Exhibit 6. Dr. Fino stated that it was his understanding that claimant did not have any asbestos exposure in the mines, Employer's Exhibit 15 at 29-31, and thus he did not directly address whether claimant's asbestosis arose, in part, out of his coal mine employment-related asbestos exposure.

Finally, the record contains a report from Dr. Pickerill, a Board-certified pulmonologist and B reader, who noted claimant's smoking history, his thirteen years of coal mine employment, and his history of asbestos exposure from 1966-1975 with Pittsburgh Mills foundry. Employer's Exhibit 13. Dr. Pickerill diagnosed chronic pulmonary asbestosis, causally related to asbestos exposure, but did not document claimant's coal mine-related asbestos exposure or discuss its possible role in his disease. Employer's Exhibit 13.

most complete picture of claimant's health. 20 C.F.R. §718.201(c); *see Stark v. Director, OWCP*, 9 BLR 1-36 (1986); Decision and Order at 23.

The administrative law judge first considered Dr. Cohen's opinion regarding the cause of claimant's totally disabling respiratory impairment. Dr. Cohen stated that it was partly "caused by his more than 13 years of coal mine dust exposure," but was "also caused, to some degree, by his asbestos exposure. So that's, I think, significantly caused by that." Claimant's Exhibit 6 at 28. Dr. Cohen further testified that there was no way he could distinguish between an impairment and disability attributable to asbestos exposure and an impairment and disability attributable to coal mine dust exposure, because claimant has had very comparable exposures to both agents. Claimant's Exhibits 1, 6 at 109-110. The administrative law judge permissibly found the probative value of Dr. Cohen's opinion to be only "minimally diminished" because the physician failed to clearly document claimant's coal mine employment-related asbestos exposure in his initial written report. Claimant's Exhibits 1, 6; Decision and Order at 11-12 and n.33, 22 and n.62, 23-24. Contrary to employer's arguments, whether Dr. Cohen's conclusion, that both coal workers' pneumoconiosis and asbestosis contributed to claimant's disability, is sufficiently reasoned is for the administrative law judge to decide. *See Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*); Employer's Brief at 13. Therefore, we affirm the administrative law judge's determination that the weight of Dr. Cohen's opinion is only "minimally diminished."

Employer further asserts, citing Dr. Paul's opinion, that the administrative law judge's finding that pneumoconiosis contributed to claimant's disabling pulmonary impairment is undermined by the administrative law judge's failure to resolve conflicts in the evidence. Employer's Brief at 12-13. Pursuing this stream of consciousness style of argument, employer states that Dr. Paul opined that claimant's mild restrictive impairment is due to coal workers' pneumoconiosis and obesity, and that the impairment "may be work limiting;" employer suggests the opinion is speculative and is not a definitive finding that pneumoconiosis caused or contributed to any diagnosis. Employer's Brief at 13. Employer's argument is specious because the record reflects that the administrative law judge did not rely upon Dr. Paul's opinion to find pneumoconiosis contributed to claimant's disability. The administrative law judge stated that he accorded diminished weight to Dr. Paul's opinion on the alternate ground that he was the only physician who did not consider claimant's asbestos exposure, and, therefore, had an incomplete picture of claimant's health. *Stark*, 9 BLR at 1-37; Director's Exhibit 15; Decision and Order at 11, 24.

Considering Dr. Raffensperger's opinion, the administrative law judge permissibly found the physician's conclusion, that claimant's coal dust-induced coal workers'

pneumoconiosis played a substantial role in claimant's total disability,[7] to be well-documented and well-reasoned, *see Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Clark*, 12 BLR at 1-149; he accorded diminished weight only to the physician's additional conclusions regarding the role of claimant's asbestos exposure in his disability as somewhat vague. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Director's Exhibit 15; Decision and Order at 11, 24. As employer raises no arguments regarding the administrative law judge's crediting of Dr. Raffensperger's conclusion, that claimant's coal dust-induced coal workers' pneumoconiosis played a substantial role in claimant's total disability, it is hereby affirmed. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The administrative law judge also considered the opinion of Dr. Pickerill, who opined that claimant's respiratory impairment and occupational lung disease are primarily due to asbestosis rather than to coal workers' pneumoconiosis.[8] Employer's Exhibit 13. The administrative law judge accorded Dr. Pickerill's opinion diminished weight because the physician stated that he based his conclusion, in part, on three x-ray readings that had been excluded from the record pursuant to the evidentiary limitations at 20 C.F.R. §725.414.[9] Decision and Order at 24. As Dr. Pickerill stated that his conclusion was based, in part, on his opinion that the abnormalities seen on the three excluded x-rays were not typical of those produced by coal workers' pneumoconiosis, we hold that the administrative law judge reasonably exercised his discretion to conclude that Dr. Pickerill

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[7] Dr. Raffensperger diagnosed clinical coal workers' pneumoconiosis due to coal dust exposure and, discussing the cause of claimant's disability, stated: "Mr. Venesky's past exposure to coal dust is playing a substantial role in his restrictive disease which is now disabling him from his former coal mine employment. His coal mine dust related impairment has substantially caused his physiologic embarrassment. I also believe that the previous asbestos exposure is playing a substantial role in his disability. However, Mr. Venesky would not be as disabled as he is today if he did not have the exposure to coal mine dust." Director's Exhibit 21.

[8] Dr. Pickerill diagnosed chronic pulmonary asbestosis, causally related to asbestos exposure, but stated that he could not diagnose coal workers' pneumoconiosis within a reasonable degree of medical certainty. Employer's Exhibit 13. He offered the only opinion in the current claim which did not diagnose clinical pneumoconiosis.

[9] Section 725.414 provides that "[a]ny chest X-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, biopsy report, and physicians' opinions that appear in a medical report must each be admissible under this paragraph or paragraph (a)(4) of this section." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i).

had relied on the three inadmissible chest x-ray interpretations in determining that claimant does not have pneumoconiosis and, thus, is not totally disabled due, in part, to coal workers' pneumoconiosis. *See Brasher v. Pleasant View Mining Co., Inc.*, 23 BLR 1-141 (2006); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting); Employer's Brief at 13-14. The administrative law judge further permissibly accorded less weight to Dr. Pickerill's opinion because it contained a "superficial hypothetical," a statement that he could not diagnose pneumoconiosis, but that if it was present, it did not contribute to disability.[10] *See Soubik*, 366 F.3d at 234, 23 BLR at 2-99. Therefore, we affirm the administrative law judge's finding that Dr. Pickerill's opinion is entitled to "diminished" weight.

Finally, in evaluating Dr. Fino's opinion, the administrative law judge noted that the physician specifically stated that he based his conclusion, that claimant's disabling lung impairment was not caused by his clinical coal workers' pneumoconiosis but, rather, was due to asbestosis, largely on the fact that he saw no progression of pneumoconiosis between two x-rays, one taken in 1996 and the other taken in 2004, despite evidence that claimant's respiratory impairment had markedly worsened during the same time period. Employer's Exhibits 1, 2, 6, 15; Decision and Order at 12, 25. The administrative law judge provided two, independent reasons for rejecting Dr. Fino's opinion on causation. First, he correctly pointed out that the requisite evidence supporting Dr. Fino's opinion, *i.e.*, Dr. Fino's reading of a 2004 x-ray, is not in the record. Employer does not dispute this, but argues that "the judge's decision to discredit the opinion for this reason is too harsh." Employer's Brief at 15. Employer is unable to demonstrate legal error in the administrative law judge's ruling.[11] Second, the administrative law judge acted within his discretion in finding that Dr. Fino's conclusion was unreasoned, and, therefore entitled to "significantly" diminished weight, because it was unsupported by the x-ray evidence of record, which revealed a significant increase in both the overall number of positive x-ray readings between 1996 and 2004, and in the profusion of abnormalities, or degree of pneumoconiosis, seen on those x-rays. *Hutchens v. Director, OWCP*, 8 BLR 1-

[10] Dr. Pickerill stated that he "cannot diagnose coal workers' pneumoconiosis with a reasonable degree of medical certainty based upon the negative lung biopsy results" but that if claimant "does have a minimal degree of simple coal workers' pneumoconiosis, which was not apparent on the lung biopsy results, it is likely that the coal workers' pneumoconiosis has not caused a significant functional respiratory impairment." Employer's Exhibit 13.

[11] Although employer mischaracterizes the administrative law judge's ruling and complains about it, employer does not attempt to make a legal argument demonstrating error requiring remand of the case for consideration of the excluded x-ray. *See* Employer's Brief at 15 n.1.

16 (1985); *Goss v. Eastern Associated Coal Corp.*, 7 BLR 1-400 (1984); Employer's Brief at 14-16; Decision and Order at 25.

We further reject, as unsupported, employer's argument that the administrative law judge's reasoning is hostile to the regulations in that it is based on the premise that "pneumoconiosis is a progressive and irreversible disease; once present, it does not go away." Employer's Brief at 15, quoting the administrative law judge's Decision and Order at 18 n.50. Employer has taken the administrative law judge's statement out of context; the record demonstrates that the administrative law judge fully recognized that the regulation at Section 718.201 was amended to reflect that pneumoconiosis "may be latent and progressive." Decision and Order at 18 n.50. Accordingly, as we hold that the administrative law judge permissibly accorded "significantly" diminished weight to Dr. Fino's opinion, we need not address employer's additional allegations of error with respect to the administrative law judge's weighing of Dr. Fino's report. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); Employer's Brief at 13-14.

Having considered all of the relevant medical opinion evidence, the administrative law judge noted that each of the five physicians had diagnosed either asbestosis, coal workers pneumoconiosis, or both, and each had opined that either asbestosis, coal workers pneumoconiosis, or both diseases had contributed to claimant's totally disabling respiratory impairment. Decision and Order at 25-6. The administrative law judge rationally concluded that because both diseases arose out of claimant's coal mine employment and, therefore, constituted forms of pneumoconiosis, and both diseases contributed to claimant's total disability, claimant met his burden of proof to establish that pneumoconiosis is a substantially contributing cause of his totally disabling respiratory impairment. *Bonessa v. U.S. Steel Corp.*, 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989); Decision and Order at 26. We note that the administrative law judge's ultimate determination is further supported by the opinion of Dr. Cohen: that claimant's coal workers' pneumoconiosis is due to coal dust exposure in coal mine employment; that claimant's asbestosis is due to a combination of exposure in both coal mine employment and pre-coal mine employment foundry work; and that both coal workers' pneumoconiosis and asbestosis contributed to render claimant totally disabled from performing his usual coal mine work. Claimant's Exhibits 1, 6. The administrative law judge accorded this opinion the greatest weight.[12] Claimant's Exhibit 6 at 25-26.

[12] As noted above, while the administrative law judge found some degree of fault with each of the five medical opinions upon which he relied, he found the opinions of Drs. Paul, Raffensperger, and Pickerill entitled to "diminished" weight, and he found the weight of Dr. Fino's opinion to be "diminished significantly." Decision and Order at 24-25. By contrast, the administrative law judge found the opinion of Dr. Cohen only "minimally diminished." Decision and Order at 23-24.

In addition, we reject employer's assertion that the administrative law judge improperly relied on *Bonessa*, 884 F.2d at 734, 13 BLR at 2-37 and *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18 (2003), to find that the fact that the medical evidence established that claimant's pre-coal mine employment exposure to asbestos contributed to his disability does not defeat claimant's entitlement to benefits under the Act. Employer's Brief at 16; Decision and Order at 26 n.70. The administrative law judge properly found that under *Bonessa* and *Gross*, a claimant need not establish that pneumoconiosis is the sole cause of disability, as long as it is a substantially contributing cause. *Bonessa*, 884 F.2d at 734, 13 BLR at 2-37; *Gross*, 23 BLR at 1-18; Decision and Order at 26 n.70. Moreover, employer's reliance on *Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991), is misplaced, as *Beatty* recognizes that a claimant's entitlement to benefits is not defeated when a claimant has a totally disabling pulmonary disability, but science cannot distinguish the effects of pneumoconiosis from other pulmonary diseases. Accordingly, we affirm the administrative law judge's finding that claimant established that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

We next address employer's argument that that the administrative law judge erred in finding that employer is the responsible operator in this case. Employer's Brief at 11. Employer, relying on *Director, OWCP v. North American Coal Corp.* [*Truitt*], 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980), specifically contends that claimant's total disability is due to asbestos exposure, unrelated to his coal mine employment with employer, and that therefore, employer cannot be held liable for benefits. Employer's Brief at 11-12.

We disagree with employer and hold that, under the facts of this case, the administrative law judge properly found employer to be the responsible operator. Initially, as noted above, employer does not challenge the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment, nor does it dispute claimant's testimony that he worked for employer for approximately eight years, repairing equipment and mining coal at the face, where the dust was thick. In addition, employer raises no arguments with respect to the administrative law judge's crediting, as well-documented and well-reasoned, Dr. Raffensperger's opinion that claimant's coal dust-induced clinical coal workers' pneumoconiosis played a substantial role in claimant's totally disabling respiratory impairment. *See Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-711; Director's Exhibit 15; Decision and Order at 11, 24. Employer thereby essentially concedes that pneumoconiosis is a substantially contributing cause of his disability, destroying the factual predicate of its argument that it may not be held liable as the responsible operator because asbestosis is the exclusive cause of claimant's disabling respiratory impairment. In addition, in light of our holdings, we need not discuss claimant's additional asbestos

exposure while working for employer,[13] nor address the Director's contention that because employer failed to contest its responsible operator status before the administrative law judge, employer has conceded its liability and may not reopen the issue on appeal. Director's Brief at 1.

Our dissenting colleague disagrees with our decision to affirm the administrative law judge's decision awarding benefits because she finds merit in two arguments advanced by employer: First, that the administrative law judge failed to determine whether there is sufficient medical evidence to establish that claimant's asbestosis arose out of his three years of asbestos exposure in coal mine employment and not entirely out of his prior asbestos exposure at the foundry; and second, that the administrative law judge failed to weigh together the medical opinion evidence on disability causation at 20 C.F.R. §718.204(c). Hence, on remand, regardless of his determination on the first issue, she would hold that the administrative law judge must weigh together the medical opinion evidence to determine whether "pneumoconiosis in any form is a substantially contributing cause of claimant's totally disabling respiratory impairment…."

We disagree. Medical evidence cannot distinguish asbestosis caused by coal mine employment from asbestosis caused by foundry work. As the Third Circuit observed in *Beatty*, 49 F.3d at 1002, 19 BLR at 2-153-154, "the state of current medical science makes it difficult to distinguish between pneumoconiosis and other respiratory or pulmonary diseases . . . ." The truth of the court's observation was confirmed in the instant case in which Dr. Cohen testified he could not distinguish between the disability caused by asbestosis and that caused by pneumoconiosis. Claimant's Exhibit 6 at 109-110. The best that medical science can do is to determine whether a miner's dust exposure is sufficient to be a factor contributing to his impairment. Dr. Cohen supplied the requisite evidence. He stated that for a three-year period in claimant's coal mine employment claimant worked on mine insulators with asbestos for about two hours per day, giving him asbestos exposure for that period of time each day. Claimant's Exhibit 6 at 68. Dr. Cohen opined that this exposure was one of the factors contributing to the miner's impairment, the other two being coal dust exposure and asbestos exposure in the foundry. Claimant's Exhibit 6 at 25-26. Employer did nothing to undermine the

[13] At the hearing, claimant testified that he had also been exposed to asbestos with employer when he removed asbestos from old equipment to comply with new requirements. Hearing Tr. at 11. Yet employer flatly misrepresented the record in its brief on appeal: "There is no suggestion in the record here that there was any asbestos exposure at [employer]." Employer's Brief at 12. In any event, the administrative law judge did not acknowledge claimant's testimony regarding asbestos exposure with employer and, as a result, made no finding regarding asbestos exposure with employer. D&O at 22-23.

credibility of Dr. Cohen's opinion on cross-examination; nor did employer offer any evidence contradicting Dr. Cohen's opinion.[14] Hence, Dr. Cohen's opinion constitutes substantial evidence supporting the administrative law judge's determination that claimant's asbestosis arose, in part, out of coal mine employment, and therefore constituted legal pneumoconiosis.

There is likewise no merit to the second contention, that the administrative law judge erred by failing to weigh together the medical evidence on causation. Once the administrative law judge completed his review of the medical opinions, the only credible evidence was that clinical pneumoconiosis was a "very significant" contributing cause of claimant's total disability and that asbestosis from both coal mine employment and foundry work also contributed. That was Dr. Cohen's opinion. Claimant's Exhibit 6 at 25. Similarly, Dr. Raffensperger opined that exposures to both coal dust and asbestos played substantial roles in claimant's disabling impairment. Director's Exhibit 21. As discussed *supra*, the administrative law judge gave diminished weight to Dr. Raffensperger's opinion only to the extent it matters that the doctor did not diagnose the disease caused by asbestos exposure. Decision and Order at 24. Dr. Paul diagnosed claimant's restrictive impairment as caused by clinical pneumoconiosis and obesity; the administrative law judge gave his opinion diminished weight because it does not reflect consideration of claimant's asbestos exposure. Decision and Order at 24. The administrative law judge properly rejected Dr. Pickerill's opinion because he did not diagnose pneumoconiosis. Likewise, the administrative law judge properly accorded diminished weight to Dr. Fino's opinion, that claimant's disability was due entirely to asbestosis, because he relied on an excluded x-ray and because his rationale was discredited by consideration of the breadth of the x-ray evidence. Decision and Order at 24-25. The administrative law judge properly analyzed the evidence to conclude that it established that claimant's disability is due to clinical and legal pneumoconiosis. Furthermore, because the administrative law judge provided valid reasons for rejecting the only medical opinions, those of Drs. Pickerill and Fino, excluding clinical pneumoconiosis as a cause of claimant's disability, the only conclusion to be drawn from the credible evidence is that clinical pneumoconiosis is a substantially contributing cause of claimant's disability. Since the evidence establishes that clinical pneumoconiosis is a substantially contributing cause of claimant's disability, the administrative law judge's decision awarding benefits would have to be affirmed, as well as his finding that employer is the responsible operator, whether or not substantial evidence supported the administrative law judge's finding of a contribution from legal pneumoconiosis.

[14] Although employer attempted to elicit such evidence from Dr. Fino, the doctor failed to provide it. Employer's Exhibit 15 at 24-31.

Finally, we address employer's arguments regarding the administrative law judge's award of attorney's fees to claimant's counsel. The 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. *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998)(*en banc*).

Subsequent to the issuance of the administrative law judge's Decision and Order, claimant's counsel submitted a complete, itemized fee petition to the administrative law judge, requesting a total fee of $20,294.70, representing 68.5 hours of attorney services performed between August 18, 2004 and January 19, 2006 at $200.00 per hour, 18.85 hours of attorney services performed between October 4, 1994 and January 20, 1995 at $150.00 per hour, and $3,767.20 in expenses. Employer filed objections to the requested hourly rate and to several time and expense entries. Upon consideration of the fee petition and employer's objections thereto, the administrative law judge found that $200.00 an hour for work from 2004 to 2006, and $150.00 an hour for work performed from 1994 and 1995, were reasonable rates. Attorney Fee Order at 2. Additionally, the administrative law judge approved the number of hours, and the requested expenses, in full. Attorney Fee Order at 3.

Employer argues that the administrative law judge abused his discretion in finding counsel's requested hourly rates of $150.00 for 1994-1995 and $200.00 for 2004-2006, respectively, to be reasonable, asserting that the administrative law judge failed to exercise his discretion to establish a reasonable hourly rate. Employer contends that counsel did not offer sufficient proof of her customary hourly rates, and that the administrative law judge abdicated his responsibility to establish a reasonable hourly rate. Employer's Brief at 4-7. Similarly, employer asserts that the administrative law judge failed to exercise his discretion in determining the number of compensable hours, and simply overruled employer's objections without discussion. Employer's Brief at 7-8. We disagree.

The record reflects that, in her fee petition, counsel represented that $150.00 in 1994-1995 and $200.00 in 2004-2006, respectively, represent her customary billing rates in all cases, including black lung claims. Claimant's Counsel's Letter of March 2, 2006. Counsel also represented, and employer does not dispute, that she has two degrees pertaining to the coal industry, has worked in the nation's coal mines in both union and management positions, and is one of the few women who is certified by the Commonwealth of Pennsylvania as a mine foreman. Claimant's Brief in support of attorney's fees at 1-2. Contrary to employer's arguments, the administrative law judge noted counsel's assertion that she is not a general practitioner and has been litigating federal black lung claims since 1990, and further noted that counsel had attached a list of a number of case citations to attorney fee awards in which her rates had been approved. Attorney Fee Order at 2. The administrative law judge further noted employer's

objection to the requested fee as unsupported, considered the factors required by Section 725.366(b), and concluded that the requested hourly rates were reasonable "based on Claimant's Counsel's experience in the area of Black Lung." Attorney Fee Order at 2; 20 C.F.R. §725.366(b). Similarly, with respect to the number of compensable hours claimed, the administrative law judge discussed each of employer's specific objections, as well as the responses to the objections provided by claimant's counsel. Attorney Fee Order at 3. The administrative law judge concluded that all of the entries in the fee petition "represent services an attorney could reasonably regard as necessary in pursuit of a successful prosecution of this claim," and found the time expended on these services to be reasonable "given the complexity of the issues." Attorney Fee Order at 3. Again, contrary to employer's arguments, the administrative law judge properly considered the factors set forth in 20 C.F.R. §725.366(b) and fully addressed employer's stated objections to the time entries claimed. We detect no abuse of discretion in the administrative law judge's approval of counsel's requested hourly rates and compensable hours, as reasonable. *See Jones*, 21 BLR at 1-108.

Finally, we reject employer's assertion that the administrative law judge erred in approving the requested expenses, which included fees for experts who testified by deposition. Contrary to employer's contention, as the administrative law judge properly found, the Board has held that an expert need not testify at the administrative hearing in order for claimant's counsel to be reimbursed for the costs of obtaining a physician's opinion. *Branham v. Eastern Associated Coal Corp.*, 19 BLR 1-1 (1994); Employer's Brief at 9-12; Attorney Fee Order at 3. Because employer has not demonstrated an abuse of discretion in the administrative law judge's award of a fee, we affirm the fee award. *See Jones*, 21 BLR at 1-108. A fee award is not enforceable, however, until the claim has been successfully prosecuted and all appeals are exhausted. *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 n.9 (1995).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and the administrative law judge's Attorney Fee Order are affirmed.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL
Administrative Appeals Judge

DOLDER, Chief Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision. As employer correctly asserts, the administrative law judge's finding that pneumoconiosis is a substantially contributing cause of claimant's disability is based on the administrative law judge's conclusion that claimant has both clinical pneumoconiosis, as well as legal pneumoconiosis in the form of asbestosis arising out of coal mine employment, and that both contributed to his disability. Employer's Brief at 12. As employer also correctly asserts, however, in determining that claimant established the existence of legal pneumoconiosis as set forth at 20 C.F.R. §718.202(a)(4), the administrative law judge "did not evaluate the evidence to determine whether it supported a finding of legal pneumoconiosis." Employer's Brief at 12. Rather, the administrative law judge determined that the evidence of record supported a finding of three years of coal mine employment-related asbestos exposure and then simply concluded that claimant had established the existence of legal pneumoconiosis, without first determining whether there is sufficient medical evidence in the record to establish that claimant's asbestosis arose out of his three years of coal mine employment-related asbestos exposure, and not entirely from his pre-coal mine employment asbestos exposure at the Pittsburgh Mills foundry, as required by Sections 718.201(a)(2) and 718.202(a)(4). 20 C.F.R. §§718.201(a), 718.202(a)(4), 718.203; *Shoup v. Director, OWCP*, 11 BLR 1-110 (1987); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); Decision and Order at 22-23. Therefore, I would vacate the administrative law judge's finding that claimant established the existence of legal pneumoconiosis, in the form of asbestosis arising out of coal mine employment pursuant to Section 718.202(a)(4), and remand this case for further consideration.

Furthermore, as the administrative law judge's finding at 20 C.F.R. §718.204(c), that pneumoconiosis is a substantially contributing cause of claimant's totally disabling

respiratory impairment, is premised in part on the administrative law judge's faulty conclusion that claimant established the existence of legal pneumoconiosis, I would also vacate the administrative law judge's disability causation finding at Section 718.204(c). In addition, I would hold that the administrative law judge's weighing of the medical evidence at Section 718.204(c) is cursory and incomplete, in that, after evaluating the credibility of each of the medical opinions, the administrative law judge failed to weigh the medical opinions together to determine whether the medical evidence is sufficient to establish that pneumoconiosis, in any form, is a substantially contributing cause of claimant's totally disabling respiratory impairment as set forth at Section 718.204(c). 20 C.F.R. §718.204(c); *Bonessa*, 884 F.2d at 734, 13 BLR at 2-37; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); Decision and Order at 25-26.

Therefore, it is my considered opinion that because the administrative law judge has failed to adequately address the medical evidence relevant to the existence of legal pneumoconiosis at Section 718.202(a)(4), and further failed to properly consider whether the weight of the medical evidence, as a whole, is sufficient to support claimant's burden of proof at Section 718.204(c), I would vacate his award of benefits and remand this case for further consideration. Consequently, I would decline to address, at this time, employer's additional arguments regarding its responsible operator status, and the administrative law judge's award of attorney's fees.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge