BRB No. 07-0320 BLA

C.B. Claimant-Respondent v. BOWMAN COAL COMPANY, INCORPORATED and AMERICAN BUSINESS & MERCANTILE REASSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/23/2008 DECISION and ORDER

Appeal of the Decision and Order Granting Benefits and Decision and Order Awarding Attorney Fees of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

W. Andrew Delph (Wolfe, Williams & Rutherford), Norton, Virginia, for claimant.

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

Sarah M. Hurley (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits and Decision and Order Awarding Attorney Fees (2005-BLA-05070) of Administrative Law Judge Pamela Lakes Wood rendered 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). The administrative law judge initially noted that this case involves claimant's request for modification of a denied subsequent claim.[1] She determined that the newly submitted evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and, therefore a change in conditions pursuant to 20 C.F.R. §725.310 and a change in an applicable condition of entitlement under 20 C.F.R. §725.309. Upon considering the merits of entitlement, the administrative law judge found that claimant proved that he has pneumoconiosis arising out of coal mine employment and is totally disabled due to pneumoconiosis. Accordingly, the

[1] Claimant filed an application for benefits on August 14, 1990, which was denied by the district director on February 1, 1991, as claimant did not establish any of the elements of entitlement. Director's Exhibit 1. Claimant filed a second application for benefits on January 21, 1994. *Id*. Administrative Law Judge Joan Huddy Rosenzweig denied benefits on the grounds that claimant failed to prove that he had pneumoconiosis or was totally disabled due to pneumoconiosis. *Id*. The Board affirmed Judge Rosenzweig's determination that claimant did not establish the existence of pneumoconiosis and the denial of benefits in a Decision and Order issued on October 14, 1998. *Id*. Claimant filed a third application for benefits on August 19, 2002. Director's Exhibit 3. The district director issued a Proposed Decision and Order denying benefits. Director's Exhibit 29. Claimant filed a request for modification, which the district director denied. Director's Exhibits 35, 36. Claimant again requested modification and the district director determined that claimant had established the requisite elements of entitlement. Director's Exhibit 39. Employer requested a hearing and the case was initially assigned to Administrative Law Judge Daniel F. Solomon, who denied employer's pre-hearing motion to compel claimant to appear for an examination by a physician of employer's choice located in Virginia or West Virginia. The case was subsequently assigned to Administrative Law Judge Pamela Lakes Wood, who also denied employer's motion to compel. A hearing was conducted in Abingdon, Virginia on September 30, 2005.

administrative law judge awarded benefits and determined that employer was the operator responsible for payment.

Employer argues on appeal that the administrative law judge erred in determining that employer is the responsible operator and in denying its motion to compel claimant to appear for an examination by a doctor of its choice in Virginia. Employer also contends that the administrative law judge should have applied the doctrine of collateral estoppel to the issue of the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer asserts that, in the alternative, the administrative law judge did not properly weigh the evidence relevant to 20 C.F.R. §§718.202(a)(4) and 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has also responded in support of the administrative law judge's denial of employer's motion to compel and the award of benefits.[2]

With respect to the administrative law judge's award of attorney fees, employer argues that the administrative law judge erred in shifting the burden to employer to establish that the hourly rates charged by claimant's attorneys were unreasonable. Employer asserts that if the administrative law judge had applied the proper criteria in reviewing the attorney fee application, she would have reduced the hourly rate to $150 for all three attorneys. Employer further contends that the administrative law judge did not adequately address the issue of whether the number of hours claimed was reasonable. Claimant has responded and urges affirmance of the attorney fee award. The Director has not filed a brief in response to employer's appeal of the attorney fee award.

We will first address employer's appeal of the administrative law judge's Decision and Order Granting Benefits.

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.[3] 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).

[2] We affirm the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. 718.202(a)(1)-(3), but proved that he is totally disabled under 20 C.F.R. 718.204(b)(2), as they are not challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 1, 4.

Responsible Operator

Employer initially contends that the administrative law judge erred in determining that it is the responsible operator in this case. Employer alleges that Double B Mining Company (Double B) is the properly designated responsible operator in light of the fact that claimant worked for Double B for six months subsequent to his tenure with employer and then received workers' compensation from Double B for nine years.[4] The administrative law judge found that the time during which claimant received workers' compensation from Double B did not constitute coal mine employment and, therefore, Double B is not the operator responsible for the payment of benefits under 20 C.F.R. §§725.494(c), 725.495(c)(2). Decision and Order at 11-13. Pursuant to Sections 725.494(c) and 725.495(c)(2), the responsible operator is the party that has most recently employed the miner "for a cumulative period of not less than one year." 20 C.F.R. §§725.494(c), 725.495(c)(2). In 20 C.F.R. §725.101(a)(32), a year is defined as:

> [A] period of one calendar year (365 days, or 366 days if one of the days is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 "working days." A "working day" means any day or part of a day for which a miner received pay for work as a miner, but shall not include any day for which the miner received pay while on an approved absence, such as vacation or sick leave. In determining whether a miner worked for one year, any day for which the miner received pay while on *an approved absence, such as vacation or sick leave*, may be counted as part of the calendar year and as partial periods totaling one year.

20 C.F.R. §725.101(a)(32) (emphasis supplied). As noted by the administrative law judge, a review of claimant's applications for benefits, Employment History forms, and Social Security Administration records indicates that claimant did not receive any pay from Double B after 1985 and did not engage in coal mine employment after he "was retired" on January 26, 1986 as a consequence of his back injury. Decision and Order at 12; Director's Exhibits 1, 3, 4, 11. Thus, the administrative law judge acted within her discretion as fact-finder in determining that because claimant was not "on an approved absence, such as vacation or sick leave," employer, rather than Double B, was the operator for whom claimant had most recently worked for at least one year. 20 C.F.R. §725.101(a)(32). We affirm, therefore, the administrative law judge's finding that employer meets the criteria for being designated the responsible operator pursuant to

[4] Claimant suffered a back injury while working for Double B Mining Company. 2005 Hearing Transcript at 27.

Section 725.494(c), as it is supported by the evidence of record and is in accordance with relevant law.

Employer's Right to Select Location of Examination of Claimant

Employer argues next that because the administrative law judge erred in denying its motion to compel claimant to appear for an examination by a physician located in Virginia, employer must be dismissed as the responsible operator. Employer maintains that because claimant travels regularly to Virginia and was examined by physicians in Virginia in connection with all three of his claims, claimant should have been compelled to appear as requested by employer. The administrative law judge determined that under the terms of 20 C.F.R. §725.414(a)(3)(i), employer was not entitled to have claimant examined in Virginia. Order dated June 30, 2005.

Section 725.414(a)(3)(i) provides that the employer "may not require the miner to travel more than 100 miles from his or her place of residence, or the distance traveled by the miner in obtaining the complete pulmonary evaluation provided by [20 C.F.R. §]725.406 of this part, whichever is greater[.]" 20 C.F.R. §725.414(a)(3)(i). The record indicates that claimant lives in Florida. Director's Exhibit 3; 2005 Hearing Transcript at 25. Subsequent to the filing of claimant's most recent application for benefits, the Department of Labor (DOL) arranged for Dr. Rao, whose office is located in Ocala, Florida, to perform the complete pulmonary evaluation mandated by Section 725.406. Director's Exhibits 14, 44.

Because the relevant DOL-sponsored examination occurred within 100 miles of claimant's home, the possible locations for employer's examination of claimant were circumscribed by the terms of Section 725.414(a)(3)(i), regardless of where claimant's other examinations, both DOL-sponsored and claimant-sponsored, had taken place.[5] The administrative law judge did not err, therefore, in denying employer's motion to compel claimant to appear at an examination by a physician located in Virginia. Moreover, employer has not identified any actual prejudice resulting from the administrative law judge's action. After the denial of its motion to compel, employer had claimant examined by Dr. Brooks, whose office is within the mileage limit set forth in Section 725.414(a)(3)(i). Employer's Exhibit 4. Employer does not allege that its selection of Dr. Brooks resulted in a deficient examination of claimant or that Dr. Brooks produced a medical opinion that is not adequately reasoned and documented. Accordingly, we affirm the administrative law judge's denial of employer's motion to compel claimant's appearance at a physical examination in Virginia and reject employer's argument that due

[5] There is no dispute that the location of Dr. Rao's examination of claimant was within 100 miles of claimant's home as required by 20 C.F.R. §725.414(a)(3)(i).

process requires that it be dismissed as the responsible operator in this case, as it is in accordance with the plain language of the applicable regulation.

Application of Collateral Estoppel

Employer also argues that the administrative law judge should have applied the doctrine of collateral estoppel to preclude claimant from relitigating the issue of the existence of legal pneumoconiosis under Section 718.202(a)(4). Employer asserts that because none of the newly submitted medical opinions contains explicit statements that claimant's condition has worsened since Judge Rosenzweig determined in 1997 that he did not have pneumoconiosis, and claimant did not return to coal mine employment, he is barred from attempting to establish that he now has legal pneumoconiosis. Employer's contentions are without merit.

The doctrine of collateral estoppel has limited application to claims under the Act in light of the subsequent claim provision implemented by Section 725.309 and the modification provision implemented by Section 725.310. Both of these regulations are based upon the principle that because pneumoconiosis can be latent and progressive, a miner should be given the opportunity to prove that his condition has deteriorated since his claim for benefits was denied. *See* 65 Fed. Reg. 79972, 79975 (Dec. 20, 2000). In light of the administrative law judge's determination in this case that the newly submitted medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis, whereas the evidence considered in claimant's earlier claims "was clearly negative," Decision and Order at 21, we hold that the doctrine of collateral estoppel does not apply in this request for modification of the denial of a subsequent claim. *See Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) (*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

Existence of Pneumoconiosis

Pursuant to Section 718.202(a)(4), the administrative law judge initially addressed the newly submitted medical opinions of Drs. Rao, Forehand, Rasmussen and Brooks. Dr. Rao examined claimant on October 22, 2002, at the request of the Department of Labor. Director's Exhibit 14. Dr. Rao diagnosed severe chronic obstructive pulmonary disease (COPD), chronic bronchitis, and coronary artery disease and identified cigarette smoking as the cause of claimant's COPD and chronic bronchitis. *Id*. Dr. Forehand conducted a physical examination of claimant on March 17, 2003. Director's Exhibit 32. Dr. Forehand diagnosed coal workers' pneumoconiosis and COPD and indicated that claimant was totally disabled due to his COPD, which was caused by smoking and coal workers' pneumoconiosis. *Id*. Dr. Rasmussen examined claimant on January 13, 2005

and determined that claimant was totally disabled by a severe obstructive ventilatory impairment and an impairment in oxygen exchange. Claimant's Exhibit 1. Dr. Rasmussen indicated that it was "medically reasonable to conclude that [claimant] has coal workers' pneumoconiosis," which the doctor opined was "likely … a combination of emphysema, interstitial fibrosis and small airways disease." *Id*. Dr. Rasmussen further opined that "the two known causes" of claimant's conditions were cigarette smoking and coal dust exposure and that claimant "has both clinical and legal pneumoconiosis, which contribute in a major way to his disabling lung disease." *Id*. Dr. Brooks examined claimant on August 29, 2005, and indicated in his report that there was no evidence of coal workers' pneumoconiosis and that claimant had COPD with emphysema. Employer's Exhibit 4. Dr. Brooks further indicated that claimant is totally disabled by his COPD, which was caused by cigarette smoking and is unrelated to claimant's coal mine employment. *Id*.

The administrative law judge determined that Dr. Rao's opinion, that claimant has COPD caused by smoking, was entitled to little weight, as "his conclusions are unsupported by any analysis." Decision and Order at 18. The administrative law judge credited the opinions of Drs. Forehand and Rasmussen as documented and reasoned and found their conclusions to be "persuasive." *Id*. at 19. The administrative law judge determined that Dr. Brooks's opinion "falls short of adequately addressing the opinion of legal pneumoconiosis" because Dr. Brooks did not identify the basis for his conclusion that coal mine employment played no role in claimant's COPD. *Id*.

The administrative law judge concluded that the better documented and reasoned opinions of Drs. Forehand and Rasmussen were sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order at 19. The administrative law judge also found that claimant established a change in conditions pursuant to Section 725.310. On the merits, the administrative law judge determined that because the earlier medical opinions were not controlling in light of the progressive nature of pneumoconiosis, the weight of the more credible medical opinion evidence supported a finding of legal pneumoconiosis at Section 718.202(a)(4). *Id*. at 21.

Employer contends that the administrative law judge erred in discrediting the medical opinion in which Dr. Brooks stated that claimant does not have coal workers' pneumoconiosis and diagnosed COPD with emphysema caused solely by cigarette smoking. Employer's Exhibit 4. Employer also maintains that, contrary to the administrative law judge's finding, Dr. Forehand did not diagnose legal pneumoconiosis and that both Dr. Forehand and Dr. Rasmussen relied upon discredited x-ray evidence to diagnose clinical pneumoconiosis. Lastly, employer asserts that the administrative law judge invoked a presumption of progressivity in finding that the opinions of Drs. Forehand and Rasmussen were sufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4). These contentions are without merit.

The administrative law judge acted within her discretion as fact-finder in determining that Dr. Brooks's opinion was entitled to little weight because Dr. Brooks did not explain his conclusion that claimant's pulmonary condition is entirely attributable to smoking. As the administrative law judge found, Dr. Brooks expressed his opinion in terms of whether clinical pneumoconiosis is a contributing cause of claimant's COPD, without commenting upon the extent, if any, to which coal dust exposure played a role in claimant's obstructive lung disease. The administrative law judge rationally concluded, therefore, that Dr. Brooks did not adequately address the issue of whether claimant has legal pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 535, 21 BLR 2-323, 2-340 (4th Cir. 1998); *Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

Regarding Dr. Forehand's opinion, the administrative law judge acted within her discretion as fact-finder in determining that Dr. Forehand diagnosed legal pneumoconiosis. The administrative law judge noted that Dr. Forehand's diagnosis of "coal workers' pneumoconiosis" was based upon claimant's employment history, symptoms, an abnormal chest examination, an abnormal pulmonary function study, and an abnormal blood gas study in addition to a positive x-ray reading. Director's Exhibit 32. The administrative law judge also acknowledged Dr. Forehand's subsequent statement that "[coal workers' pneumoconiosis] is a chronic lung disease caused by the inhalation of coal mine dust which leads to chronic obstructive pulmonary disease[.]" *Id*. Pursuant to 20 C.F.R. §718.201(a)(2), legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment" and includes "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). For the purposes of the regulation, a disease "arising out of coal mine employment" means a disease that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). The administrative law judge rationally determined that Dr. Forehand's diagnosis of COPD based upon the results of claimant's objective studies and his linking of this condition to the inhalation of coal dust satisfied the regulatory definition of legal pneumoconiosis. Decision and Order at 18. Accordingly, we affirm the administrative law judge's finding that Dr. Forehand rendered a reasoned and documented diagnosis of legal pneumoconiosis pursuant to Section 718.202(a)(4). *See Hicks*, 138 F.3d at 535, 21 BLR at 2-340; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

We also affirm the administrative law judge's crediting of Dr. Rasmussen's diagnosis of legal pneumoconiosis. In evaluating Dr. Rasmussen's opinion, the administrative law judge noted, correctly, that Dr. Rasmussen based his diagnosis of an obstructive impairment caused by both smoking and coal dust exposure upon claimant's employment and smoking histories, the physical findings on examination, and the x-ray, pulmonary function and blood gas study results, and epidemiological studies. Decision

and Order at 7-8, 19. Contrary to employer's argument, therefore, the administrative law judge acted within her discretion in crediting Dr. Rasmussen's opinion as containing a documented diagnosis of legal pneumoconiosis. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order at 19. We also reject employer's assertion that because Dr. Rasmussen stated that he was unable to distinguish between the effects of smoking and the effects of coal dust exposure, the administrative law judge erred by failing to find that his opinion was equivocal as to whether claimant's COPD was due to coal dust exposure. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-351, 2-372-2-373 (4th Cir. 2006) (a physician is not required to specify relative degrees of causal contribution to a lung impairment); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2004) (a medical opinion that pneumoconiosis "was one of two causes" of the miner's total disability met the "substantially contributing cause" standard at Section 718.204(c). We affirm, therefore, the administrative law judge's determination that Dr. Rasmussen's diagnosis of legal pneumoconiosis is both documented and reasoned. *See Williams*, 453 F.3d at 622, 23 BLR at 2-372-73; *Underwood*, 105 F.3d at 949, 21 BLR at 2-28.

We also conclude that there is no merit in employer's assertion that the administrative law judge was required to resolve the conflict between Dr. Rasmussen and Dr. Forehand regarding whether claimant has emphysema before she could credit either opinion. As the administrative law judge rationally determined, both physicians diagnosed an obstructive impairment based upon the results of claimant's objective studies and identified coal dust exposure as a significant cause of the impairment. Decision and Order at 7-8, 18-19; Director's Exhibit 35; Claimant's Exhibit 1. The physicians differed as to the extent to which smoking played a role in claimant's obstructive lung disease, with Dr. Forehand indicating that smoking was not a primary cause of claimant's totally disabling obstructive impairment, as there was no evidence that claimant has emphysema. Director's Exhibit 35. This variation between the two physicians' opinions is not meaningful in light of their agreement upon the fact that coal dust exposure was a significant cause of claimant's COPD. *See Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999); *Shaffer v. Consolidation Coal Co.*, 17 BLR 1-56 (1992).

In addition, employer is incorrect in stating that the administrative law judge relied upon a presumption that pneumoconiosis is progressive. As the Board indicated in *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004) (*en banc*) and *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004) (*en banc*), a claimant is not required to prove separately that the form of pneumoconiosis from which he is suffering is progressive and has actually progressed since the denial of a prior claim. Newly submitted evidence that establishes the existence of pneumoconiosis when pneumoconiosis was not demonstrated in the earlier claim suffices to demonstrate that the

pneumoconiosis from which the claimant now suffers is progressive. Because employer has not raised any meritorious allegations of error, we affirm the administrative law judge's finding that the opinions of Drs. Forehand and Rasmussen were sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). We also affirm her finding that claimant established a change in conditions at Section 725.310 and the existence of legal pneumoconiosis on the merits, based upon a weighing of all of the relevant evidence.[6] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208, 22 BLR 2-162, 2-177 (4th Cir. 2000); *Rutter*, 86 F.3d at 1362, 20 BLR at 2-235.

Total Disability Due to Pneumoconiosis

Pursuant to Section 718.204(c), the administrative law judge considered the opinions of Drs. Rao, Forehand, Rasmussen, and Brooks. The administrative law judge discredited the opinion in which Dr. Rao identified smoking as the cause of claimant's disabling obstructive impairment on the ground that he did not address coal dust exposure as a possible etiological factor. Decision and Order at 22-23. With respect to the remaining medical opinions, the administrative law judge determined that because "Dr. Brooks['s] opinion is essentially conclusory on the issue of what caused the COPD while, in contrast, Drs. Forehand and Rasmussen discussed the epidemiology in some detail, I find that [claimant] has established disability causation through the opinions of Drs. Forehand and Rasmussen." *Id*. at 23.

Employer argues that the administrative law judge's finding under Section 718.204(c) must be vacated, as the administrative law judge did not adequately set forth her rationale for discrediting Dr. Brooks's opinion or for crediting Dr. Rasmussen's opinion. These allegations of error are without merit. The administrative law judge acted within her discretion as fact-finder in determining that Dr. Brooks's opinion was entitled to little weight because Dr. Brooks did not explain his conclusion that claimant's pulmonary condition is entirely attributable to smoking. As the administrative law judge found, Dr. Brooks expressed his opinion regarding the cause of claimant's disabling COPD in terms of whether clinical pneumoconiosis played any role, without discussing whether coal dust exposure was a causal factor in claimant's impairment. Decision and Order at 19, 23; Employer's Exhibit 4. The administrative law judge rationally concluded, therefore, that Dr. Brooks did not adequately address the issue of whether legal pneumoconiosis was a contributing cause of claimant's total disability. *See Hicks*, 138 F.3d at 535, 21 BLR at 2-340; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *see also Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-382-3 (4th Cir. 2002);

[6] We affirm the administrative law judge's finding, pursuant to 20 C.F.R. §718.203(b), that claimant's pneumoconiosis arose out of coal mine employment, as it is unchallenged on appeal. *Skrack*, 6 BLR at 1-711; Decision and Order at 21.

Toler v. Eastern Associated Coal Co., 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995).

In addition, there is no merit in employer's contention that the administrative law judge erred in finding that Dr. Rasmussen's opinion contains a reasoned and documented diagnosis of total disability due to pneumoconiosis pursuant to Section 718.204(c). The administrative law judge determined correctly that Dr. Rasmussen's opinion, that coal dust exposure was a significant contributing cause of claimant's obstructive impairment, was adequately documented as it was based upon claimant's employment and smoking histories, the physical findings on examination, and the x-ray, pulmonary function and blood gas study results, and epidemiological studies. *See Underwood*, 105 F.3d at 949, 21 BLR at 2-28; Decision and Order at 19, 23. There is also no merit in employer's assertion that the administrative law judge erred in crediting Dr. Rasmussen's opinion at Section 718.204(c), as the doctor indicated that he could not distinguish between the effects of smoking and the effects of coal dust exposure. The administrative law judge's finding with respect to Dr. Rasmussen's opinion is supported by the doctor's statement that claimant "has both clinical and legal pneumoconiosis, which contribute in a major way to his disabling lung disease." Claimant's Exhibit 1; *see Williams*, 453 F.3d at 622, 23 BLR at 2-372-73; *Gross*, 23 BLR at 1-18.

Lastly, we reject employer's argument that the administrative law judge should have held that claimant's back injury and a disabling respiratory impairment caused solely by smoking precluded a finding of total disability due to pneumoconiosis. Citing *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004), employer argues that pneumoconiosis must be a necessary or sufficient cause of claimant's total disability. Employer's view is unsupported by 20 C.F.R. §718.204(a), which provides that "any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a). In addition, Section 718.204(c)(1) requires only that pneumoconiosis be a substantially contributing cause of a miner's total disability. 20 C.F.R. §718.204(b)(2). Finally, in *Bateman v. Eastern Associated Coal Corp.*, 22 BLR 1-255, 1-265-67 (2003), the Board rejected the assertion that the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has adopted the approach urged by employer. We affirm, therefore, the administrative law judge's finding that claimant established total disability due to pneumoconiosis under Section 718.204(c) and further affirm the award of benefits.

Attorney Fee Award

Employer also appeals from the administrative law judge's Order Awarding Attorney Fees. Counsel for claimant requested a fee of $13,712.50 for 30.25 hours of

services performed by attorney Joseph E. Wolfe at an hourly rate of $400; 1.75 hours of services performed by attorney Bobby S. Belcher at an hourly rate of $250; 3 hours of services performed by attorney Andrew Delph at an hourly rate of $200; and 5.75 hours of services performed by a legal assistant at an hourly rate of $100. Employer objected, arguing that the hourly rates charged by the three attorneys who provided services were excessive. Employer also contended that the practice of billing in quarter-hour increments was improper and that counsel billed more than once for the same service or performed services that should not have been billed. The administrative law judge overruled all of employer's objections with the exception of employer's challenge to the $400 hourly rate charged by Mr. Wolfe. The administrative law judge reduced the hourly rate for Mr. Wolfe to $250 and awarded a fee of $9,175.00. Order Awarding Attorney Fees at 5.

Employer argues on appeal that the administrative law judge erred in shifting the burden to employer to establish that the hourly rates charged by claimant's attorneys were unreasonable. Employer asserts that if the administrative law judge had applied the proper criteria in reviewing the hourly rates claimed, she would have reduced them to $150 for all three attorneys. Employer further contends that the administrative law judge did not adequately address the issue of whether the number of hours claimed was reasonable. Claimant has responded and urges affirmance of the attorney fee award.

The award of an attorney 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*); *Pritt v. Director, OWCP*, 9 BLR 1-159, 1-160 (1986); *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894, 1-896 (1980).

The regulation governing the consideration of attorney fee petitions is set forth in 20 C.F.R. §725.366(b), which provides:

> Any fee approved . . . 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); *Pritt v. Director, OWCP*, 9 BLR 1-159 (1986); *see also Velasquez v. Director, OWCP*, 844 F.2d 738, 11 BLR 2-134 (10th Cir. 1988). Counsel, as the proponent of the fee petition, bears the burden of establishing the reasonableness of the fee request in light of the criteria set forth in Section 725.366(b). *See* 20 C.F.R.

§725.366(a); 5 U.S.C. §556(d), as incorporated into the Act by 5 U.S.C. §554(c)(2), 30 U.S.C. §932(a) and 33 U.S.C. §919(d).

In the present case, the administrative law judge began her analysis of employer's objections to the fee petition by stating that "[e]mployer has failed to satisfy its burden of establishing that the fees claimed are excessive." Order Awarding Attorney Fees at 1-2. The administrative law judge then determined that the rate of $250 per hour for Mr. Wolfe and the rates claimed for Mr. Belcher and Mr. Delph were reasonable because the attorneys had permissibly incorporated a risk of loss into their hourly charges and the administrative law judge had approved similar rates for these attorneys in other cases. *Id*. at 2-3. With respect to the number of hours claimed, the administrative law judge considered whether employer established that the tasks were unnecessary or duplicative. *Id*. at 4-5. Because it is apparent that the administrative law judge shifted the burden of proof to employer and did not apply the criteria set forth in Section 725.366(b) to the fee petition filed in this case, we must vacate her award of attorney fees.[7] *See Lenig v. Director, OWCP*, 9 BLR 1-147 (1986); *Allen v. Director, OWCP*, 7 BLR 1-330 (1984). On remand, the administrative law judge must consider whether counsel has established the reasonableness of both the hourly rate and the number of hours claimed in light of the factors listed in Section 725.366(b). *Id*. The administrative law judge must also set forth her findings in detail, including the underlying rationale.

Regarding the issue of whether the hourly rate can reflect the risk of loss, we note that this is a constant factor in black lung litigation and, therefore, is deemed incorporated into the hourly rate and is not evaluated separately. *See Gibson v. Director, OWCP*, 9 BLR 1-149 (1986); *see also City of Burlington v. Dague*, 505 U.S. 557, 567 (1992). Nevertheless, enhancement of the hourly rate to reflect a delay in the payment of an attorney's fee is an "appropriate factor in what constitutes a reasonable attorney's fee" under a fee shifting statute. *Missouri v. Jenkins*, 491 U.S. 274, 284 (1989); *see also Kerns v. Consolidation Coal Co.*, 176 F.3d 802, 805, 21 BLR 2-631, 2-638 (4th Cir. 1999); *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91 (1995); *Nelson v. Stevedoring Services of America*, 29 BRBS 90, 97 (1995). The administrative law judge need not reconsider employer's objection to the billing of hours in quarter-hour increments on

[7] The administrative law judge cited *Jones v. Badger Coal Co.*, 21 BLR 1-102 (1998) (*en banc*) in support of the proposition that employer was required to establish that the hourly rates claimed were excessive. Order Awarding Attorney Fees at 1-2. The administrative law judge's interpretation of the Board's holding in *Jones* is not correct. The Board referred to "employer's burden of proving that the rate awarded was excessive," in the context of the standard of review that the Board applies when addressing challenges to an administrative law judge's application of the criteria set forth in 20 C.F.R. §725.366(b). *Jones*, 21 BLR at 1-110.

remand, however, as the administrative law judge rationally determined that this practice is acceptable. *See Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230, 237 n.6 (1993); Order Awarding Attorney Fees at 3.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed, but the administrative law judge's Order Awarding Attorney Fees is vacated and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge