BRB No. 10-0429 BLA

SHIRLEY DOBRZYNSKI (o/b/o of EDWARD E. DOBRZYNSKI)	)	
Claimant-Respondent	)	
v.	)	
VALLEY CAMP COAL COMPANY	)	DATE ISSUED: 07/29/2011
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Modification of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

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

Jonathan Rolfe (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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, SMITH, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Modification[1] (2008-BLA-21) of Administrative Law Judge Alice M. Craft, with respect to a duplicate claim filed on November 2, 2000, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[2] The administrative law judge initially determined that claimant's request for modification was proper and would render justice under the Act. The administrative law judge also found that, based on the newly submitted evidence, claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and, therefore, a material change in conditions at 20 C.F.R. §§725.309(d) (2000),[3] 725.310. On the merits, the administrative law judge noted that employer previously conceded that the miner was totally disabled

[1] Claimant is the widow of the miner and is pursuing this claim on behalf of his estate. The miner filed his initial claim on May 14, 1982, which was denied by the district director on October 8, 1982, because the miner did not establish the existence of pneumoconiosis or that he was totally disabled due to the disease. Director's Exhibit 26. The miner did not take any further action on that claim. On April 22, 1999, the miner filed a duplicate claim, which was denied by the district director on September 15, 1999, because the miner again did not establish the presence of pneumoconiosis or that he was totally disabled due to pneumoconiosis. Director's Exhibit 27. The miner filed his current claim on November 2, 2000, but died in January 2005, while his claim was pending. Director's Exhibits 1, 32. The claim was denied by Administrative Law Judge Thomas F. Phalen, Jr., on January 12, 2006. Director's Exhibit 32. Although Judge Phalen found that the miner established a material change in conditions, based on the establishment of a totally disabling respiratory impairment, he determined that the miner did not establish that his disability was due to pneumoconiosis. *Id*. The Board affirmed Judge Phalen's decision on January 30, 2007. *Dobrzynski v. Valley Camp Coal Co.*, BRB No. 06-0364 BLA (Jan. 30, 2007)(unpub.); Director's Exhibit 35. Claimant filed the current request for modification on January 29, 2008. Director's Exhibit 36.

[2] The Director, Office of Workers' Compensation Programs (the Director), has filed a letter brief in which he asserts that the amendment to the Act contained in Section 1556 of Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)), has no impact on this case because it was filed prior to January 1, 2005. We agree with the Director that the amendment does not apply in this case, as the relevant claim was filed on November 2, 2000.

[3] Because this duplicate claim was filed on November 2, 2000, the prior version of 20 C.F.R. §725.309 is applicable. 20 C.F.R. §725.2.

pursuant to 20 C.F.R. §718.204(b)(2), but has not further contested this issue. The administrative law judge also determined that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that claimant's request for modification should be barred because claimant's motive, and the timing of the request, are suspect. Employer also asserts that the administrative law judge did not properly weigh the medical opinion evidence at 20 C.F.R. §§718.202(a)(4), 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited brief in this appeal, arguing that the administrative law judge acted properly in granting claimant's modification request.[4]

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.[5] 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).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that the miner had pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[4] The Board previously affirmed the findings of Administrative Law Judge Thomas F. Phalen, Jr., that the miner had thirteen years of coal mine employment and that a material change in conditions was established, based on the miner's totally disabling respiratory impairment. *Dobrzynski*, BRB No. 06-0364 BLA, slip op. at 2 n.3. In addition, we affirm the administrative law judge's finding that claimant did not establish that the miner had clinical pneumoconiosis at 20 C.F.R. §718.202(a), as it is unchallenged in the present appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] The record reflects that the miner's coal mine employment was in West Virginia. Director's Exhibit 32. Accordingly, this 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*).

I. 20 C.F.R. §725.310

A. The Administrative Law Judge's Findings

In a brief on remand, employer argued that claimant's request for modification should be barred, as the motive and timing of the request were suspect, based on the decision of the United States Court of Appeals for the Fourth Circuit in *Sharpe v. Director, OWCP*, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007).[6] Decision and Order at 4. The administrative law judge determined that claimant's request was timely filed and any allegations concerning motive were "mere supposition." *Id*. at 4-5. The administrative law judge also rejected employer's argument that it is not permissible to readjudicate legal findings made in a prior claim when an appellate body has already affirmed a prior administrative law judge's findings of fact and legal determinations. *Id*. at 5. The administrative law judge determined that, because 20 C.F.R. §725.310 "allows reconsideration of a denied claim without any limitation respecting the level of appeal at which the claim was denied," she had the authority to consider claimant's modification request. *Id*. The administrative law judge also noted that the *de novo* standard of review for modification requests differs from the substantial evidence standard used by the Board when reviewing a decision on appeal. *Id*. Finding that the other cases cited by employer were either distinguishable or not relevant, the administrative law judge concluded that claimant's request for modification was proper under the Act and the regulations. *Id*.

B. Arguments on Appeal

Employer asserts that the administrative law judge's findings on the issue of modification are unexplained and unfounded. Employer alleges that, contrary to the administrative law judge's determination, the motive and timing of the modification request are suspect because it was made one day before the one-year time limit set forth in 20 C.F.R. §725.310 expired. Employer also reiterates the argument it made before the administrative law judge that, because claimant did not offer any new medical evidence in light of the miner's death, claimant was improperly seeking to readjudicate findings made in the prior claim that an appellate body has affirmed. Employer further maintains

[6] In *Sharpe*, the Fourth Circuit vacated an award of benefits and remanded the case to the administrative law judge with instructions to assess whether reopening the case would render justice under the Act, based on a consideration of the factual accuracy of the award, the requesting party's diligence and motive, and the potential futility of modifying the prior disposition. *Sharpe v. Director, OWCP*, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007).

that claimant is attempting "to correct tactical errors made in the litigation of the initial decision," which is not a proper basis for modification. Employer's Brief at 17.

Regarding modification, the Director responds and argues that the administrative law judge did not abuse her discretion by granting claimant's modification request. The Director states that employer's argument, that the timing and motive of the request are suspect, lacks merit because the request was timely filed and employer did not identify any unlawful motive. The Director distinguishes the current case from the Fourth Circuit's decision in *Sharpe* by noting that, in that case, the administrative law judge granted employer's modification request as a matter of right and the request was made seven years after the Board affirmed the award, rather than within one year of the final approval of the claim. The Director also urges the Board to reject employer's contention, that a party cannot seek to alter an appellate decision via modification, as "nothing in 33 U.S.C. §922 or 20 C.F.R. §725.310 prohibits modification by an [administrative law judge] after a Board or court decision" and the case law cited by employer does not support its argument. Director's Brief at 4. Further, the Director indicates that "the notion that finality concerns prevent the submission of evidence available prior to an earlier denial of a claim under the Act . . . is simply wrong." *Id*. at 4-5, *citing Sharpe*, 495 F.3d at 133, n.15, 24 BLR at 2-69, n.15; *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 546, 22 BLR 2-429, 2-452 (7th Cir. 2002). Claimant responds, concurring with the Director's argument in its entirety and asserting that the modification request was proper.

We review the administrative law judge's rulings on procedural matters for abuse of discretion. *See Dempsey v. Sewell Coal Co*., 23 BLR 1-47 (2004)(*en banc*). Upon consideration of the administrative law judge's findings and the arguments on appeal, we affirm the administrative law judge's determination that claimant's modification request was not barred. The plain language of 20 C.F.R. §725.310 indicates that a party may seek modification "at any time before one year from the date of the last payment of benefits" or "at any time before one year after the denial of a claim." 20 C.F.R. §725.310. Therefore, the administrative law judge correctly determined that claimant's modification request was not time-barred, despite the fact that claimant submitted it on the last possible day, as the petition for modification was filed within the one-year limit set forth in 20 C.F.R. §725.310. In addition, the administrative law judge acted within her discretion in finding that employer's mere assertion, that the filing of the request for modification one day before the expiration of the time limit was suspect, was insufficient to establish that claimant had an improper motive. *See Dempsey*, 23 BLR at 1-60.

The administrative law judge also rationally determined that the Fourth Circuit's decision in *Sharpe* does not mandate a finding that claimant's request for modification would not render justice under the Act. In *Sharpe*, the Fourth Circuit emphasized that "modification of a black lung award or denial does not automatically flow from a mistake

in an earlier determination of fact" and that "the requesting party's motive may be an appropriate consideration in adjudicating a modification request." *Sharpe*, 495 F.3d at 132-133, 24 BLR at 2-61-62. With respect to the latter principle, the court quoted with approval the statement of the United States Court of Appeals for the Seventh Circuit in *Hilliard*, that "if the party's purpose in filing a modification [request] is to thwart a claimant's good faith claim or an employer's good faith defense, the remedial purpose of the statute is no longer served." *Sharpe*, 495 F.3d at 133, 24 BLR at 2-69, *quoting Hilliard*, 292 F.3d at 546, 22 BLR at 2-452. The court further indicated that, intertwined with the moving party's motive are considerations of the moving party's diligence, and the ultimate futility of a request for modification, i.e., a resolution favorable to the moving party would have no impact upon the substantive disposition of the prior claim. *Sharpe*, 495 F.3d at 133, 24 BLR at 2-69.

In the present case, the administrative law judge did not merely grant claimant's modification request as a matter of right but, rather, she considered whether claimant was pursuing the miner's claim in good faith and acted within her discretion in resolving this issue in claimant's favor. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). Furthermore, in *Sharpe*, the delay between the Board's affirmance of the award of benefits and the employer's request for modification was seven years, rather than the approximately one-year period in this case, thereby providing support for a finding, in *Sharpe*, that the employer's motives were suspect. *See Sharpe*, 495 F.3d at 129, 24 BLR at 2-63. Similarly, employer has not explained why claimant's request for modification should be barred under the "futility factor" identified in *Sharpe*, when claimant is seeking to modify a denial of benefits to an award of benefits. *Sharpe*, 495 F.3d at 133, 24 BLR at 2-69.

In addition, employer's citation to several cases in support of the general proposition that claimant filed the modification request to correct "tactical errors" and that, therefore, finality considerations should prevent the submission of evidence available prior to the Board's earlier denial, is not persuasive. Employer's Brief at 17-18, *citing Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002); *McCord v. Cephas*, 532 F.2d 1377 (D.C. Cir. 1976); *Kinlaw v. Stephens Shipping and Terminal Co.*, 33 BRBS 68 (1999). Employer does not explain how these cases establish that modification is precluded in this case and its argument regarding finality concerns is erroneous because "while finality interests may sometimes be relevant to a proper modification ruling," the "principle of finality just does not apply to the Longshore Act and black lung claims as it does in ordinary lawsuits." *Sharpe*, 495 F.3d at 133, n.15, 24 BLR at 2-69, n.15 (citation omitted). Furthermore, contrary to employer's assertion, "whether requested by a miner or an employer, a modification request cannot be denied out of hand . . . on the basis that the evidence may have been available at an earlier stage in the proceeding." *Hilliard*, 292 F.3d at 546, 22 BLR at 2-452. Therefore, the administrative law judge properly considered the appropriate factors

as to whether permitting the modification request would render justice under the Act and acted within her discretion in considering claimant's request. *Mays*, 176 F.3d at 756, 21 BLR at 2-591.

II. 20 C.F.R. §§718.202(a)(4), 718.204(c)

A. The Administrative Law Judge's Findings

In considering whether claimant established modification, the administrative law judge initially considered whether the newly submitted medical opinions were sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Drs. Farber, Cohen, Dowdeswell, Diaz, and Hinkamp all opined that the miner had legal pneumoconiosis. In contrast, Drs. Goodman, Morgan, Fino, Branscomb, and Ghio, opined that coal dust exposure did not contribute to the miner's respiratory impairment.

The administrative law judge gave probative weight to Dr. Farber's opinion because she found it to be documented and sufficiently reasoned. Decision and Order at 35. The administrative law judge determined that Dr. Farber's diagnosis of "IPF" referred to interstitial pulmonary fibrosis, rather than idiopathic pulmonary fibrosis, based on Dr. Farber's identification of coal dust as a cause of the fibrosis. *Id*.; *see* Director's Exhibit 6. The administrative law judge further found Dr. Farber's attribution of the miner's obstructive impairment to a combination of smoking and coal dust to be consistent with the premises underlying the regulations and sufficient to meet the requirement that coal dust be a contributing cause of the miner's impairment. Decision and Order at 35.

The administrative law judge gave great weight to Dr. Cohen's opinion, based on his expertise in black lung disease, and the fact that his opinion was well documented and well reasoned. Decision and Order at 36. The administrative law judge determined that Dr. Cohen's diagnosis of legal pneumoconiosis was supported by the evidence available to him and was consistent with the regulations. *Id*.; *see* Director's Exhibit 30-37; Claimant's Exhibit 1.

The administrative law judge gave the opinion of Dr. Dowdeswell, the miner's treating physician, some weight because it was consistent with the other evidence of record, but declined to give it controlling weight because the tests he relied on were not in evidence. Decision and Order at 36-37; *see* Director's Exhibit 30-25. Therefore, the administrative law judge found that Dr. Dowdeswell's opinion was not as well documented as the opinions of the other physicians who diagnosed legal pneumoconiosis. Decision and Order at 37.

The administrative law judge gave probative weight to Dr. Diaz's opinion because she found it was documented and reasoned. Decision and Order at 37. In addition, the administrative law judge concluded that Dr. Diaz's attribution of the miner's obstructive impairment to smoking and coal dust exposure is consistent with the regulations and sufficient to meet the requirement that coal dust be a contributing cause of the impairment. *Id*.; *see* Director's Exhibit 30-27. The administrative law judge indicated that, although Dr. Branscomb questioned Dr. Diaz's characterization of the miner's smoking history as moderate, she determined that Dr. Diaz's "understanding of the [m]iner's smoking history [was] sufficient so as not to undermine the reliability of his opinion." Decision and Order at 37.

The administrative law judge also gave probative weight to Dr. Hinkamp's opinion because she determined that Dr. Hinkamp was well qualified and that his opinion was documented and reasoned. Decision and Order at 37. The administrative law judge indicated that Dr. Hinkamp's assessments concerning the development of the miner's impairment, and the objective test results, were consistent with Dr. Hinkamp's characterization of the miner's smoking and exposure to coal dust as significant. *Id*. at 37-38.; *see* Director's Exhibit 36. The administrative law judge also determined that Dr. Hinkamp's assessments, and the test results, supported his opinion that the additive effects from smoking and coal dust can cause a more severe obstructive impairment than either factor alone. Decision and Order at 38.

With respect to the opinions of the physicians who ruled out coal dust exposure as a contributing cause of the miner's impairment, the administrative law judge gave less weight to Dr. Goodman's opinion because she was unable to discern which smoking history Dr. Goodman relied upon in rendering his conclusion. Decision and Order at 38. The administrative law judge further determined that Dr. Goodman did not sufficiently explain why he excluded coal mine dust as a contributing factor and found that Dr. Goodman's statement, that centrilobular emphysema is almost always due to cigarette smoking, was based on generalities, instead of the miner's specific condition. *Id*.; *see* Director's Exhibits 17, 21. Further, the administrative law judge noted the inconsistency between Dr. Goodman's 1999 finding, that "the miner qualifie[d] for his prior diagnosis of black lung," and Dr. Goodman's 2002 finding, that there was no evidence of coal workers' pneumoconiosis. Decision and Order at 38; Director's Exhibit 17. The administrative law judge indicated that, while Dr. Goodman attempted to clarify this discrepancy by explaining that there was no evidence of pneumoconiosis on the later CT scans, x-rays, or on the physical examination, his analysis focused solely on clinical pneumoconiosis. Decision and Order at 38; Director's Exhibit 21 at 18.

The administrative law judge also gave less weight to Dr. Morgan's opinion, despite her finding that Dr. Morgan is highly qualified. Decision and Order at 39. The administrative law judge found that Dr. Morgan did not explain why coal dust exposure

was not a contributing cause of the miner's obstructive impairment, especially based on the May 21, 1999 pulmonary function study results showing qualifying values pre- and post-bronchodilator. *Id*.; *see* Director's Exhibit 18. The administrative law judge also determined that Dr. Morgan's opinion concerning legal pneumoconiosis was not consistent with the premises underlying the regulations. *Id*.

The administrative law judge accorded diminished weight to Dr. Fino's opinion because she found that Dr. Fino's views on the effects of coal dust exposure were rejected by the Department of Labor (DOL) when it promulgated the current regulations. Decision and Order at 40; *see* Director's Exhibit 31-434; Employer's Exhibit 2. In addition, the administrative law judge indicated that, although Dr. Fino acknowledged that pneumoconiosis can be progressive, he stated that generally, pneumoconiosis does not progress if it was not present when the miner left his coal mine employment. Decision and Order at 40. The administrative law judge also determined that Dr. Fino did not sufficiently explain why the miner's coal dust exposure did not contribute to his obstructive impairment. *Id*. The administrative law judge concluded that Dr. Fino's opinion was inconsistent with the regulations and that Dr. Fino did not link the general studies he referenced to the miner's specific condition. *Id*. Further, the administrative law judge found that Dr. Fino's "selective choice of articles and commentary demonstrate his bias against 'the prevailing view of the medical community [and] the substantial weight of the medical and scientific literature' underlying the current regulations, and undermine[s] his credibility." *Id*., *quoting* 65 Fed. Reg. 79,939 (Dec. 20, 2000).

In addition, the administrative law judge gave less weight to Dr. Branscomb's opinion, based on inconsistencies in his report, and because his opinion, that coal dust exposure was not a contributing cause of the miner's obstructive impairment, is inconsistent with the premises underlying the regulations. Decision and Order at 41; *see* Director's Exhibits 31-372, 31-338. The administrative law judge indicated that Dr. Branscomb initially determined that the characteristics of the miner's impairment were typical of chronic obstructive pulmonary disease (COPD) in smokers, especially those with significant gastroesophageal reflux disease (GERD), but later testified that GERD did not contribute to the miner's impairment. Decision and Order at 41. The administrative law judge also noted that Dr. Branscomb's statements, concerning the effects of smoking cessation on the miner were inconsistent, as Dr. Branscomb contended that quitting smoking causes any decline in lung function to return to the values of a non-smoker, unless severe obstruction is already present. *Id*. However, the administrative law judge indicated there was no evidence that the miner had a severe obstructive impairment when he quit smoking in 1987. *Id*.

The administrative law judge found that Dr. Ghio's opinion was entitled to diminished weight, despite finding that he was highly qualified, because he did not sufficiently explain why a severe obstructive impairment is rarely observed in legal

pneumoconiosis. Decision and Order at 41-42; *see* Employer's Exhibit 1. The administrative law judge also found Dr. Ghio's opinion to be contrary to the premises underlying the regulations, which state that "individual miners affected can have quite severe disease, and statistical averaging hides this effect." Decision and Order at 42, *quoting* 65 Fed. Reg. 79,941 (Dec. 20, 2000). The administrative law judge indicated that Dr. Ghio is of the opinion that coal dust can only contribute to a clinically significant obstructive impairment when complicated pneumoconiosis is present, which is contrary to the regulations. *Id*.

Upon considering all of the opinions relevant to 20 C.F.R. §718.202(a)(4) together, the administrative law judge gave greater probative weight to the opinions of the five physicians who stated that the miner had legal pneumoconiosis, based on their credentials, and the fact that their opinions were in better accord with the evidence and the premises underlying the regulations. Decision and Order at 42-43. The administrative law judge found that none of the physicians who stated that the miner did not have legal pneumoconiosis sufficiently explained why the miner's approximately thirteen years of coal mine employment did not contribute, in part, to the miner's obstructive impairment. *Id*. at 43. Weighing all of the evidence relevant to 20 C.F.R. §718.202(a), the administrative law judge concluded that claimant established that the miner had legal pneumoconiosis and, therefore, established a material change in conditions since the denial of the prior claim. *Id*. The administrative law judge also indicated that, considering all of the medical evidence from the miner's claims together, her conclusions were unchanged. *Id*.

At 20 C.F.R. §718.204(c), the administrative law judge indicated that all of the physicians who found the miner to be disabled agreed that it was due to his obstructive impairment but they differed as to whether coal dust exposure contributed to the impairment. Decision and Order at 46. The administrative law judge stated that she could "find no specific and persuasive reasons for concluding that the judgment of Drs. Morgan, Fino, Branscomb, and Ghio[,] that exposure to coal dust did not cause or contribute to the [m]iner's disability[,] did not rest upon their disagreement with my finding that the [m]iner had legal pneumoconiosis." *Id*. Therefore, relying on her findings at 20 C.F.R. §718.202(a), the administrative law judge credited the opinions of Drs. Farber, Cohen, Dowdeswell, Diaz, and Hinkamp, that coal dust contributed to the miner's disabling impairment, and determined that claimant established that the miner was totally disabled due to pneumoconiosis under 20 C.F.R. §718.204(c). *Id*.

B. Arguments on Appeal

Employer asserts that the administrative law judge erred by presuming that, in all retired miners with COPD, the regulations mandate findings that coal dust exposure contributed to the impairment, that coal dust and cigarette smoking have additive effects,

and that coal dust and smoking cause damage to the lungs through similar mechanisms. Rather, employer argues that a miner is required to prove a causal relationship between his coal mine employment and any obstructive impairment that may have developed. Employer further alleges that the administrative law judge impermissibly relied on medical opinions indicating that the effects of cigarette smoke and coal dust are indistinguishable, because the opinions are not "reliable, probative, and substantial" evidence since they merely speculate, or improperly assume, the presence of legal pneumoconiosis in miners with COPD. Employer's Brief at 22. Specifically, employer states that Dr. Cohen referenced medical articles, which he indicated supported the proposition that coal dust exposure can cause an obstructive lung impairment, and criticized Dr. Branscomb and others for opining that impairment due to coal mine dust does not progress. However, employer contends that, contrary to the administrative law judge's findings, Drs. Fino and Branscomb did not state that pneumoconiosis, or coal mine dust-induced lung disease, might never progress. Employer also maintains that the diagnoses of Drs. Dowdeswell and Diaz are equivocal and inadequate to satisfy claimant's burden of proof at 20 C.F.R. §§718.202(a)(4), 718.204(c).

Regarding the administrative law judge's references to the preamble to the amended regulations, employer argues that it is "questionable" whether an administrative law judge can rely on "generalizations found in a preamble" and that the "critical error" in this case was the way the administrative law judge utilized the preamble to create an erroneous presumption of legal pneumoconiosis. Employer's Brief at 24. Employer asserts that, absent this presumption, the record does not contain any well reasoned, or well supported, opinions that coal dust exposure contributed to the miner's impairment. Employer also indicates that the regulations do not shift the burden of proof, or require an employer to rule out all potential causes of a miner's obstructive lung impairment, and that the Administrative Procedure Act (APA) "places an affirmative duty on [administrative law judges] to qualify evidence as 'reliable, probative, and substantial' before relying upon it to grant or deny a claim." Employer's Brief at 27, *quoting* 5 U.S.C. §556(d), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Relying on the Fourth Circuit's decision in *United States Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999), employer argues that the opinions offered by claimant in this case "establish only that it is possible that coal dust exposure contributed to [the miner's] obstructive lung disease" and do not sufficiently tie this generalization to the facts in this case. Employer's Brief at 29.

Finally, employer maintains that the administrative law judge selectively analyzed the medical opinions. Employer asserts that the administrative law judge's finding that Dr. Farber's diagnosis is persuasive, because it was based on the evidence he reviewed, is unreasoned and irrational. Regarding Dr. Hinkamp's opinion, employer argues that there is no reason to give his opinion greater weight than the other, similarly qualified experts.

Employer also maintains that Dr. Hinkamp's reliance on medical studies was not sufficient to support his conclusion that the miner's impairment was due to coal dust exposure, and that the administrative law judge did not address the conflicts between the studies relied upon and the miner's condition, although she discredited the opinions of Drs. Goodman, Morgan, Fino, Branscomb, and Ghio on this basis. Employer further asserts that Dr. Cohen's opinion was insufficient to meet claimant's burden of proof because he did not know anything about the specifics of the miner's coal dust exposure and because the administrative law judge did not resolve inconsistencies between his diagnosis and the medical literature he referenced. Employer argues that Dr. Cohen's opinion should have been discredited because he diagnosed clinical pneumoconiosis, contrary to the administrative law judge's findings, and because he erroneously presumed that COPD arises in all cases from coal dust exposure. Employer states that, in contrast, Drs. Fino and Ghio explained why the miner's impairment was due solely to cigarette smoking. Employer also maintains that their opinions were well reasoned and did not conflict with the regulations or the preamble.

Employer's allegations of error are without merit. Contrary to employer's contention, the administrative law judge clearly stated that "[t]he burden of proof remains on the miner to show that his obstructive lung impairment arose out of his coal mine employment." Decision and Order at 34. Therefore, the administrative law judge did not merely presume that coal dust exposure necessarily contributes to obstructive impairments diagnosed in retired miners. Rather, the administrative law judge examined the medical opinion evidence and permissibly determined that the opinions of Drs. Farber, Cohen, Dowdeswell, Diaz, and Hinkamp, that the miner had legal pneumoconiosis, were more persuasive than the contrary opinions of Drs. Goodman, Morgan, Fino, Branscomb, and Ghio. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); Decision and Order at 42-43. Further, opinions like those of Drs. Farber, Cohen, Dowdeswell, Diaz and Hinkamp, are not speculative simply because the physician was unable to apportion the effects of cigarette smoking and coal dust exposure on a miner's impairment. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 372 (4th Cir. 2006); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2004). It is within the purview of the administrative law judge to evaluate the evidence and make credibility determinations and the Board will not substitute its judgment for that of the administrative law judge. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Mays*, 176 F.3d at 756, 21 BLR at 2-591; *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127.

We also reject employer's arguments concerning the administrative law judge's weighing of the opinions of Drs. Dowdeswell and Diaz. The administrative law judge acted within her discretion in interpreting Dr. Dowdeswell's statement that "it is likely that [the miner's] occupational exposure . . . for twelve years has contributed to his

progressive lung disease and debility: this can be stated with a reasonable degree of medical certainty," as a diagnosis of legal pneumoconiosis. Director's Exhibit 30-25. She permissibly gave his opinion less weight, despite his status as a treating physician, since it was not as well documented, as the tests he relied on were not in evidence. Decision and Order at 36-37; *see Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127; *see Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366, 23 BLR 2-374, 2-386 (4th Cir. 2006); *Mays*, 176 F.3d at 756, 21 BLR at 2-591. In addition, the administrative law judge was not required to give less weight to Dr. Diaz's opinion, simply because he opined, "it would not be surprising for emphysema secondary to the combined effect of coal dust and cigarette smoking to progress, even after an individual leave the mines." Director's Exhibit 30-27. Rather, the administrative law judge permissibly gave "probative" weight to Dr. Diaz's opinion because she found it was documented, reasoned, and consistent with the regulations. Decision and Order at 37; *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127; *Perry*, 469 F.3d at 366, 23 BLR at 2-386; *Mays*, 176 F.3d at 763, 21 BLR at 2-605-06. Accordingly, we affirm the administrative law judge's weighing of the opinions of Drs. Farber, Cohen, Dowdeswell, Diaz, and Hinkamp.

Employer also erroneously states that the administrative law judge found that Drs. Fino and Branscomb indicated that pneumoconiosis is never a progressive disease. In fact, the administrative law judge specifically noted that both physicians acknowledged that coal mine dust-related impairments can be progressive. *See* Decision and Order at 40-41. However, the administrative law judge also accurately noted that Dr. Fino stated, "a general rule of thumb is that [an obstructive impairment due to coal dust] does not progress if it was not present at the time a miner leaves the mines." Employer's Exhibit 2; Decision and Order at 40. In addition, the administrative law judge was correct in indicating that Dr. Branscomb stated, "late acceleration of obstruction after years of latency has not been demonstrated as an effect of coal mine dust or CWP," and "the timing of [the miner's] deterioration, the corner it turned was long after the – any aggravating effect from dust would have happened." Director's Exhibits 31-3 at 69, 31-338. Moreover, the administrative law judge stated that, when questioned as to whether emphysema can progress once coal mine employment has ceased, Dr. Branscomb stated, "I do not think there's any data to indicate that clinically significant major airway obstruction progresses on that basis." Director's Exhibit 31-3 at 139. Therefore, the administrative law judge permissibly accorded less weight to the opinions of Drs. Fino and Branscomb because they made statements that were inconsistent with their acknowledgement that an impairment due, in part, to coal dust exposure can be latent and progressive. *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127; *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

We also reject employer's assertions that it was "questionable" for the administrative law judge to rely on generalizations in the preamble to the regulations and that it the administrative law judge used the preamble to create a presumption of legal

pneumoconiosis. Employer's Brief at 24. The Board has held that the extent to which a medical opinion accords with accepted scientific evidence, as recognized by the DOL in the preamble to the revised regulations, is a valid criterion for an administrative law judge to consider in weighing an opinion. *See J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009). Thus, the administrative law judge rationally relied on this information in weighing the medical opinion evidence at 20 C.F.R. §§718.202(a)(4), 718.204(c). Further, as addressed *supra*, the administrative law judge did not assume that legal pneumoconiosis must result whenever an obstructive impairment develops in a retired miner, nor did she shift the burden of proof to require employer to rule out all potential causes of a miner's obstructive impairment. Rather, the administrative law judge evaluated the medical opinions and acted within her discretion in determining that Drs. Goodman, Morgan, Fino, Branscomb, and Ghio did not adequately address the etiology of claimant's obstructive impairment and did not adequately account for the presence of the residual, disabling impairment demonstrated on the miner's post-bronchodilator pulmonary function studies. *See Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997).

Moreover, in considering the medical opinion evidence, the administrative law judge, in compliance with the APA, determined that the opinions of Drs. Farber, Cohen, Dowdeswell, Diaz, and Hinkamp were reasoned, documented, and probative, before relying on them to find that claimant established that the miner suffered from legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Decision and Order at 35-38, 42-43. Also, unlike the Fourth Circuit's decision in *Jarrell*, where the court concluded that one physician's opinion, that it was possible that the miner's death could be due to occupational pneumoconiosis, was insufficient to establish death causation, in this case, there were several physicians who attributed the miner's obstructive impairment to a combination of coal dust exposure and cigarette smoking, based on the objective evidence and medical literature supporting this conclusion. *See Jarrell*, 187 F.3d at 389-91, 21 BLR at 2-649-53.

We also reject employer's contention that the administrative law judge selectively analyzed the medical opinions. Employer argues that "[t]he finding that Dr. Farber's diagnosis is persuasive, as it was based on the evidence he had, is unreasoned and irrational." Employer's Brief at 33 n.12. However, employer does not provide any support for this assertion or explain why an opinion, supported by objective medical evidence, cannot be credited.

In addition, despite employer's allegation to the contrary, there is no indication that the administrative law judge gave greater weight to Dr. Hinkamp's opinion than to the opinions of experts with similar qualifications. In fact, the administrative law judge also found physicians who did not diagnose legal pneumoconiosis to be qualified to

provide an opinion, but discredited their opinions on other grounds. *See* Decision and Order at 37-42. Employer also criticizes several of the studies that Dr. Hinkamp relied on, as not supporting his conclusions in the current case, and states that "Dr. Hinkamp's opinion is irrational and conclusory [in] presuming that COPD was caused by coal dust exposure alone." Employer's Brief at 36. However, Dr. Hinkamp did not determine that the miner's impairment was due solely to coal dust exposure. Instead, he attributed it to a combination of coal dust exposure and cigarette smoking, which he found could have additive effects resulting in a more severe impairment than either factor would cause alone. Director's Exhibit 41 at 36-39. In addition, while employer criticizes Dr. Hinkamp's reliance on medical studies that do not support a finding that the miner's COPD is due to coal mine dust, employer has not submitted evidence to discredit the additional studies, or the objective test results that Dr. Hinkamp relied on to support his diagnosis of legal pneumoconiosis. *See* Director's Exhibits 36, 41.

Regarding Dr. Cohen's opinion, employer inaccurately argues that Dr. Cohen "did not know anything about the specifics of [the miner's] exposure." Employer's Brief at 36. While employer is correct that Dr. Cohen testified that he did not have specific information about any personal protection the miner might have used, Dr. Cohen provided a detailed coal mine employment history for the miner in his medical opinion and stated that during the time that the miner was working, historically, individuals did not have very good respirator or personal protective equipment. Director's Exhibit 30-37; Claimant's Exhibit 1 at 52. Employer's attempt to discredit Dr. Cohen's opinion by identifying problems with some of the studies Dr. Cohen relied on is also unavailing. Dr. Cohen explained that the 1995 National Institute for Occupational Safety and Health's "Criteria for A Recommended Standard,"[7] actually supported his opinion, that the effects of coal mine dust and smoking are additive, and employer has not provided any documentation to dispute this. Claimant's Exhibit 1 at 40, 62-63.

In addition, the administrative law judge properly acknowledged, at 20 C.F.R. §718.202(a)(4), that Dr. Cohen's diagnosis of clinical pneumoconiosis was contrary to her findings, but rationally found that his diagnosis of legal pneumoconiosis, a distinct condition, is reasoned and documented. *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127; *Underwood*, 105 F.3d at 949, 21 BLR at 2-28; Decision and Order at 36. Further, despite employer's assertion to the contrary, Dr. Cohen had access to the miner's lung function data and noted that there were no pulmonary function studies available between 1982, when the study showed a low normal FEV1, and 1999, when the miner's FEV1 was severely reduced. Director's Exhibit 30-37. Employer's additional argument, that Dr.

[7] Dr. Cohen testified that this document was published to justify the National Institute for Occupational Safety and Health's new recommended exposure limit for coal mine dust at one milligram per liter cubed. Claimant's Exhibit 1 at 40.

Cohen's opinion was inadequate because, unlike Drs. Fino and Ghio, he was unable to apportion how much of the miner's impairment was due to coal dust exposure as opposed to cigarette smoking and that, in contrast, is a request that the Board re-weigh the medical evidence and substitute its opinion for that of the administrative law judge – a function that is not within the purview of the Board. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co*., 12 BLR 1-20 (1988).

Accordingly, we affirm the administrative law judge's finding that claimant established that the miner had legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), that the prior denial of benefits contained a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, and that the miner was totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). We also affirm, therefore, the award of benefits.

III. Administrative Law Judge's Attorney Fee Order

On June 7, 2010, the administrative law judge granted claimant's counsel's attorney fee petition for a total of $51,498.08 for legal services and costs. The total included a request for $36,139.42 for 97.47 hours of work by Attorney Thomas E. Johnson at an hourly rate of $235; 72.07 hours of work by a legal assistant at $100 per hour; and expenses in the amount of $6,031.97 for work performed from July 23, 2002 to March 9, 2010. Counsel's petition also included a request for $14,788.75 for 51.75 hours of work by Attorney Christopher R. McFadden, charged at an hourly rate of $285 in 2004 and $325 in 2005, and expenses in the amount of $569.91 for work performed in 2004 and 2005. In approving the total amount, the administrative law judge noted that there had been no objections to the application for fees.

On appeal, employer, for the first time, contends that the administrative law judge erred in awarding fees and costs for services performed during the unsuccessful litigation of the miner's prior claims. Employer also asserts that claimant's modification request was filed only to correct tactical errors committed in prosecuting the original case and that attorneys are not entitled to compensation under fee-shifting statutes "for errors below or erroneous litigation decisions." Employer's Supplemental Brief at 11. Claimant responds, arguing that, by failing to raise any objections before the administrative law judge, employer waived its ability to contest these issues for the first time on appeal. In the alternative, claimant states that, because case law supports the award of fees, it should be affirmed.

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*). In addition, absent exceptional circumstances, an issue that is not raised before the administrative law judge is waived. *See Dankle v. Duquesne Light Co.*, 20 BLR 1-1 (1995); *Prater v. Director,*

OWCP, 8 BLR 1-461 (1986); *Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199 (1984) (Board will not address issue raised for first time on appeal). Employer has not cited any reason that prevented it from raising these issues when the fee petitions were before the administrative law judge. Further, case law supports the assertion that an attorney is entitled to fees for work performed in unsuccessful appeals before the Board, if the attorney ultimately obtains benefits for claimant through a request for modification. *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139-140 (1993). Therefore, we affirm the administrative law judge's Attorney Fee Order for services rendered to the claimant in this case.

IV. Attorney Fee Petition for Services Performed Before the Board

On November 1, 2010, claimant's counsel filed an attorney fee petition for services performed before the Board from August 3, 2006 to October 17, 2008, pursuant to 20 C.F.R. §802.203. Claimant's counsel requests a total fee of $20,266.40 for 86.24 hours of attorney services at an hourly rate of $235.00.[8] No objections to the fee petition have been received. Upon review of the fee petition, we hold the requested fee to be reasonable in light of the services performed and approve a fee of $20,266.40, to be paid directly to claimant's counsel by employer. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

[8] This amount reflects 30.24 hours performed by Attorney Thomas Johnson and 56.00 hours performed by Attorney Anne Megan Davis.

Accordingly, the administrative law judge's Decision and Oder Awarding Benefits on Modification and Attorney Fee Order are affirmed. In addition, counsel is awarded a fee of $20,266.40, to be paid directly to counsel by employer. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge