BRB Nos. 02-0618 BLA
and 02-0618 BLA-A

ARNOLD E. SWIGER	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
CONSOLIDATION COAL COMPANY	)	
	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-In-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order--Awarding Benefits and Supplemental Decision and Order Awarding Attorney Fees of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order--Awarding Benefits and Supplemental Decision and Order Awarding Attorney Fees (2000-BLA-0744) of Administrative Law Judge Michael P. Lesniak 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).

[1] Claimant's initial application for black lung benefits filed with the Social Security Administration (SSA) was denied on August 25, 1973. Director's Exhibit 88. On February 1, 1990, claimant filed an application for benefits with the Department of Labor (DOL). Director's Exhibit 37-1. The District Director of the Office of Workers' Compensation Programs denied benefits on June 26, 1990 because claimant did not establish any element of entitlement. Director's Exhibit 37-29. On April 28, 1992, claimant filed another application, which was a duplicate claim for benefits because it was filed more than one year after the final denial of a previous claim. Director's Exhibit 38-1; *see* 20 C.F.R. §725.309(d)(2000). After holding a hearing, Administrative Law Judge Victor Chao found that claimant established that he had a totally disabling respiratory or pulmonary impairment, but did not establish the existence of pneumoconiosis. Director's Exhibit 38-43. Accordingly, Judge Chao denied benefits in a Decision and Order effective July 19, 1993. *Id*.

Proceeding without the assistance of counsel, claimant drafted an August 10, 1993 letter which, he would later testify, he timely mailed to the district director's office in Parkersburg, West Virginia. [1999] Tr. at 11-14, 19. In the handwritten letter, which bore the case number of his claim, claimant stated, "I protest this claim," and alleged errors in the determination of his claim. Director's Exhibit 32. According to claimant's testimony, approximately two months after mailing the letter, he telephoned the district director's Parkersburg office and was informed that no letter was ever received. [1999] Tr. at 20. Claimant testified that at that point, he "gave up." [1999] Tr. at 14.

On January 7, 1997, claimant filed the current application for benefits. Director's Exhibit 1. During the processing of his claim, claimant retained counsel and began to raise issues concerning the procedural status of his claim. As a result, three hearings were held before two different administrative law judges.

On June 23, 1999, Administrative Law Judge Richard A. Morgan held a hearing on the issue of whether claimant's April 28, 1992 claim was still pending. Judge Morgan found that claimant's August 10, 1993 letter was mailed to the district director and, coupled with claimant's subsequent phone call, constituted a timely request for modification. Director's Exhibit 78; *see* 33 U.S.C. §922,

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

implemented by 20 C.F.R. §725.310(2000)(providing, in relevant part, for modification within one year of a denial, based on a mistake of fact or change in conditions). Consequently, Judge Morgan ruled that claimant's 1992 claim remained open, and that claimant's 1997 claim merged into the 1992 claim. *See* 20 C.F.R. §725.309(c)(2000). Judge Morgan remanded the claim to the district director for further processing.

On November 5, 2000, Administrative Law Judge Michael P. Lesniak held a hearing confined to the issue of whether claimant could elect review of his Part B claim that was denied by SSA in 1973. Both claimant and employer alleged that claimant never received an election card and good cause therefore excused his failure to timely elect review of his Part B claim. *See* 20 C.F.R. §§725.496(d); 727.104(b). Claimant therefore requested the application of 20 C.F.R. Part 727 to his claim, and employer moved to be dismissed on the ground that liability transferred to the Black Lung Disability Trust Fund (Trust Fund). Based on SSA computer data of record, Judge Lesniak found that an election card was mailed to claimant on March 24, 1978 and that claimant timely received the card. Order, April 12, 2001. Consequently, the administrative law judge ruled that claimant could not belatedly elect review of his denied Part B claim, and that liability did not transfer to the Trust Fund. Accordingly, the administrative law judge also denied employer's motion to be dismissed.

On September 12, 2001, Judge Lesniak held a hearing on the merits of the claim. In the ensuing Decision and Order--Awarding Benefits, the administrative law judge credited claimant with "approximately 40 years" of coal mine employment, Decision and Order at 6, determined that Judge Morgan correctly found that claimant requested modification of the denial of his prior duplicate claim, and found that a material change in conditions had been established in the duplicate claim when Judge Chao found claimant to be totally disabled. *See* 20 C.F.R. §725.309(d)(2000); *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). Reviewing the entire record, the administrative law judge found that the x-ray evidence was inconclusive for the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but found that the better reasoned medical opinion evidence established that the miner's chronic lung disease was due in part to coal mine dust exposure and thus constituted legal pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(4); 718.201. Weighing the chest x-rays and medical opinions together, the administrative law judge found that the evidence established the existence of legal pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The administrative law judge further found that claimant was totally disabled and that

his total disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §§718.204(b),(c). Accordingly, the administrative law judge awarded benefits. In a Supplemental Decision and Order, the administrative law judge awarded claimant's counsel a fee of $37,968.75 for services performed, and $9,909.84 for costs incurred, while the case was pending before the Office of Administrative Law Judges.

On appeal, employer contends that the administrative law judge erred in denying employer's motion to be dismissed from the claim. Employer alleges further that the administrative law judge erred in finding that claimant requested modification of the denial of his previous claim. Additionally, employer argues that the administrative law judge erred in his analysis of the medical opinion evidence pursuant to Sections 718.202(a)(4), and 718.204(c). Employer also contends that the administrative law judge erred in awarding claimant's counsel an hourly rate of $225.00. Claimant responds, urging affirmance of the attorney's fee award, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

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

Employer contends that the administrative law judge erred in finding that claimant could not elect review of his denied Part B claim and therefore erred in denying employer's motion to be dismissed from the claim. Employer's Brief at 21-37. Employer's contention lacks merit. The record contains a printout of a DOL computer screen, along with the affidavit and testimony of District Director Robert L. Hardesty, explaining that the screen contains SSA data reflecting that an election card was mailed to claimant on March 24, 1978 and was not returned. Director's Exhibit 98; Employer's Exhibit 13. Based on this evidence, the administrative law judge found that an election card was mailed. The administrative law judge was not persuaded by the testimony of claimant and his wife that they did "not recall

[2] We affirm as unchallenged on appeal the findings of approximately forty years of coal mine employment, that the chest x-ray readings were inconclusive for the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b). *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).

[receiving] a particular piece of mail 22½ years after the fact," and he found that the card was received "on or about March 24, 1978." Order at 8. The administrative law judge's finding is supported by substantial evidence and is in accordance with law. *See Caney Creek Coal Co. v. Satterfield*, 150 F.3d 568, 21 BLR 2-464 (6th Cir. 1998); *Crace v. Kentland-Elkhorn Coal Corp*., 109 F.3d 1163, 21 BLR 2-73 (6th Cir. 1997); *Barber v. Director, OWCP*, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995).

Employer's argument that it appears likely the election card was incorrectly addressed to Arnold "Swinger" does not alter the analysis. The administrative law judge considered this possibility and found, within his discretion, that it "would not have precluded [the card's] receipt in the normal and ordinary course." Order at 8; *see Mays v. Piney Mountain Coal Co*., 21 BLR 1-59, 1-64 (1997)(Dolder, J., concurring and dissenting)(The Board will not substitute its inferences for those of the administrative law judge). The administrative law judge's finding is reasonable and supported by substantial evidence. Review of the record reflects that claimant's 1973 denial letter from SSA reached him even though addressed to "Mr. Arnold Swinger," and claimant stated that he has never moved from the Wallace, West Virginia address to which the denial letter was sent. Director's Exhibit 88. Therefore, we reject employer's contention and affirm the administrative law judge's finding that because claimant never elected review of his Part B claim, employer could not be dismissed as the responsible operator. *See Satterfield, supra*; *Barber, supra*.

Employer next argues that the administrative law judge erred in finding that claimant requested modification of the July 12, 1993 denial of his previous claim. Employer's Brief at 19-21. Employer does not challenge Judge Morgan's finding that claimant timely mailed his August 10, 1993 letter to the district director and called the district director two months later to check on his claim. Instead, employer argues that the letter is not a modification request because it was not received by the district director within the one-year modification period, and because the letter does not reflect an intent to seek modification. We disagree.

The administrative law judge reasonably found that the letter was a request for modification even though the district director had no record of its receipt. Judge Morgan considered but was not persuaded by District Director Hardesty's deposition testimony that he could find no record of claimant's August 10, 1993 letter, because Mr. Hardesty could not exclude the possibility that the letter had arrived but had been misplaced. Director's Exhibit 58, Hardesty Tr. at 71-72, 128. In this context, Judge Morgan found "credible" the affidavit of claimant's counsel setting forth several specific instances in which the district director's office in West Virginia had lost part or all of a claim file. Director's Exhibits 72, 78 at 7. These were credibility matters reserved for the administrative law judge. *See Mays, supra*. Moreover,

given the uncontested fact of timely mailing, the letter's absence from DOL's file is not dispositive of whether the letter was a modification request. *See Consolidation Coal Co. v. Borda*, 171 F.3d 175, 181, 21 BLR 2-545, 2-557 (4th Cir. 1999)("The content and context of the letter itself, and not the Director's reaction to it, must govern whether it was a request for modification.")

Additionally, contrary to employer's contention, the administrative law judge properly found that claimant's letter constituted a request for modification. The standard for a modification request is so low that "[a]lmost any sort of correspondence from the claimant can constitute a request for modification of a denial, so long as it is timely and expresses dissatisfaction with a purportedly erroneous denial." *Betty B Coal Company v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999). Claimant's August 10, 1993 letter states, "I protest this claim," alleges that DOL "disregarded 40 ¼ yr in the mines," and argues that a physician whose opinion was credited similarly failed to consider claimant's coal mine employment. Director's Exhibit 32. Claimant's letter meets the modification standard because it is timely and expresses dissatisfaction with Judge Chao's prior findings. *See Stanley, supra; Borda, supra*. Therefore, we reject employer's contention and affirm the administrative law judge's finding that claimant requested modification of the denial of his 1992 claim. Accordingly, we turn to the administrative law judge's findings on the merits of entitlement.

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 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).

Pursuant to Section 718.202(a)(4), employer argues that the administrative law judge erred in finding the existence of legal pneumoconiosis established because he provided an inadequate rationale for crediting the opinions of Drs. Abrahams, Koenig, and Rasmussen over those of Drs. Bellotte, Renn, Fino, Branscomb, and Rosenberg. Employer's Brief at 38-43. The physicians agreed that claimant has a moderately severe, variable, and partially reversible obstructive impairment. Based on claimant's medical history and the pattern of variable, partially reversible impairment, most of the physicians diagnosed bronchial asthma,

which they stated is unrelated to the inhalation of coal mine dust. Director's Exhibits 26, 30; Employer's Exhibits 4, 9, 14, 19, 22, 24, 25, 27-29. The physicians disagreed regarding the etiology of the fixed portion of claimant's obstructive impairment that does not reverse with the administration of a bronchodilator. Drs. Renn and Branscomb stated that the non-reversible portion of claimant's impairment resulted from airway scarring due to prolonged asthma, and from emphysema or chronic bronchitis due to smoking. Employer's Exhibits 28 at 15; 29 at 69, 115-16. Drs. Bellotte, Fino, and Rosenberg attributed claimant's fixed obstruction to smoking. Employer's Exhibits 4, 9, 25. By contrast, Drs. Rasmussen, and Koenig concluded that claimant's fixed obstruction was due to both smoking and coal mine dust exposure, Director's Exhibit 26 at 3; Employer's Exhibit 27 at 55, 87; Claimant's Exhibit 10 at 3-5, and Dr. Abrahams opined that all of claimant's obstruction resulted from smoking and coal mine dust exposure. Claimant's Exhibit 1 at 4-7.

After setting forth the medical opinions and the physicians' qualifications, the administrative law judge found that "despite the impressive credentials" of employer's experts, the opinions of Drs. Rasmussen, Koenig, and Abrahams were "more persuasive regarding the pneumoconiosis issue." Decision and Order at 21. Employer contends that the administrative law judge did not provide an adequate rationale for crediting the opinions of Drs. Rasmussen, Koenig, and Abrahams because he merely stated that they were "more consistent with" the miner's worsening breathing problems, coal mine employment and smoking histories, and test results. Decision and Order at 21-22.

Upon review of the administrative law judge's Decision and Order as a whole, we hold that he provided an adequate rationale for his weighing of the medical evidence. The administrative law judge specifically found that the presence of an obstructive impairment that remained even after the administration of bronchodilator medication was a factor that supported the "opinions of Drs. Rasmussen, Abrahams, and Koenig that the miner's totally disabling respiratory impairment is due to a combination of factors, including pneumoconiosis." Decision and Order at 22. As the trier of fact, the administrative law judge "must evaluate the evidence, weigh it, and draw his own conclusions." *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997). The administrative law judge's inference that claimant's residual abnormality was consistent with a diagnosis of legal pneumoconiosis was not unreasonable. *See Mays, supra*. Additionally, in weighing

[3] Dr. Abrahams stated that asthma was absent. His opinion was that claimant has obstructive airways disease due to both smoking and coal mine dust exposure. Claimant's Exhibit 1. Dr. Koenig concluded that asthma was neither confirmed nor excluded by claimant's test results, but he opined that assuming claimant has asthma, claimant is still totally disabled by obstructive lung disease due in part to coal mine dust exposure. Claimant's Exhibit 10.

together all of the relevant evidence, the administrative law judge specified that it was "the better reasoned medical opinion evidence [that] establishe[d] the presence of legal pneumoconiosis as defined in §718.201." Decision and Order at 22. The determination of whether a medical opinion is better reasoned is a credibility matter for the administrative law judge. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-88-89 and n.4 (1993). The administrative law judge's findings that the opinions of Drs. Rasmussen, Koenig, and Abrahams were more persuasive because they were supported by the presence of a non-reversible impairment and because they were better reasoned constitute valid reasons for crediting their opinions over those of employer's experts. *See Hicks, supra*. Consequently, we reject employer's allegation of error and affirm the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 718.202(a).

Pursuant to Section §718.204(c), employer contends that the administrative law judge erred in according greater weight to the opinions of Drs. Rasmussen, Koenig, and Abrahams because he provided the same rationale he relied on in finding the existence of legal pneumoconiosis established. Employer's Brief at 38. The administrative law judge did cite the same rationale, Decision and Order at 24, but based on our foregoing analysis of this issue, we reject employer's contention. Employer's additional argument, that the opinions of Drs. Rasmussen, Koenig, and Abrahams are legally insufficient to establish total disability due to pneumoconiosis because they do not distinguish between the effects of smoking and coal mine dust exposure, lacks merit. Employer's Brief at 45-46. These three physicians stated unequivocally that although part of claimant's impairment was due to smoking, his totally disabling obstruction was also due to or aggravated by coal mine dust exposure. No more was required. *See* 20 C.F.R. §§718.201; 718.204(c); *Jones v. Badger Coal Co*., 21 BLR 1-102, 1-107-08 (1998)(*en banc*)(A medical opinion need not "specifically apportion the effects of the miner's smoking and his dust exposure in coal mine employment upon the miner's condition.") Therefore, we affirm the administrative law judge's finding that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) and that claimant is therefore entitled to benefits.

Employer challenges the administrative law judge's award of an attorney's fee, alleging that the hourly rate is unreasonable. 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*, 21 BLR at 1-108.

[4] Because we affirm the award of benefits, we need not address claimant's cross-appeal.

Subsequent to the issuance of the administrative law judge's Decision and Order--Awarding Benefits, claimant's counsel submitted a complete, itemized fee petition to the administrative law judge, requesting $44,043.75 for 195.75 hours of services at $225.00 per hour, plus $10,228.28 in expenses. Employer filed objections to the requested hourly rate and to several time and expense entries. Claimant replied to employer's objections. On September 30, 2002, the administrative law judge held a telephone conference on the record. After hearing arguments from employer and claimant, the administrative law judge found that $225.00 an hour was a reasonable rate, considering claimant's counsel's qualifications, experience, and the hourly rate he was awarded previously by administrative law judges. [2002] Tr. at 12-13; *see* 20 C.F.R. §725.366(b). Upon review of employer's additional objections and claimant's responses thereto, the administrative law judge struck 27 hours of time and $318.44 in expenses, and awarded a fee of $37,968.75 plus $9,909.84 in expenses. [2002] Tr. at 13-48. In the ensuing Supplemental Decision and Order, the administrative law judge again awarded the above-referenced fee and expenses, "based upon my rationale as stated during the telephone hearing conducted on September 30, 2002." Supplemental Decision and Order at 2.

Employer contends that the administrative law judge abused his discretion by failing to explain why $225.00 an hour is a reasonable rate when it exceeds the rate that claimant's counsel charges paying clients. Employer's Brief at 4-8. In his fee petition to the administrative law judge and in his response on appeal, claimant's counsel states that he charges a higher hourly rate for black lung work than for other matters because of his expertise and experience in the black lung field. Fee Petition Cover Letter at 6-7; Claimant's Brief at 6-7.

We detect no abuse of discretion in the administrative law judge's finding that $225.00 was a reasonable hourly rate. *See Jones, supra*. The applicable regulation directs the administrative law judge to consider, *inter alia*, "the quality of the representation, the qualifications of the representative," and "any other information which may be relevant to the amount of the fee requested." 20 C.F.R. §725.366(b). Based upon the quality of the legal representation provided by claimant's counsel, and citing counsel's "professionalism" and estimated win rate of 50 to 60 per cent in black lung cases, the administrative law judge found that claimant's counsel is "the strongest Claimant's lawyer in the field. . . . [H]e is more or less setting the standard." [2002] Tr. at 12. The administrative law judge also reasonably took into account recent attorney fee awards by the Office of Administrative Law Judges granting claimant's counsel an hourly rate of $225.00. *See* 20 C.F.R. §725.366(b); Fee Petition, Exhibits F-H. Thus, contrary to employer's contention, the administrative law judge explained his finding that $225.00 was a reasonable hourly

rate.

Employer presents no reason to disturb the administrative law judge's discretionary determination. *See Jones, supra*. During the telephone conference, the administrative law judge considered employer's objection that the requested hourly rate exceeds the $175.00 an hour that claimant's counsel charges for ordinary civil litigation, along with counsel's explanation that $225.00 an hour is his customary billing rate for black lung work because of his expertise in that field. [2002] Tr. at 6-11. The administrative law judge explained to employer that "the reasons I am going to award $225 an hour I feel are--outweigh everything you said." [2002] Tr. at 11. Consistently with Section 725.366(b), the administrative law judge then explained his finding with reference to the quality of claimant's counsel's representation, his qualifications in the black lung field, and recent fee awards granting him $225.00 an hour. *See* 20 C.F.R. §725.366(b). Considering that the administrative law judge overruled employer's objection to the hourly rate based on a finding that claimant's counsel is the most highly qualified claimant's representative practicing before him, employer presents no reason to remand this case for the administrative law judge to state the obvious: that it is therefore reasonable for claimant's counsel to charge more for black lung work than he charges for other matters in which he has less expertise. *See Zeigler Coal Co. v. Director, OWCP* [*Hawker*], 326 F.3d 894, 902 n.9, --- BLR --- (7th Cir. 2003)(upholding administrative law judge's finding that counsel reasonably charged a higher hourly rate for black lung cases because of his experience in that field). Because employer has not demonstrated an abuse of discretion in the administrative law judge's determination that the requested

hourly rate of $225.00 was reasonable, we affirm the administrative law judge's finding. *See Jones, supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge