**U.S. Department of Labor**

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0239 BLA

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| CHARLIE WOODS | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| COASTAL COAL COMPANY, LLC | ) | DATE ISSUED: 03/15/2017 |
| | ) | |
| Employer-Petitioner | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | DECISION and ORDER and AWARD of ATTORNEY FEES |
| | ) | |
| Party-in-Interest | ) | |

Appeal of the Decision and Order Awarding Benefits on Remand of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Asher, Kentucky, for claimant.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (2011-BLA-05122) of Administrative Law Judge Lystra A. Harris rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the

Act). This case involves a subsequent claim filed on November 17, 2009 and is before the Board for the second time.[1]

In its prior decision, the Board affirmed the administrative law judge's finding that claimant had thirty years of underground coal mine employment for purposes of invoking the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] *Woods v. Coastal Coal Co.*, BRB No. 12-0623 BLA (June 27, 2013) (unpub.). The Board, however, vacated the administrative law judge's finding that claimant established total respiratory disability at 20 C.F.R. §718.204(b). Specifically, the Board held that pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge failed to adequately explain her conclusion that the blood gas study evidence supported a finding of total disability. *Woods*, slip op. at 3-4. The Board also held that, pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge did not identify claimant's usual coal mine work or determine the exertional requirements of that work, and did not assess whether the medical opinions diagnosing a totally disabling respiratory or pulmonary impairment were based on an accurate understanding of claimant's job duties. *Id.* at 4-5. Because the Board vacated the administrative law judge's finding of total disability and remanded the case for further consideration of that issue, it also vacated the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption.

In the interest of judicial economy, the Board also addressed employer's allegations of error in the administrative law judge's findings that employer did not rebut the Section 411(c)(4) presumption. *Id*. at 6-8. Finding no merit in those arguments, the Board affirmed the administrative law judge's determination that employer did not rebut

[1] This is claimant's second claim. Director's Exhibit 3. Claimant filed his first claim on October 22, 2002. Director's Exhibit 1. On July 28, 2006, Administrative Law Judge Daniel A. Sarno, Jr. issued a Decision and Order denying benefits because claimant did not establish any of the elements of entitlement. *Id*. The Board affirmed Judge Sarno's denial of benefits. *Woods v. Coastal Coal Co.*, BRB No. 06-0901 BLA (Apr. 27, 2007) (unpub.). Claimant did not pursue this claim any further.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where a claimant establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b).

the presumption. Accordingly, the Board held that if the administrative law judge found on remand that claimant established total disability,[3] the administrative law judge could reinstate her finding that claimant invoked the Section 411(c)(4) presumption and the award of benefits.[4] *Id*.

The administrative law judge found on remand that claimant had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R §718.204(b)(2). The administrative law judge therefore determined that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis and established a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Noting that the Board previously affirmed her determination that employer did not rebut the presumption, the administrative law judge awarded benefits.

Employer asserts on appeal that the administrative law judge erred in finding that the evidence established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2) and thus erred in finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a brief in this appeal. Employer filed a reply brief in support of its position.

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.[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).

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[3] The Board noted that, because this is a subsequent claim and claimant's prior claim was denied because he failed to establish any elements of entitlement, a finding of total disability on remand would also establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *Woods v. Coastal Coal Co.*, BRB No. 12-0623 BLA, slip op. at 6 (June 27, 2013) (unpub.), *citing* 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc*., 23 BLR 1-1, 1-3 (2004).

[4] The Board denied employer's motion for reconsideration. *Woods v. Coastal Coal Co.*, BRB No. 12-0623 BLA (Jan. 31, 2014) (unpub.) (Order).

[5] The record indicates that claimant's last coal mine employment was in Kentucky. Director's Exhibits 4, 6. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

**Invocation of the Section 411(c)(4) Presumption-Total Disability**

Evaluating the evidence relevant to total respiratory disability, the administrative law judge initially considered the blood gas study evidence pursuant to 20 C.F.R. §718.204(b)(2)(ii), noting that the record contains two new blood gas studies: a March 15, 2010 blood gas study administered by Dr. Rasmussen and a July 22, 2010 study administered by Dr. Jarboe.[6] Dr. Rasmussen's March 15, 2010 blood gas study yielded qualifying values at rest, but non-qualifying values with exercise.[7] Decision and Order at 4; Director's Exhibit 10. Dr. Jarboe's July 22, 2010 blood gas study produced non-qualifying values at rest; exercise studies were not conducted.[8] Decision and Order at 4; Directors Exhibit 12.

Considering the reliability of the blood gas studies pursuant to 20 C.F.R. §718.105, the administrative law judge found that Dr. Jarboe's July 22, 2010 blood gas study is not in compliance with the quality standards. The administrative law judge noted that the test results are not signed by the physician who supervised the study, and do not include the barometric pressure, claimant's pulse rate, the time between the drawing of the sample and the sample analysis, or whether the equipment was calibrated, as required by the regulations. Decision and Order at 5; Director's Exhibit 12. The administrative law judge found that, in contrast, Dr. Rasmussen's March 15, 2010 blood gas study is in "perfect compliance" with the quality standards for blood gas studies. Decision and

[6] Employer also asserts that the administrative law judge erred in failing to begin her analysis of the evidence relevant to total respiratory disability with the first provision of the regulation, i.e., the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i). Employer's Brief at 13-14. Contrary to employer's contention, the administrative law judge is not required to consider the evidence in a specific order, but must consider all relevant evidence in rendering her decision. 5 U.S.C. §557(c)(3)(a), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). The administrative law judge acknowledged that she found that the pulmonary function studies of record were non-qualifying in her prior decision, and she considered this evidence in weighing the contrary probative evidence under 20 C.F.R. §718.204(b). Decision and Order at 10-11.

[7] A "qualifying" blood gas study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study produces results that exceed those values. See 20 C.F.R. §718.204(b)(2)(ii).

[8] Claimant declined to undergo the exercise portion of the July 22, 2010 blood gas study. Director's Exhibit 12.

Order at 4. Consequently, the administrative law judge found that Dr. Rasmussen's March 15, 2010 blood gas study is more probative than Dr. Jarboe's study. *Id.* at 5.

The administrative law judge further considered that only the resting values of Dr. Rasmussen's March 15, 2010 blood gas study are qualifying. Noting that the regulations do not require that an exercise study be performed, but only require that an exercise study be offered to a miner if his resting blood gas study is non-qualifying, the administrative law judge found that the qualifying resting values are a probative measurement of disability. Decision and Order at 5 n.1, *citing* 20 C.F.R. §718.105(b). Thus, the administrative law judge concluded that, if considered in the absence of contrary probative evidence, Dr. Rasmussen's March 15, 2010 arterial blood gas study is sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 5.

Turning to the new medical opinions pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that all of the physicians agreed that claimant is totally disabled by a respiratory or pulmonary impairment. Weighing all of the relevant new evidence together, the administrative law judge found that claimant established total disability by a preponderance of the evidence pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 10.

Employer argues that the administrative law judge erred in discrediting Dr. Jarboe's July 22, 2010 blood gas study on the grounds that it is not in compliance with the quality standards at 20 C.F.R. §718.105(d). Further, employer argues that in finding that Dr. Rasmussen's qualifying resting blood gas values established total disability at 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge did not adequately explain why Dr. Rasmussen's qualifying resting blood gas results outweighed his non-qualifying exercise blood gas results.[9]

[9] Employer also contends that the administrative law judge failed to consider all of the results of Dr. Rasmussen's March 15, 2010 blood gas study. Employer's Brief at 15-16. The Board previously addressed and rejected this argument, stating:

> [W]e reject employer's allegation that the administrative law judge should have considered all of the results of the March 15, 2010 study. The "other results" that employer is referring to consists [sic] of measurements of claimant's baseline, exercise draws during various stages, and post-exercise recovery. [citations omitted]. These values are not recognized as providing a basis for a finding of total disability at 20 C.F.R. §718.204(b)(2)(ii), which identifies the relevant values as those listed in Appendix C to Part

After reviewing the arguments on appeal, the administrative law judge's findings, and the relevant evidence, we affirm the administrative law judge's determination that the blood gas study evidence established total disability under 20 C.F.R. §718.204(b)(2)(ii). Substantial evidence supports the administrative law judge's permissible finding that, considered both quantitatively and qualitatively, claimant's blood gas studies support a finding of total disability. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005). Contrary to employer's assertion, the regulations provide that in evaluating the blood gas study evidence the administrative law judge should consider whether a study substantially conforms to the quality standards set forth in 20 C.F.R. §718.105 and Part 718, Appendix C. *See* 20 C.F.R. §718.101(b) (providing that "any evidence which is not in substantial compliance with the applicable standard is insufficient to establish the fact for which it is proffered"); *see also Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-237 (2007) (en banc).

Applying these standards, the administrative law judge permissibly found that Dr. Jarboe's test results were entitled to less weight than the conforming blood gas study results obtained by Dr. Rasmussen because Dr. Jarboe's July 22, 2010 blood gas study results were missing "several important quality indicators" required by 20 C.F.R. §718.105(c). *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 5. Further, contrary to employer's argument, the administrative law judge acknowledged the conflict between Dr. Rasmussen's qualifying resting values and non-qualifying exercise values and explained why she concluded that Dr. Rasmussen's qualifying resting blood gas study is nonetheless a valid indicator of total disability. Decision and Order at 5 n.1.

Moreover, employer has not explained how, under the facts of this case, further analysis of the blood gas studies could have impacted the administrative law judge's finding that claimant is totally disabled. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (holding that the appellant must explain how the "error to which [it] points could

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718. Appendix C sets forth tables of qualifying pO2 and pCO2 values and does not include the "other results" to which employer refers.

*Woods*, BRB No. 12-0623 BLA, slip op. at 4. Because no exception to the law of the case doctrine has been demonstrated, we decline to disturb the Board's prior determination on this issue. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-15 (1993); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989) (Brown, J., dissenting).

have made any difference"). As the administrative law judge found, Drs. Rasmussen and Jarboe, the only physicians who rendered medical opinions in the current claim, diagnosed claimant as totally disabled based on their review of the qualifying and non-qualifying objective test results.[10] Decision and Order at 16-21; Director's Exhibit 12; Claimant's Exhibits 2, 5; Employer's Exhibits 1, 4. Further, Dr. Jarboe, retained by employer, relied on claimant's severely reduced diffusing capacity as demonstrated by the pulmonary function studies and not on the results of the blood gas studies in opining that claimant is totally disabled.[11] Director's Exhibit 12. In light of these factors, any error by administrative law judge in discrediting Dr. Jarboe's non-qualifying blood gas study, or in crediting Dr. Rasmussen's qualifying resting blood gas study, is harmless. *See Shinseki*, 556 U.S. at 413; *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

Employer next contends that the administrative law judge erred in evaluating the medical opinion evidence relevant to total disability. Specifically, employer contends that the administrative law judge mischaracterized claimant's usual coal mine work[12] as requiring moderate to heavy labor. Employer therefore asserts that the administrative law judge erred in relying on the opinions of Drs. Rasmussen and Jarboe that claimant lacks the respiratory capacity to perform such labor. Employer's contentions lack merit.

Employer initially argues that the administrative law judge erred in departing from Administrative Law Judge Daniel A. Sarno, Jr.'s determination in the prior claim that "[w]hether claimant's last usual coal mine job was as a beltman or a crusher operator . . . it entailed only limited physical exertion." Judge Sarno's July 28, 2006 Decision and Order at 3; Employer's Brief at 21. Employer contends that because Judge Sarno's finding was not disturbed by the Board on appeal it is the law of the case. Employer's Brief at 21. We disagree.

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[10] Dr. Rasmussen based his conclusions on the results of the pulmonary function and blood gas studies he conducted. Director's Exhibit 10. As the administrative law judge correctly observed, however, Dr. Jarboe considered all of the objective evidence of record, including the resting and exercise blood gas studies conducted by Dr. Rasmussen, in reaching his conclusion that claimant is totally disabled by a respiratory impairment. Decision and Order at 7-9; Director's Exhibit 12.

[11] Drs. Rasmussen also relied upon claimant's reduced diffusing capacity in opining that claimant is totally disabled. Director's Exhibit 10 at 42, 45.

[12] A miner's "usual coal mine work" is the most recent job he performed regularly and over a substantial period of time. *See Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

The doctrine of the "law of the case" is a discretionary rule of practice based on the policy that once an issue is litigated and decided, the matter should not be re-litigated. *United States v. U.S. Smelting Refining & Mining Co.*, 339 U.S. 186 (1950), *reh'g denied*, 339 U.S. 972 (1950); *see also Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-15 (1993); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990). In the prior claim, the Board affirmed Judge Sarno's denial of benefits on the grounds that claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement; the Board did not address Judge Sarno's findings regarding the exertional requirements of claimant's usual coal mine work, or whether claimant was disabled from performing that work. *Woods v. Coastal Coal Co.*, BRB No. 06-0901 BLA (Apr. 27, 2007) (unpub.). As those issues were not resolved by the Board's prior decision, the law of the case doctrine does not apply. *See Coleman*, 18 BLR at 1-15; *Brinkley*, 14 BLR at 1-151. Moreover, the Board specifically instructed the administrative law judge to determine the exertional requirements of claimant's usual coal mine work and consider them in conjunction with the medical opinions assessing disability. *Woods*, BRB No. 12-0623 BLA, slip op. at 4-5. There thus is no merit to employer's contention that the administrative law judge was precluded from independently evaluating the nature and exertional requirements of claimant's usual coal mine work.

Moreover, the administrative law judge's finding that claimant's last coal mine work required moderate to heavy labor is supported by substantial evidence. In addressing the issue of claimant's usual coal mine work, the administrative law judge initially found that the evidence regarding the nature of claimant's last job was varied. Decision and Order at 8. The administrative law judge noted that in a 2009 deposition claimant testified that his last job was working on the belt line where he would shovel the belt, walk the belts, and make sure everything was working; in March 2010 claimant told Dr. Rasmussen that his last job was as a repairman and electrician;[13] in July 2010, claimant told Dr. Jarboe that his last job was as a welder;[14] and at the 2011 hearing

[13] The administrative law judge noted that in his 2010 medical report, Dr. Rasmussen recorded that during his coal mining career, claimant worked as a hand loader and later as a repairman and equipment operator. Decision and Order at 6; Director's Exhibit 10. The administrative law judge noted that Dr. Rasmussen also recorded the last coal mine employment claimant performed for at least a year, stating that '"[m]ost of [claimant's] time was spent as a repairman and electrician, which was his last job." Decision and Order at 6; Director's Exhibit 10.

[14] The administrative law judge noted that, in his 2010 report, Dr. Jarboe recorded that during claimant's mining career "[c]laimant 'performed about all jobs including operating a miner, shuttle car and pigs.'" Decision and Order at 7; Director's Exhibit 12.

claimant did not identify his last job. *Id.* Based on this evidence, the administrative law judge permissibly concluded that the most recent job that claimant performed on a regular basis was as a "general repairman, performing both electrical and welding work along the belt, and other tasks along the belt as necessary." Decision and Order at 8; *see Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. This finding is not inconsistent with Judge Sarno's finding in the prior claim that claimant's last coal mine work may have been as a "beltman." Judge Sarno's July 28, 2006 Decision and Order at 3.

We further reject employer's contention that in finding that claimant's job as a general repairman included heavy labor, the administrative law judge failed to consider all relevant evidence, and instead erroneously relied on the "incorrect[]" job descriptions claimant provided to Drs. Rasmussen and Jarboe. Employer's Brief at 22-23. As summarized by the administrative law judge, Dr. Rasmussen recorded claimant's statement that, "as a repairmen [sic] and equipment operator . . . '[claimant] carried heavy tools, sometimes up to [seventy pounds] in weight and did considerable heavy lifting of motors, pumps and wheels.'" Decision and Order at 6; Director's Exhibit 10. Dr. Jarboe noted claimant's statement that he "had to do heavy lifting and climbing," and also summarized the exertional requirements claimant provided to Dr. Rasmussen. Decision and Order at 7; Director's Exhibit 12.

Contrary to employer's contention, the job descriptions relied upon by Drs. Rasmussen and Jarboe, which included heavy lifting, are not "directly contradicted" by claimant's testimony in the prior claim. Employer's Brief at 22. As employer concedes, claimant testified in the prior claim that his last job was "run[ning] the crusher and the belts." Director's Exhibit 1 at 342; Employer's Brief at 22. While claimant stated that operating the crusher involved pushing buttons, claimant explained that working the belts required other duties. Director's Exhibit 1 at 343. Also, when asked if his work with Coastal Coal Company, his last employer, involved any heavy manual labor, claimant responded that he "lifted grounded metal all the time" that was "all heavy" weighing fifty pounds or more. Director's Exhibit 1 at 350.

Further, the administrative law judge did not rely solely on the job descriptions provided to Drs. Rasmussen and Jarboe in the current claim. The administrative law judge noted that while Judge Sarno characterized claimant's job as requiring limited exertion, he summarized the exertional requirements of a beltman as including standing

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The administrative law judge also noted that "Dr. Jarboe stated that '[claimant's] last job was as a welder, which he performed for five years.'" *Id.*

for eight to twelve hours a day and lifting fifty pounds several times a day. *Id.* The administrative law judge thus permissibly found that the actual exertional requirements Judge Sarno relied upon did not differ qualitatively from her own finding that "[a[lthough many of [claimant's] electrical and welding tasks may have required less physical exertion, . . . the heavy lifting that he performed was a necessary and usual part of his employment." *Id*. at 8, 12.

The task of weighing the evidence and rendering findings of fact is committed to the discretion of the administrative law judge. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989) (en banc). As the administrative law judge considered the conflicting evidence regarding claimant's exertional requirements, including "all the evidence from the prior claim," and explained why it did not alter her determination that claimant's usual coal mine work required moderate to heavy labor, this finding is affirmed. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *McMath v. Director, OWCP*, 12 BLR 1-6, 1-10 (1988); *Hvizdzak v. North Am. Coal Corp.*, 7 BLR 1-469 (1984); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982); Decision and Order at 8, 12. We therefore affirm the administrative law judge's finding that claimant established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv) based on the well-reasoned opinions of Drs. Rasmussen and Jarboe. *See McMath*, 12 BLR at 1-10; *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988).

Finally, we reject employer's assertion that the administrative law judge erred in failing to weigh all of the relevant evidence together at 20 C.F.R. §718.204(b)(2). Employer's Brief at 20, 23-24. The administrative law judge permissibly found that the well-reasoned opinions of Drs. Rasmussen and Jarboe, together with the qualifying March 15, 2010 arterial blood gas study administered by Dr. Rasmussen, "outweigh any contrary probative evidence, including the non[-]qualifying pulmonary function tests." Decision and Order at 11; *see Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc). The administrative law judge stated that "Drs. Rasmussen and Jarboe both considered these tests when finding total disability . . . [and] they both noted other findings from the spirometry that supported a finding of total disability." Decision and Order at 10. Thus, we affirm the administrative law judge's finding that claimant established total respiratory disability at 20 C.F.R. §718.204(b). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-123 (6th Cir. 2000); *see also Killman v. Director, OWCP*, 415 F.3d 716, 721-22, 23 BLR 2-250, 2-259 (7th Cir. 2005); Decision and Order at 11.

In light of our affirmance of the administrative law judge's findings that claimant established at least thirty years of qualifying coal mine employment and the existence of

a totally disabling respiratory impairment at 20 C.F.R. §718.204(b), we affirm her finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).

Moreover, because the Board rejected employer's assertion that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption in its prior decision, *see Woods*, BRB No. 12-0623 BLA, slip op. at 7-8, we affirm the administrative law judge's decision to reinstate the award of benefits.

**Attorney Fee Award**

We now address claimant's counsel's fee petition filed in connection with services performed before the Board in the prior appeal, BRB No. 12-0623 BLA. The Act provides that when a claimant wins a contested case, the employer, its insurer, or the Black Lung Disability Trust Fund shall pay a "reasonable attorney's fee" to claimant's counsel. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928(a). Claimant's counsel has filed a complete, itemized statement requesting a total fee of $2,137.50 for 9.5 hours of legal services at an hourly rate of $225.00.

Employer contends that claimant's counsel has failed to support the fee petition with sufficient proof of the prevailing market rate in Asher, Kentucky, where counsel practices. We reject employer's assertion. Evidence of fees received in the past provides some guidance as to what the market rate is, and is appropriately included within the range of sources from which to ascertain a reasonable rate.[15] *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *Maggard v. Int'l Coal Group*, 24 BLR 1-172 (2010) (Order); *Bowman v. Bowman Coal Co.*, 24 BLR 1-165 (2010) (Order). In the present case, we find the hourly rate requested by counsel to be reasonable in light of, *inter alia*, the quality of the representation, the complexity of the legal issues involved, and the level of proceedings to which the claim was raised. 20 C.F.R. §725.366(b).

Employer also asserts that the number of hours of legal services requested by claimant's counsel is unreasonable, arguing that the times charged on February 29, 2016, October 31, 2012, August 24, 2013, and August 30, 2013 are excessive and duplicative. Employer's Objections to Claimant's Counsel's Attorney Fee Petition at 3. We agree with employer's objection to claimant's counsel's request for compensation for one-quarter hour of legal services performed on February 29, 2016, as the services were

[15] The Board has previously awarded claimant's counsel an hourly rate of $225.00. *See,* e.g., S*mith v. Leeco, Inc./James River Coal Co.*, BRB Nos. 06-0425 BLA and 08-00385 BLA (July 29, 2015) (unpub.).

performed in another appeal. Since the Board denied claimant's request for reconsideration of its decision to remand the case to the administrative law judge on January 31, 2014, the one-quarter hour requested for legal services performed on February 29, 2016 is not associated with or compensable under this fee petition.

We reject employer's contention, however, that each of the three one-hour fee requests, identified as "office conference with client," for legal services performed on October 31, 2012, August 24, 2013, and August 30, 2013 was unnecessary and excessive. Contrary to employer's argument, communications between counsel and client are a reasonable and necessary service, especially in protracted litigations. Because employer has not shown that these charges were unnecessary, we find the disputed charges neither excessive nor unreasonable. *Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316-17 (1984). We therefore approve a total fee of $2,081.25 for 9.25 hours of legal services at an hourly rate of $225.00 rendered in defense of this claim.

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is affirmed. In addition, claimant's counsel is awarded a fee of $2,081.25, 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.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge