BRB Nos. 09-0202 BLA
and 09-0202 BLA-S

DONALD COKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	DATE ISSUED: 05/25/2010
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 - Award of Benefits, and the Supplemental Decision and Order - Award of Attorney's Fees, of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

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

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen Frank 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Award of Benefits and the Supplemental Decision and Order - Award of Attorney's Fees (06-BLA-5476) of

Administrative Law Judge Daniel F. Solomon rendered on a claim filed 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).[1] The administrative law judge credited claimant with at least twenty-eight years of coal mine employment,[2] based on the parties' stipulation, and found that claimant established the existence of clinical pneumoconiosis, based on the x-ray and medical opinion evidence, pursuant to 20 C.F.R. §718.202(a)(1), (4). The administrative law judge further found that the medical opinion evidence established legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) and chronic bronchitis due to both smoking and coal mine dust exposure, pursuant to 20 C.F.R. §718.202(a)(4). Additionally, the administrative law judge found that claimant is totally disabled due to pneumoconiosis under 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits. Subsequently, the administrative law judge considered claimant's counsel's petition for a fee, and employer's objections, and awarded a fee of $8,7456.59.

On appeal, employer challenges the administrative law judge's findings of clinical and legal pneumoconiosis, 20 C.F.R. §718.202(a)(1), (4). Employer further challenges the administrative law judge's findings of total disability, and that claimant's total disability is due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(b), (c). With respect to the cause of claimant's disability, employer asserts that the administrative law judge erred in considering the preamble to the revised regulations when he weighed the medical opinion evidence. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's assertion that the administrative law judge erred in considering the preamble to the revised regulations. Employer has filed reply briefs, reiterating its contentions.

In its appeal of the Supplemental Decision and Order – Award of Attorney's Fees, employer argues that the administrative law judge erred in awarding expert witness fees,

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[1] The Director, Office of Workers' Compensation Programs, and employer correctly state that the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this case, as it involves a miner's claim filed before January 1, 2005. Therefore, we reject claimant's assertion that the recent amendments affect his claim.

[2] The record indicates that claimant's last coal mine employment was in Kentucky. Director's Exhibit 3. 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*).

and transcript and travel expenses. Claimant responds, urging affirmance of the fee award. The Director has indicated that he will not respond to employer's appeal of the fee award.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 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 under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Relevant to the existence of legal pneumoconiosis[3] at 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Chavda,[4] Baker,[5] Fino,[6] and Repsher.[7] He noted that while the physicians agree that claimant suffers from

[3] Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[4] Dr. Chavda diagnosed chronic obstructive pulmonary disease (COPD) and chronic bronchitis, "caused by smoking and aggravated by [claimant's] exposure to coal dust." Director's Exhibit 39-23, 39-28.

[5] Dr. Baker diagnosed COPD, chronic bronchitis, and pneumoconiosis, and stated that claimant's COPD and bronchitis are due to smoking and coal dust exposure. Claimant's Exhibit 1b.

[6] Dr. Fino opined that there was no evidence of clinical or legal pneumoconiosis, but that claimant's pulmonary function studies showed a moderate obstructive ventilatory impairment. Dr. Fino stated that claimant's respiratory impairment is caused by cigarette smoking. Employer's Exhibits 2, 5, 8.

[7] Dr. Repsher opined that there was no evidence of clinical or legal pneumoconiosis. Employer's Exhibits 6, 8. Dr. Repsher stated that claimant's pulmonary function studies showed "mild COPD, which would be a typical finding in a

obstructive lung disease, they disagree about whether it is related to coal dust exposure. Finding that Drs. Chavda and Baker based their opinions on the results of physical examinations, objective test results, occupational and medical histories, and medical literature, the administrative law judge found that the opinions of Drs. Chavda and Baker were "well reasoned and documented." Decision and Order at 20.

By contrast, the administrative law judge found that the opinions of Drs. Fino and Repsher merited "less weight." Decision and Order at 21. Specifically, the administrative law judge found that Dr. Fino did not sufficiently explain his opinion that coal dust was not a factor in claimant's respiratory impairment, given the biopsy evidence of dust deposition in claimant's lungs.[8] The administrative law judge also found that Dr. Fino based his opinion largely on medical and statistical generalities, rather than on claimant's specific symptoms, occupational history, or test results. Decision and Order at 21. Further, the administrative law judge found that Dr. Repsher did not review the complete pathology evidence of record, and that, like Dr. Fino, he based his opinion on statistics and medical literature without adequately addressing claimant's specific symptoms. The administrative law judge concluded that the opinions of Drs. Chavda and Baker were entitled to greater weight than the opinions of Drs. Fino and Repsher, and that claimant had therefore established legal pneumoconiosis by the medical opinion evidence. Decision and Order at 21.

Employer asserts that the administrative law judge erred in crediting the opinions of Drs. Chavda and Baker, and in discrediting those of Drs. Fino and Repsher.

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sensitive cigarette smoker, but which would be uncommon as a result of [the] inhalation of coal mine dust." Employer's Exhibit 6.

[8] In January 2002, the lower portion of claimant's right lung was removed, as part of his treatment for squamous cell carcinoma. Dr. Corpus, the hospital pathologist, prepared the surgical pathology report. On gross examination, Dr. Corpus described "marked anthracosis . . . on the surface of the lung parenchyma," and reported that "nine hilar lymph nodes . . . [were] anthracotic." In his microscopic description, Dr. Corpus stated that the "overlying pleura [was] fibrotic and anthracotic." Claimant's Exhibit 3. Dr. Caffrey performed a microscopic examination of the tissue slides and described a "mild amount of anthracotic pigment identified within the lung tissue and adjacent lymph node tissue." Employer's Exhibit 3. While the administrative law judge concluded that the biopsy evidence did not establish the existence of clinical coal workers' pneumoconiosis, he correctly found, and employer does not dispute, that both pathologists identified "some level of anthracotic evidence" in claimant's lung. Decision and Order at 19.

Specifically, employer asserts that the opinions of Drs. Chavda and Baker are unreasoned and insufficient to establish legal pneumoconiosis because Dr. Chavda could not differentiate between the effects of smoking and coal dust exposure, and because Dr. Baker did not "rule in" coal dust exposure as a cause of claimant's obstructive impairment. Employer's Brief at 23-24. We disagree.

The administrative law judge accurately observed that, in affirmatively attributing claimant's COPD to both smoking and coal mine dust exposure, Drs. Chavda and Baker diagnosed legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2); Decision and Order at 7-10, 20-21; Director's Exhibit 39-23; Claimant's Exhibits 1b, 6 at 12; Employer's Exhibit 9 at 24-27, 36. Contrary to employer's assertion, the doctors were not required to allocate the degree to which smoking and coal dust exposure contributed to claimant's impairment. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 358, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120-21 (6th Cir. 2000). Further, substantial evidence supports the administrative law judge's conclusion that Drs. Chavda and Baker based their opinions on clinical findings and objective evidence; they considered all of the known risk factors for lung disease applicable to claimant, including smoking, coal dust exposure, and lung cancer with resulting lobectomy; and they explained their opinions that coal dust can aggravate lung damage caused by smoking. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Cornett*, 227 F.3d at 576, 22 at 2-121; Decision and Order at 7-10, 20-21; Director's Exhibit 39-23; Claimant's Exhibits 1b, 6 at 12; Employer's Exhibit 9 at 24-27, 36. Additionally, we reject employer's argument that the administrative law judge was required to discount the conclusions of Drs. Chavda and Baker because they did not render differential diagnoses. *See Stover v. Peabody Coal Co.*, BLR , BRB No. 08-0549 BLA (Jan. 27, 2010) (*en banc*); Employer's Reply to the Director at 6-8. The administrative law judge, therefore, permissibly found that the opinions of Drs. Chavda and Baker are well-reasoned and documented, and entitled to probative weight. *See Tenn. 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); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

We also reject employer's assertion that the administrative law judge failed to state a valid reason for discounting Dr. Fino's opinion. The administrative law judge acted within his discretion as the fact-finder when he determined that Dr. Fino downplayed the uncontradicted evidence of dust deposition in claimant's lungs, and did not adequately explain his opinion that coal dust played no role in claimant's respiratory impairment, in light of this evidence.[9] *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129;

[9] In summarizing Dr. Corpus's report, Dr. Fino noted: "The pathology showed a poorly differentiated squamous cell cancer. The surgical margins were clear of cancer

Rowe, 710 F.2d at 255, 5 BLR at 2-103. Substantial evidence also supports the administrative law judge's permissible credibility determination that Dr. Fino's opinion was unpersuasive because it was based upon generalities. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Decision and Order at 21; Employer's Exhibit 5. Although Dr. Fino based his opinion, that coal mine dust did not contribute to claimant's COPD, on medical literature supportive of the proposition that coal mine dust does not cause a clinically significant impairment in the average coal miner, Dr. Fino did not indicate that he also based his opinion upon any information particular to claimant's case. Employer's Exhibit 5 at 6-12.

We additionally reject employer's assertion that the administrative law judge erred in discounting Dr. Repsher's opinion. Although Dr. Repsher noted that claimant underwent a right lower lobectomy, his reports do not reflect that he was aware of the findings of either Dr. Corpus or Dr. Caffrey describing anthracotic deposits in claimant's lung. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984) (holding that an administrative law judge may properly discredit the opinion of a physician that is based upon an incomplete picture of the miner's health); Decision and Order at 21; Employer's Exhibits 6, 8. Moreover, a review of Dr. Repsher's reports supports the administrative law judge's finding that the physician's conclusion, that it would be "unlikely" that coal dust played a role in claimant's COPD, was based primarily on medical literature supporting the "statistical probability" that any measureable reduction in claimant's pulmonary function was due to smoking. Employer's Exhibit 6 at 3-5. Therefore, the administrative law judge found that the opinion was not based on information specific to claimant. *Williams*, 338 F.3d at 518, 22 BLR at 2-655; *Knizner*, 8 BLR at 1-7; Decision and Order at 21.

Because the administrative law judge provided valid reasons for crediting the opinions of Drs. Chavda and Baker, and for discounting the opinions of Drs. Fino and

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and nine hilar nodes were clear of cancer. There was no mention of any changes consistent with coal workers' pneumoconiosis." Employer's Exhibit 5 at 2. Dr. Fino did not acknowledge Dr. Corpus's identification of "marked anthracosis" or nine "anthracotic" lymph nodes. Dr. Fino also summarized Dr. Caffrey's findings, noting: "Dr. Caffrey reviewed the pathological slides from the right lower lobectomy and agreed that there was a lung cancer. He found mild centrilobular emphysema and mild chronic bronchitis. There was a mild amount of anthracotic pigment. There was no evidence of coal workers' pneumoconiosis. Certainly his pathological interpretation is consistent with the pathological interpretation offered by the hospital pathologist." Employer's Exhibit 5 at 4.

Repsher, we affirm his finding that claimant established legal pneumoconiosis under 20 C.F.R. §718.202(a)(4).[10] *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 21.

We next address employer's contention that the administrative law judge erred in finding that claimant is totally disabled by a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). As summarized by the administrative law judge, the record contains the results of four valid pulmonary function studies,[11] three of which are qualifying.[12] The administrative law judge acted within his discretion in concluding that the three more recent, qualifying, pulmonary function studies outweighed the sole non-qualifying study, and supported a finding that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(i). *See Martin*, 400 F.3d at 307, 23 BLR at 2-286; *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004) (*en banc*); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); Decision and Order at 15. The administrative law judge also noted that the record contains the results of five blood gas studies, all of which are non-

[10] Although employer challenges the administrative law judge's additional finding of clinical pneumoconiosis, the Board has long held that 20 C.F.R. §718.202 provides four alternative methods for establishing the existence of pneumoconiosis, *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985), and has declined to extend the holdings in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), and *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), outside the jurisdictions of the United States Courts of Appeals for the Third and Fourth Circuits, respectively. *See Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-227 (2002)(*en banc*). Thus, our affirmance of the administrative law judge's finding of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) obviates the need to address employer's challenges to the administrative law judge's finding of clinical pneumoconiosis under 20 C.F.R. §718.202(a)(1). *Dixon*, 8 BLR at 1-345.

[11] The administrative law judge permissibly found that while the record contains the results of two additional pulmonary function studies performed by Dr. Repsher, these studies were entitled to less weight based on Dr. Repsher's "own notes that he was not able to 'produce acceptable and reproducible spirometry data.'" Decision and Order at 15; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985).

[12] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

qualifying, pursuant to 20 C.F.R. §718.204(b)(2)(ii).[13] Decision and Order at 7-12; Director's Exhibits 11, 39; Claimant's Exhibit 1c; Employer's Exhibits 4, 6. Considering the medical opinions pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge noted that Drs. Chavda and Fino opined that claimant is totally disabled from a respiratory standpoint because of the moderate obstructive impairment reflected in his pulmonary function studies. Claimant's Exhibit 6 at 14-17; Employer's Exhibit 8. In contrast, Dr. Baker opined that claimant could "probably" perform his usual coal mine work, and Dr. Repsher opined that claimant's respiratory impairment is not disabling. Claimant's Exhibits 1a, 1b; Employer's Exhibits 3, 4, 6.

In addressing this conflicting evidence, the administrative law judge considered the exertional requirements of claimant's usual coal mine work as a shop foreman or supervisor. Decision and Order at 5, 16. The administrative law judge credited claimant's testimony that, although claimant's employment contract did not require him to perform manual labor, he performed manual labor daily. Specifically, claimant testified that, officially, his job required him to check the beltlines, which involved walking for thirty minutes a day. Claimant testified further, however, that he also engaged in manual labor for two to three hours a day, when he would climb twenty to forty steps, while helping to carry seventy to seventy-five-pound bearings. Decision and Order at 5, 16; Hearing Tr. at 13-14, 18-20, 24-26, 30.

After discrediting the opinions of Drs. Baker and Repsher, the administrative law judge accorded the greatest weight to the opinion of Dr. Chavda, that claimant is totally disabled, because Dr. Chavda's opinion was the most complete, rational, and well-reasoned. Decision and Order at 16. The administrative law judge, therefore, found that the well-reasoned medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and thus substantiated the qualifying pulmonary function study evidence. Decision and Order at 15-17.

Employer initially asserts that the administrative law judge erred in finding that claimant's usual coal mine work involved manual labor, when claimant testified that those duties were not required and that he performed them voluntarily. Employer's Brief at 26-27. Contrary to employer's assertion, the fact that claimant performed certain duties voluntarily does not necessarily put those duties outside the scope of his employment. *See Jim Walter Res., Inc. v. Allen*, 995 F.2d 1027, 1029, 18 BLR 2-237, 2-242 (11th Cir. 1993); *Brown v. Cedar Coal Co.*, 8 BLR 1-86 (1985). Thus, the administrative law judge rationally determined that claimant's coal mine employment

[13] The administrative law judge correctly found that the record contains no evidence of complicated pneumoconiosis or cor pulmonale with right-sided congestive heart failure, pursuant to 20 C.F.R. §718.204(b)(1), (b)(2)(iii). Decision and Order at 15.

included manual labor, based on claimant's credible testimony. *See Lafferty v. Cannelton Indus.*, 12 BLR 1-190 (1989); Decision and Order at 5, 16; Hearing Tr. at 13-14, 18-20, 24-26, 30.

Additionally, employer contends that Dr. Chavda's statement, that coal mine work "may cause more further damage, more aggravated symptoms" is simply a recommendation against further dust exposure, not a finding of total disability. Employer's Brief at 27; Claimant's Exhibit 6 at 15. Employer further asserts that the administrative law judge improperly relied on Dr. Chavda's opinion to find total respiratory disability because "nothing in [Dr. Chavda's] opinion discloses any knowledge of the functional demands of [claimant's] last job." Employer's Brief at 27. Employer's contentions lack merit.

First, Dr. Chavda accurately noted that claimant last worked as a "shop foreman." Director's Exhibit 39. In addition, Dr. Chavda specified that claimant's pulmonary impairment could cause claimant "shortness of breath or difficulty breathing" with "any exertional activity" so that claimant would have difficulty walking, or climbing two or three steps. Claimant's Exhibit 6 at 9-10. Contrary to employer's contention, the administrative law judge reasonably found Dr. Chavda's opinion to be sufficient to establish that claimant is totally disabled from performing his last coal mine work, with its attendant walking and manual labor. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order at 15-16; Claimant's Exhibit 6 at 9-10.

There is also no merit to employer's contention that the administrative law judge improperly discredited Dr. Repsher's opinion. Contrary to employer's argument, the administrative law judge did not discredit the doctor's opinion simply "because it was in the minority." Employer's Brief at 27. The administrative law judge properly found the doctor's opinion to be against the weight of the evidence provided by claimant's testimony, and the reports of Drs. Chavda, Fino and Baker. *See Martin*, 400 F.3d at 307, 23 BLR at 2-286; Decision and Order at 16. The administrative law judge also permissibly accorded little weight to Dr. Repsher's opinion, in part, because Dr. Repsher relied on invalid spirometry data to support his conclusion that claimant has a "mild" impairment that is not disabling. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 16; Employer's Exhibit 6.

Employer next contends that the administrative law judge erred in not weighing all of the relevant evidence together pursuant to 20 C.F.R. §718.204(b). *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987)(*en banc*). As set forth above, the administrative law judge specifically weighed the pulmonary function studies together with the medical opinions to conclude that the

qualifying pulmonary function study evidence, as "substantiated by the weight of the well reasoned medical opinions," establishes that claimant suffers from a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv). Decision and Order at 15. To the extent employer contends that the administrative law judge failed to account for the non-qualifying nature of claimant's blood gas studies, we hold that any error in this regard is harmless, as pulmonary function studies and blood gas studies measure different types of impairment. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993) (holding that non-qualifying blood gas study results are not a direct offset of, or contrary to, qualifying pulmonary function study results); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Moreover, as the administrative law judge found, Drs. Baker, Chavda, Fino, and Repsher agree that the relevant inquiry in this case is whether claimant can perform his usual coal mine work in light of the obstructive impairment that is demonstrated by his pulmonary function studies. Decision and Order at 21. As employer raises no other arguments with respect to the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b), this finding is affirmed.

Employer also challenges the administrative law judge's determination, pursuant to 20 C.F.R. §718.204(c), that the medical evidence establishes that claimant's total disability is due to pneumoconiosis. Employer specifically asserts that the administrative law judge erred in discrediting the opinion of Dr. Fino, and in crediting the opinion of Dr. Chavda.[14]

We initially reject employer's assertion that the administrative law judge erred in relying on the preamble "as if it were evidence" in evaluating the credibility of the medical opinion evidence at 20 C.F.R. §718.204(c).[15] Contrary to employer's assertions, the administrative law judge did not treat the preamble as evidence; he consulted the preamble as an authoritative statement of medical principles accepted by the Department of Labor (DOL) when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. Further, as the Director points out,

[14] Employer does not contest the administrative law judge's determination that, because Drs. Baker and Repsher did not adequately address total disability, their opinions did not merit consideration at 20 C.F.R. §718.204(c). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711-12 (1983); Decision and Order at 23.

[15] In his Decision and Order, the administrative law judge noted that the preamble acknowledges the prevailing views of the medical community that a miner has an additive risk of developing lung disease if he or she also smokes, and that coal dust exposure is linked to decrements in lung function measurements. Decision and Order at 23, *citing* 65 Fed. Reg. 79938-39 (Dec. 20, 2000).

both the United States Court of Appeals for the Seventh Circuit and the Board have approved of an administrative law judge's use of the preamble in this manner. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 117, 125-26 (2009). In *Beeler*, the Seventh Circuit held that the administrative law judge permissibly discounted Dr. Tuteur's opinion, that Beeler's condition had to be caused by smoking because miners rarely have clinically significant obstruction from coal dust, in light of DOL's finding of a consensus among scientists and researchers that coal dust-induced COPD is clinically significant. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103. Similarly, in *Obush*, the Board held that a determination of whether a medical opinion is supported by accepted scientific evidence, as determined by DOL in the preamble to the revised regulations, is a valid criterion in deciding whether to credit the opinion. *Obush*, 24 BLR at 1-125-26.

Thus, in this case, the administrative law judge permissibly discounted Dr. Fino's opinion, that coal mine dust exposure does not cause clinically significant obstructive impairment in the absence of clinical pneumoconiosis, because that opinion is inconsistent with the medical literature credited by DOL. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Obush*, 24 BLR at 125-26; Decision and Order at 23. We reject employer's assertion that the administrative law judge mischaracterized Dr. Fino's opinion in this respect. Although employer argues that Dr. Fino "acknowledged that coal dust can cause obstructive disease and in some cases it can be significant," the record reflects that Dr. Fino specifically stated that coal dust exposure could cause a clinically significant reduction in FEV1 percentage "if there was moderate or profuse pneumoconiosis present." *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Amax Coal Co. v. Beasley*, 957 F.2d 324, 327, 16 BLR 2-45, 2-48 (7th Cir. 1992); Employer's Exhibit 8 at 9; Employer's Brief at 30.

Moreover, as the administrative law judge permissibly credited the opinion of Dr. Chavda to find that claimant established the existence of legal pneumoconiosis, the administrative law judge rationally relied on his opinion, that claimant's totally disabling impairment is due, in part, to coal dust exposure, to find that claimant is totally disabled due to legal pneumoconiosis. *See* 20 C.F.R. §§718.201(a)(2), 718.204(c)(1); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997). As employer raises no other arguments pertaining to the administrative law judge's weighing of the medical opinion evidence pursuant to 20 C.F.R. §718.204(c), we affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis. Because claimant established each element of entitlement, we affirm the award of benefits. *Trent*, 11 BLR at 1-27.

Finally, we address employer's appeal of the administrative law judge's Supplemental Decision and Order awarding attorney's fees. Claimant's counsel, Brent

Yonts, submitted a fee petition to the administrative law judge, requesting a fee of $5,125.50, representing 34 and 1/6 hours of legal services at the rate of $150.00 per hour, plus an additional $3,632.94 in expenses. After considering employer's objections and claimant's counsel's response, the administrative law judge approved the hourly rate and all of the hours requested, but disallowed $12.75 of the requested expenses. Accordingly, the administrative law judge awarded a total fee of $8,745.59.

On appeal, employer contests all of the awarded expenses except for $59.09 awarded for travel expenses to the May 7, 2008 hearing.[16] 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*).

Employer initially asserts that the administrative law judge abused his discretion in ordering reimbursement to claimant's counsel for the costs of testing, reports, and depositions by medical experts who did not appear at the hearing. Employer's Supplemental Brief at 3-4. Employer further asserts that the administrative law judge erred in finding that the services provided by these physicians were necessary, and that the fees they charged were reasonable. Employer's Supplemental Brief at 4-6. We disagree.

Contrary to employer's assertion, Section 28(d) of the Longshore Act, 33 U.S.C. §928(d), as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a), permits the recovery of fees for medical experts who do not attend the hearing. *Zeigler Coal Co. v. Director, OWCP* [*Hawker*], 326 F.3d 894 (7th Cir. 2003),[17] *aff'g Hawker v. Zeigler*

[16] We affirm, as unchallenged on appeal, the administrative law judge's award of $5,125.50, representing 34 and 1/6 hours of legal services at the rate of $150.00 per hour. *See Skrack*, 6 BLR at 1-711.

[17] Although employer is correct in noting that case law from the United States Court of Appeals for the Seventh Circuit does not constitute binding precedent in this case, where claimant last worked within the jurisdiction of the Sixth Circuit, the standard of review of an administrative law judge's findings regarding attorney fee petitions, namely, whether the findings are arbitrary, capricious, or an abuse of discretion, is uniform throughout the circuits. *See B&G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 661, 24 BLR 2-106, 2-217 (6th Cir. 2008); *Westmoreland Coal Co. v. Cox*, F.3d , 2010 WL 1409418, at *10 (4th Cir. 2010); *Zeigler Coal Co. v. Director, OWCP* [*Hawker*], 326 F.3d 894 (7th Cir. 2003), *aff'g Hawker v. Zeigler Coal Co.*, 22 BLR 1-177 (2001); *accord Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998)(*en banc*); Employer's Supplemental Brief at 4. Therefore, we reject employer's contention that it should not be applied in this case.

Coal Co., 22 BLR 1-177 (2001). In this case, the administrative law judge specifically considered employer's objections and determined, as was within his discretion, that the services provided by claimant's medical experts were necessary to establish entitlement to benefits, and that the fees charged by the physicians were reasonable in light of the services they performed. *See* 20 C.F.R. §725.366(c); *Branham v. Eastern Associated Coal Corp.*, 19 BLR 1-1, 1-4 (1994); Supplemental Decision and Order at 2-3. Employer has not shown that the administrative law judge acted arbitrarily, capriciously, or abused his discretion, in finding that the requested charges were reasonable. *See* 20 C.F.R. §725.366; *Jones*, 21 BLR at 1-108; *Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316-17 (1984); Supplemental Decision and Order at 2-3. We therefore hold that the administrative law judge did not abuse his discretion in allowing reimbursement to claimant's counsel for these costs. *Picinich v. Lockheed Shipbuilding*, 23 BRBS 128 (1989).

Nor is there any merit to employer's contention that the administrative law judge erred in awarding claimant's counsel $37.44 for the cost of traveling to the October 31, 2006 hearing before Administrative Law Judge Pamela Lakes Wood. Employer objected to the travel time as unreasonable, as the hearing was continued because the parties were not properly served with the Director's exhibits. Employer asserts that it is not reasonable to shift the hearing costs to employer, when employer was not responsible for the continuance. Employer's Supplemental Brief at 6. Reasonable and necessary travel time and expenses are compensable. *See* 20 C.F.R. §§725.366(b), (c), 725.459(a); *Branham*, 19 BLR at 1-4; *Bradley v. Director, OWCP*, 4 BLR 1-241, 1-245 (1981). Considering employer's objection, the administrative law judge properly found that the test for compensability is whether the attorney, at the time work was performed, could reasonably regard it as necessary to establish claimant's entitlement. *Lanning*, 7 BLR at 1-316; Supplemental Decision and Order at 3. That the hearing was ultimately continued has no bearing on whether, at the time claimant's counsel traveled, he could reasonably regard the travel as necessary. *See Lanning*, 7 BLR at 1-316. Since employer has failed to establish an abuse of discretion in the administrative law judge's finding that the requested travel time was reasonable, the finding is affirmed.[18] *See Jones*, 21 BLR at 1-108.

Therefore, we affirm the fee award as within the administrative law judge's discretion. A fee award is not enforceable until the claim has been successfully

[18] Employer additionally argues the administrative law judge erred in awarding claimant's counsel reimbursement for the costs associated with traveling to medical testing and to meetings with claimant. Employer's Supplemental Brief at 7. Employer did not object to those costs below. Consequently, we will not consider employer's objection on appeal. *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989).

prosecuted and all appeals are exhausted. *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 n.9 (1995).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge