BRB No. 07-0124 BLA

O.R.H.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BLUE STAR COAL CORPORATION	)	
	)	DATE ISSUED: 10/30/2007
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 – Partial Award of Attorney Fees of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., for employer.

Sarah M. Hurley (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits and the Supplemental Decision and Order – Partial Award of Attorney Fees (05-BLA-5418) of Administrative Law Judge Richard T. Stansell-Gamm 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). Claimant filed this subsequent claim on January 8, 2004.[1] Director's Exhibit 6. In his Decision and Order – Awarding Benefits (Decision and Order) dated September 22, 2006, the administrative law judge determined that claimant's subsequent claim was timely filed. He also determined that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis, and therefore found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Weighing all of the record evidence on the merits, the administrative law judge found that claimant satisfied his burden of proving the existence of pneumoconiosis and total disability due to pneumoconiosis. Accordingly, benefits were awarded. The administrative law judge also issued a

[1] Claimant has filed multiple claims for benefits. He first applied for benefits with the Social Security Administration (SSA) on March 29, 1971, which claim was denied on December 1, 1973 because the miner was still working and was not considered to be totally disabled. Director's Exhibit 1. Claimant elected to have his denied SSA claim considered by the Department of Labor (DOL) following the amendments to the Act. On June 22, 1981, the DOL denied the claim for failure to establish the existence of pneumoconiosis and total disability. *Id.* On December 2, 1987, claimant filed a duplicate claim for benefits, which was also denied by Administrative Law Judge Frank J. Marcellino on February 7, 1992 on the grounds that claimant was not totally disabled. Director's Exhibit 2. The denial of benefits was affirmed by the Board on appeal, *[O.R.H]. v. Blue Star Coal Corp.*, BRB No. 92-1148 BLA (June 30, 1993) (unpub.). Claimant filed a third claim on September 11, 1995, which was denied by Administrative Law Judge Richard A. Morgan on August 14, 1997, Director's Exhibit 3. Judge Morgan found that while claimant suffered from pneumoconiosis, he failed to establish total disability and causation. Claimant appealed, and the denial of benefits was affirmed by the Board, *[O.R.H.]. v. Wellmore Coal Corp.*, BRB No. 97-1669 BLA (Sept. 2, 1998) (unpub.). Claimant subsequently filed an appeal with the United States Court of Appeals for the Fourth Circuit, but the appeal was later dismissed for failure to prosecute. Director's Exhibit 3. Claimant filed his fourth application for benefits on February 1, 2001. Director's Exhibit 4. Although the district director determined that claimant had a totally disabling respiratory impairment, benefits were denied on November 1, 2002 because the evidence was found insufficient to establish the existence of pneumoconiosis. *Id*. Claimant took no action with regard to the denial of his fourth claim until he filed the current subsequent claim on January 8, 2004. Director's Exhibit 6. The district director issued a Proposed Decision and Order awarding benefits on September 27, 2004. Director's Exhibit 33. Employer requested a hearing, which was held on July 26, 2005.

Supplemental Decision and Order – Partial Award of Attorney Fees (Supplemental Decision) on November 29, 2006, directing employer to pay claimant's counsel the amount of $6,115.00 for legal services rendered to claimant.

On appeal, employer contends that the administrative law judge erred in finding that claimant's subsequent claim was timely filed pursuant to 20 C.F.R. §725.308, that he erred in failing to apply the proper legal standard under Section 725.309, and that he erred in finding that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer's Brief in Support of Petition for Review (Employer's Brief) at 8. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief, urging the Board to reject employer's arguments with regard to the timeliness of the claim. Employer has filed a brief in reply to the Director's response brief.

Additionally, employer appeals the administrative law judge's award of attorney fees. Employer asserts that the hourly rate approved by the administrative law judge is excessive, and that he erred by failing to disallow time entries that occurred while the case was before the district director. Employer's Brief in Support of Petition for Review Relating to Supplemental Decision and Order – Partial Award of Attorney Fees (Employer's Brief on Attorney Fees) at 3-7. Claimant responds, urging affirmance of the award of attorney fees.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Timeliness of the Subsequent Claim:

Initially, we address employer's contention that the administrative law judge erred in finding that claimant's January 8, 2004 subsequent claim was timely filed. Employer's Brief at 8-14. Section 422(f) of the Act, 30 U.S.C. §932(f), and its implementing regulation at 20 C.F.R. §725.308(a), provide that a claim for benefits must be filed within three years of a medical determination of total disability due to pneumoconiosis which has been communicated to the miner. The regulation at Section 725.308(c) provides a rebuttable presumption that every claim for benefits filed under the Act is timely filed. 20 C.F.R. §725.308(c). In *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-

288 (6th Cir. 2001), the United States Court of Appeals for the Sixth Circuit[2] stated that it is "employer's burden to rebut the presumption of timeliness by showing that a medical determination satisfying the statutory definition was communicated to [the claimant]" more than three years prior to the filing of his/her claim. *Kirk*, 264 F.3d at 607, 22 BLR at 2-296.

In this case, the administrative law judge determined that the Section 725.308 presumption of timeliness had not been rebutted, and therefore that claimant's subsequent claim was timely filed. The administrative law judge specifically stated:

> Since [claimant] filed his first claim for black lung disability benefits over 35 years ago, several physicians have concluded that [claimant] either had impaired lung function or should no longer work as a coal miner due to the presence of pneumoconiosis in his lungs. Due to several factors, either separate or combined, none of these physicians' statements satisfy the statute of limitations trigger event – the communication to [claimant] of a determination of total disability due to pneumoconiosis based on a reasoned medical opinion.

Decision and Order at 8.

Employer asserts that the administrative law judge failed to offer valid reasons for finding this claim to be timely filed. We disagree. The administrative law judge properly considered the evidence developed in conjunction with claimant's prior claims, focusing on the reports of Drs. Modi, Sutherland, Forehand and Robinette. Decision and Order at 5. As noted by the administrative law judge, Dr. Modi examined claimant on January 9, 1987 and diagnosed coal workers' pneumoconiosis and chronic obstructive pulmonary disease (COPD). *Id*. Dr. Modi noted that claimant struggled with back pain, and that he could no longer crawl, squat or lift heavy objects. *Id*. Dr. Modi advised against further exposure to coal dust, and concluded that claimant was totally disabled for work. *Id*. Although claimant testified at the hearing that Dr. Modi was the first physician to tell him he was totally disabled, Hearing Transcript at 34, the administrative law judge properly found that Dr. Modi's opinion did not address whether claimant was totally disabled from a respiratory or pulmonary impairment. *Id*.

Employer challenges the administrative law judge's finding with respect to Dr. Modi, asserting that it was not necessary for Dr. Modi to specifically address claimant's

[2] Because the miner's most recent coal mine employment occurred in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

disability from a respiratory standpoint. Employer's Brief at 10. We disagree. Section 718.204(a), specifically provides that a "nonpulmonary or nonrespiratory condition or disease, which causes an independent disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(a). Because the administrative law judge correctly found that Dr. Modi's report suggests that claimant was disabled due to a back condition, and the doctor "did not also specifically attribute [claimant's] physical limits to any pulmonary condition or impairment[,]" Decision and Order at 5, we affirm the administrative law judge's finding that Dr. Modi's opinion is insufficient to trigger the Section 725.308 statute of limitations. *Kirk*, 264 F.3d at 607, 22 BLR at 2-298, *Brigance v. Peabody Coal Co.*, 23 BLR 1-170, 1-175 (2006) (*en banc*); *Sturgill v. Bell County Coal Corp.*, 23 BLR 1-160, 1-166 (2006)(*en banc*) (McGranery, J., concurring in part and dissenting in part); *Daugherty v. Johns Creek Elkhorn Coal Corp.*, 18 BLR 1-95, 1-99 (1993).

With respect to Dr. Sutherland, the record reflects that he wrote letters dated May 16, 1996 and January 31, 1997, addressed to claimant's counsel, which diagnosed that claimant was totally disabled due to pneumoconiosis. The administrative law judge gave two reasons for finding Dr. Sutherland's opinion insufficient to trigger the statute of limitations. Decision and Order at 6. First, he noted that there was no evidence that Dr. Sutherland communicated his diagnosis to claimant. *Id*. Second, the administrative law judge did not consider Dr. Sutherland's opinion to be reasoned. *Id*. Although employer contends that "the fact that Dr. Sutherland's opinion was not credible does not stop it from triggering the three year statute," employer ignores the language of *Kirk*. In defining what constitutes a medical determination that is sufficient to start the running of the statute of limitations, the Sixth Circuit court, in *Kirk*, specifically stated that the statute relies on the "trigger of the reasoned opinion of a medical professional." *Kirk*, 264 F.3d at 2-298; 22 BLR at 2-298; *see also Brigance*, 23 BLR at 1-175. Thus, in accordance with dictates of *Kirk*, the administrative law judge properly took into consideration whether Dr. Sutherland's opinion, that claimant was totally disabled due to pneumoconiosis, was reasoned and documented. In so doing, the administrative law judge permissibly determined that, "besides Dr. Sutherland's terse conclusions in his correspondence to [claimant's] counsel, no record of his treatment of [claimant] has been placed into the record." Decision and Order at 6. Thus, because the administrative law judge was unable to ascertain from the record whether Dr. Sutherland's opinion constituted a reasoned medical determination of total disability due to pneumoconiosis, we affirm his finding that Dr. Sutherland's opinion was insufficient to trigger the statute of limitations. Moreover, as discussed below, we affirm his finding that Dr. Sutherland's opinion was not communicated to claimant.

The administrative law judge also determined that, because the medical opinions of Drs. Sutherland, Forehand and Robinette, diagnosing total disability due to pneumoconiosis, were not *communicated* to claimant, employer failed to rebut the

presumption based on those opinions. In challenging the administrative law judge's finding,[3] employer maintains that the plain language of the statute does not require that the medical determination be communicated to the miner. Employer also asserts that the reports of Drs. Sutherland, Forehand and Robinette, diagnosing total disability due to pneumoconiosis, were "communicated" to claimant by virtue of the fact that he is party to this claim. Employer's Brief at 13. Employer argues that because claimant appeared *pro se*, at certain times during the litigation of his prior claims, he would have been "served directly with complete copies of the administrative record by the Department of Labor on more than one occasion." Employer's Brief at 12.

These arguments have no merit. Contrary to employer's assertion, the administrative law judge did not err by refusing to impute knowledge of the contents of the medical reports of Drs. Sutherland, Forehand and Robinette to claimant simply because the reports were made a part of the record in his prior claim or were sent to his attorney. The Board has held that a medical report must be provided directly to claimant to commence the Act's limitation period, *Daughtery*, 18 BLR at 1-99, and therefore, information possessed by claimant's attorney does not constitute communication to claimant.[4] Thus, we affirm the administrative law judge's finding that the opinions of

[3] The administrative law judge acknowledged that Dr. Forehand prepared a report on October 3, 1995, stating that claimant was totally disabled due to pneumoconiosis, and that Dr. Robinette prepared a report on March 27, 1997, diagnosing total disability due to pneumoconiosis. Decision and Order – Awarding Benefits at 7. Although he considered these opinions to be reasoned determinations of total disability due to pneumoconiosis, he found that the opinions failed to trigger the statute of limitations because they were not communicated to claimant. *Id*.

[4] We reject employer's contention that claimant's hand-written statement on his September 11, 1995 application for benefits proves that a medical determination of total disability due to pneumoconiosis was communicated to claimant. Employer's Brief in Support of Petition for Review (Employer's Brief) at 13. Claimant wrote on his September 11, 1995 application: "Physician disabled me because of black lung [and] dust . . . . According to medical reports . . . I believe I have the third state [sic] of black lung." Director's Exhibit 3. Contrary to employer's assertion, the administrative law judge specifically rejected the two medical reports, predating claimant's 1995 application, that employer cited as being sufficient to trigger the statute of limitations. The administrative law judge determined that Dr. Modi's opinion, because it failed to address the extent of claimant's respiratory impairment, did not constitute a medical determination of total disability due to pneumoconiosis. Decision and Order at 5. He also determined that Dr. Robinette's January 31, 1991 opinion, diagnosing coal workers' pneumoconiosis and a "significant respiratory impairment" was not a "reasoned" medical determination of total disability due to pneumoconiosis. Decision and Order at 7. Based

Drs. Sutherland, Forehand and Robinette were insufficient to trigger the statute of limitations as he permissibly found that their diagnoses of total disability had not been communicated to claimant. We therefore affirm the administrative law judge's finding that employer failed to rebut the presumption at Section 725.308 that claimant timely filed his January 8, 2004 claim for benefits.

Subsequent Claim/Change in an Applicable Condition of Entitlement:

Employer asserts that, because claimant's prior claims were denied for his failure to establish the existence of pneumoconiosis, the doctrine of *res judicata* must apply to preclude claimant from demonstrating that he now suffers from the disease. Employer's Brief at 15. Citing *Kirk*, employer contends that the administrative law judge erred in failing to consider whether the new evidence showed a qualitative change from the previously submitted evidence, prior to finding that claimant had satisfied his burden of proof under Section 725.309. *Id*. Employer maintains that "it is legally impossible for [claimant] to establish a change in his condition, because Dr. Rasmussen's latest opinion [diagnosing that claimant has pneumoconiosis] is essentially the same as his opinion in the prior denied claim." Employer's Brief at 17-18.

Employer's arguments are without merit. In *Kirk*, the court addressed the standard for proving a material change in conditions under the prior regulation at 20 C.F.R. §725.309 (2000). Because claimant's subsequent claim was filed under the revised regulations, he is no longer required to establish a material change in condition; rather, claimant must show, by way of new evidence, that one of the applicable conditions of entitlement has changed since the denial of his prior claim.[5] *See* 20 C.F.R. §725.309(d)(2), (3); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) (*en banc*). Claimant's prior claim was denied because he failed to establish that he had pneumoconiosis. Consequently, claimant had to submit new evidence establishing the

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on the administrative law judge's findings, these opinions are not sufficient to rebut the presumption, regardless of whether they were communicated to claimant.

[5] If a miner files an application for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2).

existence of pneumoconiosis in order to demonstrate a change in an applicable condition of entitlement at Section 725.309.

Under 20 C.F.R. §718.202(a)(4), the administrative law judge determined that the newly submitted medical opinion evidence was sufficient to establish that claimant suffered from legal pneumoconiosis, and thus, he found that claimant had demonstrated a change in an applicable condition of entitlement pursuant to Section 725.309.[6] With respect to the administrative law judge's finding of legal pneumoconiosis, employer asserts that the administrative law judge failed to provide a valid reason for rejecting Dr. Fino's opinion, that claimant's chronic obstructive pulmonary disease (COPD) was not due to coal dust exposure. Employer's Brief at 19. Employer also asserts that "[a]t best, the evidence is equally divided on the issue of "legal' pneumoconiosis; therefore, the administrative law judge erred in concluding that claimant satisfied his burden of proof under Section 718.202(a)(4)." *Id*.

Employer's assertions of error have no merit. As noted by the administrative law judge, the record contains two new medical opinions by Dr. Fino and Dr. Rasmussen. These doctors disagree as to the etiology of claimant's COPD. In weighing the conflicting medical opinions, the administrative law judge determined that Dr. Fino's causation analysis did not fully address the definition of legal pneumoconiosis pursuant to 20 C.F.R. §718.201. The administrative law judge stated:

> After acknowledging [claimant's] worsening pulmonary condition and its rapid onslaught, Dr. Fino eliminates coal mine dust exposure as a possible cause of [claimant's] obstruction because the decline in pulmonary condition has occurred long after [claimant] left coal mining in 1986. Such a rationale seems to conflict with the recognition in 20 C.F.R. §718.201(c) that pneumoconiosis "is recognized as a latent and progressive disease which may first become detectable only after cessation of coal mine dust exposure." As Employer's counsel stressed in his closing brief, the regulatory recognition does not produce a presumption of latency. However, Dr. Fino's elimination of coal dust as a possible etiology is based

[6] We affirm, as unchallenged on appeal, the administrative law judge's finding that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and that claimant was unable to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3), since there is no biopsy evidence for pneumoconiosis, and claimant is not eligible for any of the presumptions available to establish the existence of pneumoconiosis. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

> primarily on [claimant's] development of a significant pulmonary impairment *long after* the cessation of his coal mine employment. Thus, contrary to the regulatory recognition of latency, Dr. Fino appears to maintain that a coal mine dust-related significant obstructive pulmonary impairment can occur only *near* the cessation of exposure to coal mine dust [emphasis added].

Decision and Order at 14.

Employer contends that the administrative law judge erred in rejecting Dr. Fino's opinion because he ignored that Dr. Fino eliminated coal dust exposure as a possible etiology of claimant's COPD based on the "rapid" development of claimant's pulmonary impairment since 2001. Employer's Brief at 3. We disagree. Although Dr. Fino expressed concern that claimant's lung function had rapidly deteriorated to the point of total respiratory disability from 2001 to 2004, he also specifically stated that "the occurrence of this reduction in lung function over time *long after he left the coal mines* is not consistent with a coal mine due-related condition [emphasis added]." *Id*. In light of Dr. Fino's statement, the administrative law judge permissibly questioned whether his opinion reflected a personal view of pneumoconiosis that was at odds with the well-recognized position of the Department of Labor, that coal dust may be both latent and progressive in nature. *See* 20 C.F.R. §718.201(c); *National Mining Ass'n v. Dep't of Labor*, 292 F.3d 849 (D.C. Cir. 2002) (NMA); *United States Steel Mining Co. v. Director, OWCP* [*Jones*], 386 F.3d 977, 23 BLR 2-213 (11th Cir. 2004); *Coleman v. Director, OWCP*, 345 F.3d 861, 23 BLR 2-1 (11th Cir. 2003); *Robbins v. Jim Walter Resources, Inc.*, 898 F.2d. 1478, 13 BLR 2-400 (11th Cir. 1990); *see also* 65 Fed. Reg. at 79,937-79,945, 79,968-79,977; *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004) (Decision and Order on Reconsideration *en banc*); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004) (Decision and Order on Reconsideration *en banc*) (McGranery, J., concurring and dissenting).

In contrast to Dr. Fino, the administrative law judge permissibly assigned controlling weight to Dr. Rasmussen's opinion, that claimant's COPD was due, in part to coal dust exposure,[7] because he found that it was better supported by the objective

[7] Employer argues that it was illogical for the administrative law judge to find Dr. Rasmussen's contrary opinion, that claimant's chronic obstructive pulmonary disease was due to both smoking and coal dust exposure, to be documented and reasoned, when the administrative law judge specifically stated that he rejected Dr. Rasmussen's diagnosis of clinical pneumoconiosis, as being based solely on a positive x-ray. Employer's argument has no merit. Clinical pneumoconiosis, as diagnosed by x-ray, is only one form of pneumoconiosis that claimant may establish under 20 C.F.R. §718.202(a)(4). Claimant may also establish legal pneumoconiosis, which encompasses a broader range of lung

evidence, including claimant's more recent qualifying arterial blood gas studies, which showed significant hypoxemia with exercise. Decision and Order at 15. Noting that Dr. Rasmussen provided a reasoned and documented opinion, "integrating the results of the physical examinations, pulmonary function tests, and exercise arterial blood gas study[,]" Decision and Order at 15, the administrative law judge was persuaded by Dr. Rasmussen's explanation of how "the combination of a pulmonary obstruction, reduced diffusion capacity, and significant blood oxygenation impairment upon exercise established coal mine dust exposure as a principal cause of [claimant's] pulmonary impairment."[8] *Id.*

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark*, 12 BLR at 1-149; *Anderson*, 12 BLR at 1-111. Consequently, we affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis based on the newly submitted evidence at 20 C.F.R. §718.202(a)(4).[9] *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir.

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conditions that include "any chronic dust disease or impairment and its sequelae arising out of coal mine employment." *see* 20 C.F.R. §718.201.

[8] Because we affirm the administrative law judge's finding of legal pneumoconiosis pursuant to 20 C.F.R.§718.202(a)(4), it is not necessary that we further address employer's argument that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis based on the x-ray evidence at 20 C.F.R. §718.202(a)(1) or that he erred in finding that claimant established the existence of clinical pneumoconiosis under Section 718.202(a)(4).

[9] Citing *Island Creek Coal Co. v. Compton,* 211 F. 3d 203, 22 BLR 2-162 (4th Cir. 2000), employer asserts that the administrative law judge erred by not weighing "new [negative] x-ray evidence together with the new medical opinion evidence" prior to finding that claimant had satisfied his burden of proving the existence of pneumoconiosis. Employer's Brief at 18-19. Contrary to employer's contention, because we apply the law of the United States Court of Appeals for the Sixth Circuit to this case, we conclude that the administrative law judge was not required to perform a *Compton* analysis, and weigh together all of the contrary probative evidence pursuant to 20 C.F.R. §718.202(a). Rather, the administrative law judge properly recognized that 20 C.F.R. §718.202(a) sets forth four distinct and alternative methods for establishing the existence of the disease. 20 C.F.R. §718.202(a); *see generally Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985).

2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Thus, we affirm as supported by substantial evidence, the administrative law judge's finding that claimant established a change in an applicable condition of entitlement pursuant to Section 718.309.

Merits of Entitlement

After finding that claimant had demonstrated a change in an applicable condition of entitlement pursuant to Section 725.309, the administrative law judge considered all of the record evidence and awarded benefits because he found that claimant was totally disabled due to pneumoconiosis. Employer challenges the administrative law judge's finding of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), alleging that the administrative law judge erred in applying the later evidence rule to credit Dr. Rasmussen's opinion, that claimant suffers from a respiratory condition due, at least in part, to coal dust exposure. Employer's Brief at 24-28.

Employer's argument is without merit. Under Section 718.202(a)(4), the administrative law judge weighed the medical opinion evidence from the prior claims,[10] against Dr. Rasmussen's opinion as to the etiology of claimant's COPD. Although the prior physicians had not attributed claimant's COPD to coal dust exposure, the

[10] The administrative law judge weighed eight medical opinions, developed in conjunction with the prior claims, that he considered to be relevant to whether claimant suffered from legal pneumoconiosis. Dr. Lane examined claimant on April 13, 1987 and attributed claimant's chronic obstructive pulmonary disease (COPD) to smoking, in light of the normal blood gas study results obtained during his evaluation. Director's Exhibit 2. In June 1990, after performing a record review, Dr. Modi opined that the improvement in claimant's pulmonary function study results also pointed to smoking as the cause of his respiratory impairment. Director's Exhibit 3. Dr. Broudy examined claimant on May 6, 1987, noting that the arterial blood gas study results showed borderline hypoxemia at rest, and that claimant had mild obstruction based on the pulmonary function study results. Director's Exhibit 2. Dr. Broudy diagnosed coal workers' pneumoconiosis and a mild obstruction due to smoking. *Id.* Dr. Vuskovich examination claimant on November 18, 1995 and diagnosed COPD due to smoking, based on the results of pulmonary function testing. Director's Exhibit 3. Dr. Chandler examined claimant on June 13, 1996 and diagnosed COPD due to smoking. Dr. Branscomb examined claimant on September 16, 1996 and opined that he had a mild obstructive defect due to smoking. Director's Exhibit 3. Dr. Endres-Bercher examined claimant on April 10, 1991 and diagnosed a mild impairment due to smoking. Director's Exhibit 2. Dr. Fino examined claimant on August 20, 1996 and on August 11, 2001. Dr. Fino opined that claimant's obstruction was consistent with smoking and emphysema rather than coal dust exposure. Director's Exhibits 2, 3, 4.

administrative law judge determined that since Dr. Rasmussen had the benefit of reviewing claimant's most recent objective testing in reaching his causation finding, his opinion, that claimant's respiratory condition was due to coal dust exposure, was more probative, particularly given that claimant's respiratory condition had deteriorated since the prior evaluations. This was rational. *See Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). Moreover, since the administrative law judge had already discussed the bases for his decision to assign Dr. Fino's opinion less weight, the administrative law judge permissibly credited Dr. Rasmussen's opinion over that of Dr. Fino, in finding that claimant suffered from legal pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge specifically concluded:

> In assessing the probative value of the respective opinions on the etiology [of claimant's] pulmonary impairment, the assessments of all but two doctors have diminished probative value due to the dated nature of their underlying documentation. Specifically, in 1987, when Dr. Lane and Dr. Broudy found no causation link between [claimant's] pulmonary obstruction and his coal mine employment, the severity of [claimant's] pulmonary obstructive defect was much less than present and his blood oxygenation was near normal. Similarly, between 1991 and 1997, Dr. Endes-Bercher, Dr. Forehand, Dr. Chandler, Dr. Vuskovich, and Dr. Branscomb were obviously unaware of the nature and extent of [claimant's] pulmonary problems in 2004 and 2005. Of the two physicians who [were] aware of [claimant's] present pulmonary condition, I have already determined that Dr. Rasmussen's determination of legal pneumoconiosis is more probative and outweighs Dr. Fino's contrary conclusion. Accordingly, in light of the diminished probative value of the earlier medical opinions and the greater probative weight of Dr. Rasmussen's diagnosis of legal pneumoconiosis, [claimant] is able to also establish the presence of legal pneumoconiosis.

Decision and Order at 29. Because the administrative law judge rationally explained the basis for his credibility determinations, we affirm his finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Employer also challenges the administrative law judge's finding, pursuant to 20 C.F.R. §718.204(c), that claimant's respiratory disability is due, in part, to coal dust exposure. Employer specifically asserts that the administrative law judge erred in assigning determinative weight to Dr. Rasmussen's opinion since he "admitted that 'there was no way to distinguish between the effects of smoking and coal dust exposure.'" Employer's Brief at 2, citing Claimant's Exhibit 1. This argument is without merit. Contrary to employer's assertion, a doctor's opinion, stating that pneumoconiosis was one of two causes of claimant's totally disabling respiratory condition, is sufficient to

establish that pneumoconiosis is a substantially contributing cause of claimant's total respiratory disability. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18-19 (2003). Furthermore, as noted by the administrative law judge:

> While some studies [indicate that] no distinction can be made on the effects of these two pulmonary hazards [smoking and coal dust exposure], Dr. Rasmussen believed [claimant's] exposure to coal mine dust was a significant cause of his pulmonary impairment due to the following three factors: a) pulmonary obstruction; b) reduced diffusion capacity; and c) significant impairment of oxygen upon exercise.

Decision and Order at 13. Because Dr. Rasmussen explained, to the satisfaction of the administrative law judge, why he attributed claimant's respiratory impairment to coal dust exposure, and employer cites no other error with respect to the administrative law judge's determination under Section 718.204(c), we affirm the administrative law judge's finding that claimant satisfied his burden to establish disability causation.

Essentially, in this case, employer is asking the Board to overturn the administrative law judge's credibility determinations; however, the Sixth Circuit Court has categorically emphasized that it is for the administrative law judge as fact-finder to "decide whether a physician's report is 'sufficiently reasoned,' because such a determination is 'essentially a credibility matter'." *Stephens*, 298 F.3d at 522, 22 BLR at 2-512, *citing Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). In *Stephens*, the Sixth Circuit court stated that it deferred to the administrative law judge's authority on the findings of fact. *Stephens*, 298 F.3d at 836, 22 BLR at 2-513; *see Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Because the administrative law judge rationally explained why he accorded dispositive weight to Dr. Rasmussen's opinion, that claimant is totally disabled due to pneumoconiosis, we affirm the administrative law judge's determination under Section 718.204(c). *See Kirk*, 264 F.3d at 607, 22 BLR at 2-296. Thus, we affirm the administrative law judge's finding that claimant established his entitlement to benefits.

Award of Attorney Fees

Lastly, employer challenges the administrative law judge's Supplemental Decision and Order – Partial Award of Attorney's Fees in the amount of $6,115.00. The standard of review for the Board in analyzing petitioner's arguments on appeal of an attorney fee determination is whether the determination is arbitrary, capricious, or an abuse of discretion. *See Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980). All fee petitions must be filed with, and approved by, the adjudicating officer or tribunal before whom the services were

performed. 20 C.F.R. §§725.365, 725.366(a); *Helmick v. Director, OWCP*, 9 BLR 1-161 (1986); *Vigil v. Director, OWCP*, 8 BLR 1-99 (1985). The adjudicating officer must discuss and apply the regulatory criteria at 20 C.F.R. §725.366 in determining the fee award due, if any. *See Lenig v. Director, OWCP*, 9 BLR 1-147 (1986).

Claimant's counsel submitted a fee petition to the administrative law judge, seeking approval of $8,795.00 in attorney fees, representing 20.5 hours of legal work performed by Mr. Wolfe at the rate of $400.00 per hour, 1.50 hours of legal work by Mr. Belcher, at the rate of $250.00 per hour, and 4.0 hours of work performed by a legal assistant at the rate of $100.00 per hour. After considering employer's objections, the administrative law judge reduced Mr. Wolfe's hourly rate to $300.00, disallowed all of Mr. Belcher's services, and disallowed 1.75 hours spent by the legal assistant at the hourly rate of $100.00. The administrative law judge thus approved 19.80 hours for Mr. Wolfe at the rate of $300.00 per hour ($5,940.00) and 1.75 hours for the legal assistant at the rate of $100.00 per hour ($175.00). The administrative law judge approved a total of $6,115.00 in attorney fees to claimant's counsel.

Employer contends that the administrative law judge erred in approving a hourly rate of $300.00 for Mr. Wolfe and an hourly rate of $100.00 for services of the legal assistant on the ground that they are excessive. Contrary to employer's contention, the administrative law judge noted that, in support of his request for an hourly rate of $400.00, Mr. Wolfe attached an attorney fee survey as of January 1, 2002 for the South Atlantic Region. Based on this survey, the administrative law judge determined that Mr. Wolfe's "requested hourly fee of $400.00 well exceeds the average rate of $289 and is also above the upper quartile of $325.00." Supplemental Decision at 2. Taking into consideration that Mr. Wolfe was "highly experienced" in the area of federal black lung, and that his office was one of the few in the area that accepted these types of cases, the administrative law judge determined an hourly rate of $300.00 was appropriate for his level of expertise and years of experience. Supplemental Decision at 2; s*ee* 20 C.F.R. §725.366(b); *Pritt v. Director, OWCP*, 9 BLR 1-159 (1986). Because employer has failed to demonstrate why the administrative law judge's ruling should be considered arbitrary, capricious or an abuse of discretion, *Whitaker*, 9 BLR at 1-217; *Abbott*, 13 BLR at 1-16, and since his determination to reduce Mr. Wolfe's hourly rate to $300.00 in this case appears reasonable, it is affirmed.

Additionally, we reject employer's general assertion that the administrative law judge erred in approving an hourly rate of $100 for the services of the legal assistant. By merely asserting that an hourly rate of $75.00 for the services of a legal assistant would be more appropriate in this case, employer fails to demonstrate any error by the administrative law judge.[11] Therefore, employer has failed to meet its burden of proving

[11] Although employer provided copies of cases, wherein Mr. Wolfe and his legal assistant were awarded a lower hourly rate than that approved by this administrative law

that the administrative law judge abused his discretion in approving the $100.00 hourly rate. *See generally Lanning v. Director, OWCP*, 7 BLR 1-314 (1984).

Lastly, employer asserts that the administrative law judge erred in approving fees for work performed by claimant's counsel prior to December 28, 2004, when the case was transferred by the district director to the Office of Administrative Law Judges. We disagree. The administrative law judge properly noted that the fee petition included seven time entries between October 9, 2004 through November 23, 2004. With the exception of .25 hours charge by Mr. Wolfe on November 17, 2004, for advising claimant about the award of interim benefits by the district director, the administrative law judge permissibly determined that the remaining time entries were reasonably integral to the preparation for the hearing, and therefore, that they were allowable as relevant to the proceedings before the administrative law judge. *See Matthews v. Director, OWCP*, 9 BLR 1-184 (1986). Because the administrative law judge's approval of these time entries was neither capricious, an abuse of discretion, nor contrary to applicable law, his findings are affirmed. Consequently we affirm the administrative law judge's award of $6,115.00 in attorney fees. *See Abbott*, 13 BLR at 1-16.

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judge, those awards were based on the facts and circumstances of those particular cases and are not binding for purposes of this case. *See Whitaker v. Director, OWCP*, 9 BLR 1-216 (1986).

Accordingly, the Decision and Order – Award of Benefits and the Supplemental Decision and Order – Partial Award of Attorney Fees is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge