BRB Nos. 07-0437 BLA
and 07-0437 BLA-S

B.C. (on behalf of J.C.)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HORN CONSTRUCTION COMPANY	)	
	)	
Employer-Petitioner	)	DATE ISSUED: 08/27/2008
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Living Miner's Benefits and Attorney Fee Order of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

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

Gregory J. Fischer (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Living Miner's Benefits and Attorney Fee Order (05-BLA-0060) of Administrative Law Judge Thomas M. Burke 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). This claim

is currently being considered pursuant to the miner's second request for modification.[1] The administrative law judge credited the miner with twenty-three years of coal mine employment[2] based on the parties' stipulation. The administrative law judge found that the weight of the new evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, and that claimant was therefore entitled to the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). Accordingly, the administrative law judge awarded benefits.[3] In an Attorney Fee Order issued on July 18, 2007, the administrative law judge directed employer to pay claimant's counsel a fee of $8,635.00 for legal services rendered to claimant while the case was pending before the administrative law judge.

On appeal, employer challenges the administrative law judge's finding that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Claimant responds, urging the Board to

[1] The miner, J.C., filed the instant claim for benefits on May 16, 1997. On February 25, 1998, an administrative law judge denied the claim because the evidence failed to demonstrate a totally disabling respiratory impairment. Director's Exhibit 41. The Board affirmed the denial of benefits on March 23, 1999. Director's Exhibit 45. On January 28, 2000, the miner requested modification. Director's Exhibit 46. An administrative law judge denied the request on October 5, 2001. Director's Exhibit 71. The Board affirmed the denial of benefits on July 24, 2002. Director's Exhibit 76. On July 15, 2003, the miner filed the instant request for modification by filing new x-ray evidence indicating the presence of complicated pneumoconiosis. Director's Exhibit 77. While the modification request was pending before the administrative law judge, the miner died of a gunshot wound to the head on January 11, 2004. Director's Exhibit 85. An autopsy was conducted. The miner's widow now pursues his claim. *Id*.

[2] The law of the United States Court of Appeals for the Fourth Circuit is applicable as the miner was last employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc).*

[3] Although the administrative law judge did not make an express finding of a change in conditions pursuant to 20 C.F.R. §725.310 (2000), he found that the onset date of the award of benefits was established by the positive interpretations of the February 2003 x-ray that were submitted in the miner's second request for modification, and which represented the earliest evidence of complicated pneumoconiosis. Decision and Order at 14-15. Thus, implicit in the administrative law judge's analysis was a determination that a change in conditions was established. *See* 20 C.F.R. §725.503(d)(2). No party suggests otherwise on appeal.

affirm the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a response brief in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989).

Section 725.310 (2000) provides that a party may request modification of an award or denial of benefits on the grounds that a change in conditions has occurred or because a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310(a) (2000). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that the administrative law judge has the authority to reconsider all the evidence for any mistake of fact. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). In determining whether modification is based on a change in conditions, an administrative law judge must perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). As this claim was previously denied for failure to establish the presence of a totally disabling respiratory or pulmonary impairment, the administrative law judge properly considered whether the new evidence established this element of entitlement.

Section 411(c)(3) of the Act, implemented by Section 718.304 of the regulations, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (A) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, is a condition that would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The Fourth Circuit court has held that, "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under

prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999). In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Gollie v. Elkay Mining Corp*., 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33-34 (1991)(*en banc*). In this case, the newly submitted evidence consisted of x-ray interpretations, autopsy evidence, and medical opinion evidence.

Relevant to 20 C.F.R. §718.304(a), the administrative law judge considered four readings of two new x-rays. Drs. Ahmed and Barrett, Board-certified radiologists and B readers, read the February 26, 2003 x-ray as positive for Category A large opacities of complicated pneumoconiosis. Director's Exhibits 77, 78. Drs. Castle and Fino, B readers, read the October 8, 2003 x-ray as negative for complicated pneumoconiosis. Employer's Exhibits 2, 3. In light of the positive x-ray interpretations of the most highly-qualified readers, the administrative law judge determined that the weight of the new x-ray evidence supported a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(a). Decision and Order at 6. Employer asserts that the administrative law judge failed to provide a rational basis for rejecting the more recent x-ray readings of Drs. Fino and Castle over the contrary readings of Drs. Ahmed and Barrett. Employer's Brief at 9. Contrary to employer's assertion, however, the administrative law judge reasonably determined that the two new x-rays were contemporaneous because they were taken less than eight months apart. Decision and Order at 6; *see Aimone v. Morrison Knudson Co*., 8 BLR 1-32, 1-34 (1985)(holding that it was proper to find that eight months is not a significant period of time separating x-ray studies). The administrative law judge additionally explained that the positive readings of complicated pneumoconiosis by Drs. Ahmed and Barrett were entitled to greater weight than the contrary interpretations offered by Drs. Castle and Fino, because "Drs. Ahmed and Barrett possess superior qualifications on this record." Decision and Order at 6; *see Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003). Substantial evidence supports these permissible findings. Consequently, we reject employer's assertion of error and affirm the administrative law judge's finding that the x-ray evidence supported a finding of complicated pneumoconiosis at Section 718.304(a).

Relevant to 20 C.F.R. §718.304(b), the administrative law judge considered an autopsy protocol, conducted by Dr. Wanger, and the reports of Drs. Perper and Bush. Dr. Wanger diagnosed "moderate pneumoconiosis with retracted anthracotic scars."

Employer's Exhibit 1. Dr. Perper reviewed the autopsy protocol and a single autopsy slide, and observed a fibro-anthracotic mass measuring more than one centimeter in one dimension. Director's Exhibit 95. Based on this evidence, Dr. Perper diagnosed complicated pneumoconiosis, explaining that the lesion was fully equivalent with a one-centimeter radiological opacity or larger because:

> The further away in the body the anatomic lesion is away from the film plate (on which the patient lies) the larger the image projected on the film becomes. For this reason an anatomic-pathologic lesion observed on direct examination can only be its size or larger on a radiological film.

Director's Exhibit 95. Dr. Bush offered a contrary opinion, explaining that the largest fibrotic lesion present measured "1.0 x 0.5 cm," and because the lesion was less than one centimeter in one dimension, it would not appear as one centimeter or larger on x-ray. Employer's Exhibits 4, 5.

Considering this evidence, the administrative law judge determined that Dr. Wanger's report was not probative of the existence of complicated pneumoconiosis, because it "[did] not contain sufficient observations to support, or exclude, a finding of complicated pneumoconiosis under §718.304(b) of the regulations." Decision and Order at 7. Further, the administrative law judge credited Dr. Perper's diagnosis of complicated pneumoconiosis over Dr. Bush's contrary opinion, because Dr. Perper's qualifications were superior to those of Dr. Bush, and because Dr. Perper's opinion was better supported by the positive x-ray evidence of large opacities. Decision and Order at 12-14. Thus, the administrative law judge found that the weight of the autopsy evidence supported a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(b).

Employer challenges the administrative law judge's findings, initially asserting that, in discounting Dr. Wanger's autopsy protocol, the administrative law judge impermissibly substituted his opinion for that of a medical expert. Employer's Brief at 7. Specifically, employer states that, because Dr. Wanger acknowledged the presence of pneumoconiosis in the miner's lung tissue, his silence on the issue of complicated pneumoconiosis "cannot be considered as anything but an opinion that complicated pneumoconiosis is not present in this case." *Id.* We disagree. The administrative law judge had to determine whether Dr. Wanger diagnosed "massive lesions." 20 C.F.R. §718.304(b). Further, the administrative law judge accurately summarized Dr. Bush's opinion that Dr. Wanger's autopsy findings were "medically inadequate to evaluate for the presence or absence of complicated disease," because Dr. Wanger did not indicate the dimensions of any observed pneumoconiotic nodules. Decision and Order at 10; Employer's Exhibit 4. Contrary to employer's assertion, therefore, the administrative law judge permissibly found that Dr. Wanger's report failed to provide a basis for determining whether the miner suffered from massive lesions as outlined by the criteria

of 20 C.F.R. §718.304(b). *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100. Moreover, the administrative law judge relied on the pathologists' relative qualifications to resolve the autopsy evidence, and Dr. Wanger's qualifications are not of record. We therefore reject employer's allegation that the administrative law judge erred in his analysis of Dr. Wanger's report.

Employer additionally asserts that the administrative law judge erred in crediting Dr. Perper's opinion over the contrary opinion of Dr. Bush. Specifically, employer alleges that Dr. Perper's opinion is legally insufficient to establish complicated pneumoconiosis, because Dr. Perper did not "identify the presence of 'massive lesions' in the miner's lung tissue." Employer's Brief at 13. Employer further asserts that Dr. Perper's opinion is not well-reasoned, because Dr. Perper failed to cite any medical literature in support of his statement that a pathological lesion measuring more than one centimeter would be its size or larger on x-ray. *Id*. at 12. Employer also asserts that the administrative law judge failed to state a valid reason for crediting Dr. Perper's opinion over the contrary opinion of Dr. Bush, because it is unclear how Dr. Perper's additional Board-certification in Forensic Pathology makes him more of an expert in diagnosing complicated pneumoconiosis than is Dr. Bush, who is Board-certified in Anatomic and Clinical Pathology. *Id.* at 12-13.

For the reasons that follow, we reject employer's assertions of error. Initially, a diagnosis of progressive massive fibrosis is equivalent to a diagnosis of "massive lesions." *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366, 23 BLR 2-374, 2-387 (4th Cir. 2006). In the instant case, the administrative law judge accurately noted that Dr. Perper diagnosed progressive massive fibrosis. Decision and Order at 9; Director's Exhibit 95. Contrary to employer's assertion, therefore, Dr. Perper's opinion sufficiently identified the presence of massive lesions in the miner's lungs. Further, the administrative law judge accurately noted that Dr. Perper is Board-certified in Anatomical, Surgical, and Forensic Pathology, and his diagnosis of progressive massive fibrosis was based on a 1.3 cm. x 0.8 cm. lesion, coupled with his expert opinion that lesions on autopsy of one centimeter or more are fully equivalent with radiological lesions of one centimeter or larger. Decision and Order at 9-10; Director's Exhibit 95. Substantial evidence supports these findings. Thus, contrary to employer's assertion, the administrative law judge permissibly found Dr. Perper's opinion to be reasoned. *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *see also Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000). Lastly, we note that the administrative law judge's determination to credit Dr. Perper's opinion over that of Dr. Bush was not based solely on Dr. Perper's certification in Forensic Pathology. In finding that Dr. Perper's qualifications were superior to those of Dr. Bush, the administrative law judge

additionally noted that Dr. Perper is "active in his field."[4] Decision and Order at 13. Substantial evidence supports this finding. Moreover, the administrative law judge also found, within his discretion, that Dr. Perper's opinion was entitled to greater weight than Dr. Bush's contrary opinion, because it was better supported by the x-ray evidence. Decision and Order at 13; *see Scarbro*, 220 F.3d at 255, 22 BLR at 2-100. Substantial evidence supports this finding. Therefore, contrary to employer's assertion, the administrative law judge stated a valid reason for crediting Dr. Perper's opinion over that of Dr. Bush. S*ee Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993); *Burns v. Director, OWCP*, 7 BLR 1-597, 1-599 (1984); *see also Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). We therefore affirm the administrative law judge's finding that the pathology reports support a finding of complicated pneumoconiosis at Section 718.304(b).

Relevant to 20 C.F.R. §718.304(c), the administrative law judge considered the opinions of Drs. Castle and Fino, who offered opinions as pulmonologists. Both physicians opined that the miner did not suffer from complicated pneumoconiosis or a totally disabling respiratory impairment. Employer's Exhibits 2, 3. The administrative law judge discounted their opinions, however, finding that Drs. Castle and Fino "based a finding of no complicated pneumoconiosis on their chest x-ray interpretations, which were outweighed by the interpretations of Drs. Ahmed and Barrett of a contemporaneous study." Decision and Order at 12. Employer asserts that the administrative law judge engaged in selective analysis, because both physicians' opinions were additionally based on the miner's lifetime objective studies. Employer's Brief at 10. Contrary to employer's assertion, the administrative law judge noted that Drs. Castle and Fino based their opinions as to the nonexistence of complicated pneumoconiosis in part upon objective tests demonstrating the absence of a totally disabling pulmonary impairment. Decision and Order at 7-8, 14 n.5; Employer's Exhibits 2, 3. However, the administrative law judge properly found that the most objective measure of whether complicated pneumoconiosis is present, under Fourth Circuit law, is the chest x-ray. *Scarbro*, 220 F.3d at 258, 22 BLR at 2-104. Moreover, the administrative law judge permissibly concluded that normal pulmonary function tests do not preclude a finding of statutory complicated pneumoconiosis. *See Scarbro*, 220 F.3d at 257-57, 22 BLR 2-103-04 (holding that the statute does not incorporate a medical definition of complicated pneumoconiosis). We therefore affirm the administrative law judge's credibility determinations at Section 718.304(c). *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997).

[4] By contrast, the record reflects that Dr. Bush retired from practice in 1998 and currently performs only autopsy slide reviews and case summaries at the request of employers. Decision and Order at 13; Director's Exhibit 95; Employer's Exhibit 5 at 8, 20-25.

Considering all relevant evidence together pursuant to 20 C.F.R. §718.304, the administrative law judge determined that the pathology and x-ray evidence established the existence of complicated pneumoconiosis. Decision and Order at 14. Because the opinions of Drs. Castle and Fino did not undermine this finding, the administrative law judge concluded that the miner was entitled to the irrebuttable presumption of total disability due to complicated pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). *Id.* Employer asserts that the administrative law judge did not weigh all of the evidence together prior to invoking the presumption of complicated pneumoconiosis. Employer's Brief at 8. Contrary to employer's assertion, the administrative law judge specifically stated that "Drs. Ahmed and Barrett, physicians with superior radiological qualifications, found a size A opacity on x-ray and this is consistent with Dr. Perper's opinion." Decision and Order at 14. Thus, the administrative law judge considered the x-ray readings together with the autopsy evidence. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester v. Director, OWCP*, 993 F.2d 1143, 1146, 17 BLR 2-114, 2-118 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc*). We therefore affirm the administrative law judge's finding that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3).[5]

In light of our determination to affirm the administrative law judge's finding that invocation of the irrebuttable presumption of total disability due to pneumoconiosis was established, we affirm the administrative law judge's decision to grant modification based on a change in conditions pursuant to 20 C.F.R. §725.310 (2000). *See Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 802-03, 21 BLR 2-302, 2-311-12 (4th Cir. 1998). Further, as claimant has established each element of entitlement, we affirm the administrative law judge's award of benefits.

ATTORNEY FEE ORDER

[5] Although the administrative law judge did not address whether claimant's complicated pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203 as required, *see Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007), employer does not challenge this aspect of the administrative law judge's decision. Further, the administrative law judge determined that the miner established twenty-three years of coal mine employment based on the parties' stipulation. Decision and Order at 3. Claimant was therefore entitled to the rebuttable presumption that the miner's complicated pneumoconiosis arose out of coal mine employment at Section 718.203(b). As discussed *infra*, the administrative law judge permissibly discounted employer's evidence, which would have been necessary to rebut the presumption.

Employer also appeals the administrative law judge's Attorney Fee Order awarding claimant's counsel $8,635.00 for services rendered. The administrative law judge awarded $400.00 per hour for the 18.9 hours of work done by Joseph E. Wolfe, Esq., $250.00 per hour for 2.0 hours of work performed by Bobby S. Belcher, Jr., and $100.00 per hour for 5.75 hours of work performed by legal assistants. On appeal, employer contends that the administrative law judge's attorney's fee award is excessive.

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 (1998) (*en banc*); *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989).

Employer asserts that the administrative law judge abused his discretion in awarding hourly rates of $400.00 and $250.00 to Attorneys Wolfe and Belcher. In support of his request for the above-mentioned hourly rates, claimant's counsel represented that the practice of Black Lung Law is very limited and, to his knowledge, his is the only law firm in Virginia that is taking new Black Lung cases. Counsel additionally explained that because his firm's other work is done on a contingency basis, he does not have a usual hourly rate. Fee Petition at 3. Thus, he stated that the only source for hourly rate comparison was the Altman-Weil *Survey of Law Firm Economics 2006 Edition*, (Survey), which provided that the hourly rates for attorneys in the South Atlantic Region with thirty-one or more years' experience ranged from $346.00 to $463.00, and hourly rates for attorneys with sixteen to twenty years of experience ranged from $307.00 to $415.00. Counsel's fee petition stated that the Survey was attached.

Based on the Survey, Attorney Wolfe's experience of over thirty-one years, and Attorney Belcher's experience of over sixteen years, the administrative law judge determined that the requested hourly rates of $400.00 and $250.00, respectively, were reasonable. Attorney Fee Order at 2; *see* 20 C.F.R. §725.366(b); *Pritt v. Director, OWCP*, 9 BLR 1-159 (1986). Although employer asserts that the rates presented in the

Survey are the averaged rates of a variety of law practices, Employer's Brief Regarding the Order Awarding Attorney's Fees at 5-6, employer fails to demonstrate any abuse of discretion by the administrative law judge. *See generally Lanning v. Director, OWCP*, 7 BLR 1-314 (1984). The administrative law judge further determined that, considering "the nature of the issues involved, the degree of skill with which claimant was represented, the amount of time and work involved, and other relevant factors," the fee of $8,675.00 was reasonable. Fee Order at 2; *see* 20 C.F.R. §725.366(b). Because employer has failed to demonstrate that the administrative law judge's ruling is arbitrary, capricious, or an abuse of discretion, *Abbott*, 13 BLR at 1-16, and since his determination to award claimant's counsel the hourly rates of $400.00 and $250.00 appears reasonable, it is affirmed. Consequently, we affirm the administrative law judge's award of a fee of $8,635.00.

Accordingly, the administrative law judge's Decision and Order Awarding Living Miner's Benefits and Attorney Fee Order are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge