BRB No. 08-0825 BLA

L.K.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
U.S. STEEL CORPORATION	)	
	)	
Employer-Petitioner	)	DATE ISSUED: 09/29/2009
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Howard G. Salisbury, Jr. (Kay, Casto & Chaney PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2007-BLA-5528) of Administrative Law Judge Thomas M. Burke rendered on a request for modification of a subsequent 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 his subsequent claim on December 6, 2001.[1] Director's Exhibit 3. In a Decision

[1] Claimant filed an initial claim for benefits on December 2, 1999, which was denied by the district director on April 4, 2000, because the evidence was insufficient to establish any of the requisite elements of entitlement. Director's Exhibit 1.

and Order dated March 9, 2005, Administrative Law Judge Richard A. Morgan found that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis and, therefore, he found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R §725.309. Director's Exhibit 50. However, in considering the claim on the merits, Judge Morgan determined that the evidence failed to establish that claimant was totally disabled from performing his last coal mine work or that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were denied. Claimant appealed, and the Board affirmed Judge Morgan's findings and the denial of benefits. [*L.L.K.*] *v. U.S. Steel Corp.*, BRB No. 05-0539 BLA (Apr. 26, 2006) (unpub.).

On October 24, 2006, claimant requested modification and filed additional evidence. Director's Exhibit 57. The district director processed the modification request and forwarded the case to the Office of Administrative Law Judges, where it was assigned to Judge Burke (the administrative law judge). Following a hearing held on October 23, 2007, the administrative law judge issued his Decision and Order dated July 31, 2008, which is the subject of this appeal.

The administrative law judge adjudicated this claim pursuant to the regulations at 20 C.F.R. Part 718 and found that newly submitted affidavits by co-workers, along with claimant's testimony at the hearing, established a mistake in a determination of fact with respect to the exertional requirements of claimant's last coal mine job. Specifically, the administrative law judge determined that claimant's last job, as a mobile equipment operator, required moderate to heavy manual exertion, and that it was not a primarily sedentary position as determined by Judge Morgan. In considering the merits of the subsequent claim, the administrative law judge noted that the Board previously affirmed Judge Morgan's findings of eighteen years of coal mine employment and the existence of clinical pneumoconiosis. The administrative law judge also found that the evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge determined that claimant established a basis for modification pursuant to 20 C.F.R. §725.310 and awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant established a mistake in a determination of fact with regard to the exertional requirements of his usual coal mine work pursuant to Section 725.310. Employer challenges the administrative law judge's finding that the evidence is sufficient to establish that claimant is totally disabled and that his disability is due to pneumoconiosis. Additionally, employer asserts that administrative law judge erred in denying employer's request to develop additional medical evidence in response to the evidence submitted by claimant on modification. Claimant responds to employer's appeal, urging affirmance of

the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[2]

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.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

A. Evidentiary Challenge

Initially, we address employer's argument that the administrative law judge erred in denying employer's request to submit additional evidence in response to claimant's modification evidence. Employer's Memorandum of Law at 8 n.1. On October 4, 2007, employer requested a continuance of the hearing scheduled for October 23, 2007, in order to obtain an additional pulmonary evaluation of claimant. Employer's Motion for a Continuance dated October 4, 2007. Alternatively, employer requested permission to develop additional evidence post-hearing. *Id.* Claimant opposed employer's motion, asserting that employer's request to obtain additional medical evidence was untimely and prejudicial. Claimant's Letter dated October 9, 2007. By Order dated October 19, 2007, the administrative law judge denied employer's motion. At the hearing held on October 23, 2007, employer renewed its motion to allow the development of additional evidence. Employer specifically requested that the administrative law judge hold the record open post-hearing, in order for employer to obtain a supplemental report from Dr. Crisalli,

[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Coen v. Director, OWCP,* 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.,* 6 BLR 1-710, 1-711 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP,* 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 1.

based on the physician's review of claimant's testimony and the affidavits of claimant's co-workers. Hearing Transcript at 29. The administrative law judge granted employer's request to obtain a supplemental report from Dr. Crisalli addressing claimant's testimony, but he denied employer's request to have Dr. Crisalli review the affidavits.

Employer asserts that the administrative law judge "erred in not granting the requested continuance for development of more current medical evidence of claimant's pulmonary condition" and that he "erred in not allowing the 'new' co-worker affidavits to be included in the material reviewed by Dr. Crisalli in formulating his supplemental report." Employer's Memorandum of Law at 8 n.1. We reject employer's assertions of error as they are without merit.

As the adjudication officer empowered to conduct formal hearings, an administrative law judge is granted broad discretion in resolving procedural matters. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004) (*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986). In accordance with this principle, a party seeking to overturn an administrative law judge's disposition of an evidentiary issue must prove that the administrative law judge's action represented an abuse of his or her discretion. *Clark*, 12 BLR at 1-153. Upon consideration of the circumstances of this case, we hold that employer has not met this burden.

In his Order, the administrative law judge reasonably concluded that employer had not demonstrated good cause for failing to timely undertake development of its medical evidence in the period of time between the filing of claimant's modification request and the filing of its motion for a continuance. The administrative law judge explained:

> Employer's request that a pulmonary evaluation be admitted into evidence within 20 days of the October 23, 2007 hearing is not supported by good cause. Rather, despite notice of [claimant's] petition [for modification], dating back to October 26, 2006, notice that the claim was filed with the Office of Administrative Law Judges on March 28, 2007, and Notice of Hearing on the petition dated June 5, 2007, the Employer did not act until its October 4, 2007 letter.

Order Denying Motion For Continuance. Additionally, the administrative law judge reasonably found that employer had not demonstrated good cause for failing to provide Dr. Crisalli copies of the affidavits for review prior to the hearing, noting that "the earlier affidavits have been part of the record for about a year." Hearing Transcript at 27-29. Therefore, as employer has not demonstrated that the administrative law judge abused his discretion in denying its request to obtain an additional pulmonary evaluation or in denying its requests to have Dr. Crisalli review the co-worker affidavits, we affirm the

administrative law judge's rulings pursuant to 20 C.F.R. §725.456(b). *See Clark*, 12 BLR at 1-153.

B. Modification

Employer further argues that the administrative law judge erred in finding that claimant established modification based on a mistake in determination of fact concerning the exertional requirements of his last coal mine employment. We disagree.

Pursuant to 20 C.F.R. §725.310, modification may be granted in a miner's claim on the grounds of a change in conditions or a mistake in a determination of fact with regard to the prior denial of benefits. *See* 20 C.F.R. §725.310(a). When a request for modification is filed, the administrative law judge has the authority to "correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). The administrative law judge may reconsider all the evidence for any mistake of fact, including whether the ultimate fact of entitlement was wrongly decided. *See Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

As noted by the administrative law judge, claimant's subsequent claim was denied by Judge Morgan on the ground that claimant was not totally disabled. Decision and Order at 7. Judge Morgan found that while claimant suffered from a mild to moderate respiratory impairment, the evidence failed to establish that claimant's respiratory impairment would preclude the performance of his usual coal mine work as Mobile Equipment Operator, which Judge Morgan described as being "primarily, if not exclusively" a sedentary position, "which, at *most*, entailed periodic, milder to moderate labor." Director's Exhibit 50 at 4-6 (emphasis in original). On appeal, the Board affirmed Judge Morgan's determination that claimant's last coal mine job was sedentary, noting that while claimant described having to perform heavy manual labor, the administrative law judge properly concluded "that claimant had not provided any testimony, or other evidence, establishing that such duties were a significant part of his '*last*' usual coal mine job as a mobile equipment operator." [*L.L.K.*], BRB No. 05-0539 BLA, slip op. at 6.

In considering claimant's modification request, the administrative law judge noted that claimant submitted affidavits from three co-workers, indicating that his job as a mobile equipment operator was not entirely sedentary as determined by Judge Morgan. These affidavits described that "[c]laimant would dig ditches by hand, haul supplies, lay

piping, repair belts, install fan housing, and lay concrete."[4] Decision and Order at 6; Director's Exhibit 62. Claimant also testified at the October 23, 2007 hearing that he was required to perform additional duties in his last coal mine job that were not properly considered by Judge Morgan, such as "[running] the backhoe, pin loader, [hauling] truck [sic] and other machinery." Hearing Transcript at 9. Claimant explained that he only performed *sedentary* mobile equipment work for thirty percent of the time. *Id*. at 9-11. He also testified that "practically every day," he did maintenance and repair work on the belt along with installation and repair work on the pipeline, including repairing water lines and the fan housing. *Id*. at 12. He further testified that his additional duties involved general outside construction including laying water lines, building the pump house for the cleaning plant, bathhouse construction and road maintenance. *Id*. at 20-22.

The administrative law judge determined that claimant's hearing testimony, along with the affidavits provided by his co-workers, established that claimant "performed heavy manual labor, which did not necessarily fall under his job title." Decision and Order at 7. Employer argues, however, that "viewed in its best light," the additional evidence "may perhaps indicate that the claimant's forays into heavier tasks were more frequent than Judge Morgan may have concluded based on the evidence before him," but they are "not more reliable or probative than the claimant's own description of his employment given during the course of the initial processing of his claim." Employer's Memorandum of Law at 6. We disagree.

The Fourth Circuit has held that the "modification procedure is extremely broad, especially insofar as it permits the correction of mistaken factual findings." *Stanley*, 194 F.3d at 497, 22 BLR at 2-11. The administrative law judge may correct mistakes of fact

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[4] In an affidavit dated December 20, 2006, [A.M.] stated that he worked with claimant between 1969 and 1988, and that since claimant did not operate the mobile equipment every day, he did "any job he was asked to do," which included digging ditches by hand, hauling supplies to the mine site, laying pipe and repairing broken belt lines and pipelines." Director's Exhibit 62. He also stated that he witnessed claimant "[install] fan housing and [lift] 50 pound cinder blocks to make the foundation." *Id*. In an affidavit dated December 20, 2006, [R.S.] described that claimant was required to lift about 40-80 pounds individually. *Id*. In a January 10, 2007 affidavit, [J.S.] stated that he worked with claimant between 1970 and 1988, and that claimant "operated equipment and did carpentry work," but "running equipment was only a part of [claimant's] job duties." *Id*. He stated that claimant "only did that periodically during the work day" and that claimant "did about everything else on the crew except weld." *Id*. He further stated that claimant's "work was heavy, manual labor." *Id*. He described that claimant was required to lay pipe that weighed "up to 100 pounds" and that he had to "shovel and dig [ditches] out by hand." *Id*.

"merely [by] further reflection on the evidence initially submitted." *Id*. Moreover, the administrative law judge has discretion to evaluate the credibility of witnesses and resolve inconsistencies in the evidence. *See Doss v. Itmann Coal Co.*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). Contrary to employer's assertion, the administrative law judge reasonably concluded that the testimony of both claimant and his co-workers "bolsters, and is consistent with, [c]laimant's earlier statements that his work for [e]mployer was not limited to the operation of machinery." Decision and Order at 8. The administrative law judge permissibly concluded therefore that the "uncontradicted" testimony provided in this case established that [c]laimant's last coal mine employment required moderate to heavy manual labor, contrary to the previous determination of fact." *Id*. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established a mistake in a determination of fact concerning the exertional requirements of his last coal mine employment pursuant to 20 C.F.R. §725.310. S*ee Stanley*, 194 F.3d at 497, 22 BLR at 2-11; *Jessee*, 5 F.3d at 725, 18 BLR at 2-28.

C. Merits of the Subsequent Claim

Employer also challenges the administrative law judge's finding that claimant established that he is totally disabled from performing his usual coal mine work, even if it required heavy manual labor. The record in this case consists of three pulmonary function studies dated March 9, 2000, October 31, 2002 and May 12, 2003. Director's Exhibits 1, 17, 39. The administrative law judge correctly noted that while the March 9, 2000 pulmonary function test was non-qualifying for total disability, the October 31, 2002 pulmonary function test had qualifying pre- and post-bronchodilator values, and the May 12, 2003 pulmonary function test produced pre- bronchodilator qualifying values, but non-qualifying values post-bronchodilator. Decision and Order at 10. Additionally, the administrative law judge properly found that none of the three arterial blood gas studies of record, dated March 9, 2000, October 31, 2002 and May 12, 2003, were qualifying for total disability. *Id*.

The administrative law judge also considered the opinions of four physicians: Drs. Gaziano, Rasmussen, Crisalli and Cohen. Dr. Gaziano examined claimant on March 13, 2000, and diagnosed chronic obstructive pulmonary disease caused by coal mining and smoking. Director's Exhibit 1. According to Dr. Gaziano, claimant suffered from a moderate respiratory impairment that would prevent him from performing his usual coal mine work. *Id*. Dr. Rasmussen examined claimant on October 31, 2002, and diagnosed that the pulmonary function testing revealed moderate to severe, partially reversible obstructive ventilatory impairment, while the arterial blood gas study revealed mild impairment in oxygen transfer during exercise. Director's Exhibit 15. Dr. Rasmussen described claimant's job as requiring "considerable heavy manual labor" and opined that

claimant "has at least a moderate loss of lung function," which would prevent him from performing his last coal mine employment. *Id*.

Dr. Crisalli examined claimant on May 12, 2003 and noted that the pulmonary function studies showed "a moderate expiratory airflow obstruction and a moderate degree of air trapping." Director's Exhibit 39. He further noted that there was a small diffusion impairment with significant improvement after bronchodilators and no restrictive impairment. *Id*. In a supplemental report dated August 12, 2003, Dr. Crisalli opined that claimant retained the pulmonary capacity to perform his last coal mine employment because his pulmonary impairment improved to only a mild degree of airflow obstruction after the use of bronchodilators. Director's Exhibit 40. Dr. Crisalli stated that "with bronchodilator therapy, [claimant] can perform his previous job in the mines." *Id*. Finally, in a December 10, 2007 supplemental report, Dr. Crisalli reviewed claimant's hearing testimony and the three affidavits submitted on modification. Employer's Post-Hearing Exhibit 1. He opined that, despite this additional information, claimant retains the pulmonary capacity to perform his last coal mine work, even if it involved medium to heavy manual labor, assuming he had adequate bronchodilator therapy for his asthma. *Id*.

Dr. Cohen prepared a report on August 9, 2004, noting that claimant was classified as a mobile equipment operator but also did other jobs. Director's Exhibit 38. Dr. Cohen opined that the pulmonary function testing showed "moderate obstructive lung disease which resolves to minor obstruction with bronchodilators." *Id*. He opined that claimant's "impairment is severe enough to preclude him from engaging in the heavy physical exertion required of his coal mine employment." *Id*.

The administrative law judge weighed all of the evidence together at 20 C.F.R. §718.204(b) and found that claimant established total disability. The administrative law judge first noted that he disagreed with Judge Morgan that the pulmonary function study results were "too variable and inconsistent" to support a total disability determination. Decision and Order at 10 n.7. Rather, the administrative law judge explained that he considered "the non-qualifying pulmonary function study from March of 2000 followed by the qualifying results [to be] consistent with the progressive nature of pneumoconiosis." *Id*. He also noted that of the more recent pulmonary function tests, there was only one non-qualifying result, which was obtained post-bronchodilator. *Id*. In weighing the conflicting medical opinions, the administrative law judge credited the opinions of Drs. Rasmussen and Cohen, that claimant is totally disabled, over the contrary opinion of Dr. Crisalli, that claimant is not totally disabled.[5] Thus, the

[5] The administrative law judge gave less weight to Dr. Gaziano's opinion that claimant is totally disabled because he found that the doctor failed to address "the non-qualifying pulmonary function result that was obtained in his examination of [c]laimant"

administrative law judge found that claimant satisfied his burden of proving total disability pursuant to 20 C.F.R. §718.204(b).

Employer contends that the administrative law judge erred in according less weight to Dr. Crisalli's opinion. We disagree. As noted by the administrative law judge, Dr. Crisalli opined that claimant would be able to perform his last coal mine job "*assuming* that he undergoes adequate treatment for his asthma." Employer's Exhibit 1 (emphasis added). However, in finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge specifically rejected Dr. Crisalli's diagnosis of asthma.[6] Thus, the administrative law judge permissibly concluded that Dr. Crisalli's disability opinion was based, in part, on the faulty premise that claimant suffered from asthma, contrary to the administrative law judge's finding. Decision and Order at 11. Furthermore, the administrative law judge reasonably found Dr. Crisalli's explanation that claimant could work with adequate bronchodilator treatment to be unpersuasive:

> Dr. Crisalli's opinion is particularly problematic in light of claimant's current respiratory treatment regime. Dr. Crisalli notes, in his own report, that [c]laimant is taking five (5) breathing medications, including several bronchodilators. In light of the fact [c]laimant is currently taking numerous breathing medications and is under the care of [Dr. Zaldivar] for his respiratory impairment, I find that Dr. Crisalli's statement that [claimant] could return to work *if* he had adequate treatment untenable.

Decision and Order at 11 (footnotes omitted, emphasis in the original). The administrative law judge also properly found that Dr. Crisalli failed to explain how claimant could return to work "despite the numerous pulmonary function values that meet the regulatory standards for disability." Decision and Order at 11; *see Beavan v. Bethlehem Mines Corp*., 741 F.2d 689, 691, 6 BLR 2-101, 2-107 (4th Cir. 1984); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998).

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and failed to provide an explanation for his conclusion. We affirm the administrative law judge's credibility findings with respect to Dr. Gaziano's opinion, as they are not challenged on appeal. *Skrack,* 6 BLR at 1-711.

[6] In his analysis of the medical opinions on the issue of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge explained that he credited Dr. Cohen's reasoned opinion that claimant did not have asthma. Decision and Order at 10.

The administrative law judge's finding that Dr. Crisalli's opinion is not well reasoned or well documented is supported by substantial evidence. *Id*.

In contrast to Dr. Crisalli's opinion, however, the administrative law judge permissibly accorded significant weight to the opinions of Drs. Rasmussen and Cohen, that claimant is totally disabled from performing his usual coal mine work, because he found these opinions to be "consistent with the objective medical evidence of record" and "well reasoned and well documented." *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Clark*, 12 BLR at 1-155. Of particular importance to the administrative law judge was the fact that Dr. Cohen "compared the exertional requirements of [c]laimant's last coal mine employment to the severity of the impairment, and concluded that [c]laimant would not be able to perform the heavy labor involved." Decision and Order at 11.

Employer's assertion that the administrative law judge erred in finding that claimant is totally disabled constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's review power. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Rather, it is the duty of the administrative law judge, as the trier-of-fact, to determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *see also Fagg v. Amax Coal Co*., 12 BLR 1-77 (1988). Because the administrative law judge provided a valid rationale for according less weight to Dr. Crisalli's opinion, and significant weight to the opinions of Drs. Rasmussen and Cohen, we affirm his finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Clark*, 12 BLR 1-151. We also affirm his overall finding that claimant established total disability, as it is supported by substantial evidence pursuant to 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co*., 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon*., 9 BLR 1-236 (1987) (*en banc*).

Lastly, employer generally states the administrative law judge erred in finding that claimant established total disability due to pneumoconiosis. Employer, however, has not identified any specific error with regard to the administrative law judge's weighing of the evidence under 20 C.F.R. §718.204(c). *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); Employer's Memorandum of Law at 10. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant satisfied his burden of establishing that he is totally disabled due to pneumoconiosis based on the reasoned and documented opinions of Drs. Rasmussen and Cohen. *See Clark*, 12 BLR 1-151; Decision and Order at 12. Thus, we affirm the administrative law judge's finding that claimant established a basis for modification pursuant to 20 C.F.R. §725.310 and entitlement to benefits. *See Stanley*, 194 F.3d at 497, 22 BLR at 2-11**;** *Jessee*, 5 F.3d at 725, 18 BLR at 2-28.

D. Attorney Fees Before the Board

Lastly, claimant's counsel has filed a complete, itemized statement requesting a fee for services performed in her prior appeal to the Board, BRB No. 05-0539 BLA, pursuant to 20 C.F.R. §802.203. Counsel requests a fee of $2,607.00 for 11.85 hours of legal services performed from March 22, 2005 to March 1, 2006, at an hourly rate of $220.00. No response to the fee petition has been received.

The Board finds the requested fee to be reasonable in light of the services performed and supported by a complete statement of the extent and character of the necessary work done. Therefore, the Board hereby approves a fee of $2,607.00 for 11.85 hours of legal services performed by claimant's counsel at an hourly rate of $220.00, which is to be paid directly to claimant's counsel by employer, plus any interest due pursuant to 20 C.F.R §725.608(c). 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed.

We also order employer to pay counsel a fee of $2,607.00 for 11.85 hours of services performed before the Board at an hourly rate of $220.00. This order is not enforceable, and the fees are not payable, until the award of benefits becomes final. 20 C.F.R. §802.203.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge