BRB No. 06-0710 BLA

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| EDGAR J. HUGGINS | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| WINDSOR COAL COMPANY | ) | DATE ISSUED: 08/15/2007 |
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| Employer-Petitioner | ) | |
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| 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 and Attorney Fee Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Michelle S. Gerdano (Jonathan L. Snare, Acting Solicitor of Labor; 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits and Attorney Fee Order (04-BLA-5949) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) rendered on 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).[1] In the Decision and Order - Awarding Benefits, the administrative law judge credited claimant with at least thirty-four years of coal mine employment, and found that the weight of the new evidence established the existence of both simple and complicated pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(2),(a)(4); 718.304. Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. On the merits, the administrative law judge found that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, and that the evidence further established that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Additionally, the administrative law judge found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits. In the Attorney Fee Order, the administrative law judge granted claimant's counsel a fee of $31,309.55 for services performed and costs incurred while the case was pending before the administrative law judge.

On appeal, employer contends that the administrative law judge erred in requiring it to provide claimant with the reports of its non-testifying experts. Employer additionally contends that the administrative law judge erred in excluding medical evidence from the record that was admitted at the hearing without objection. Further, employer contends that the administrative law judge erred in finding that the evidence established the existence of both simple and complicated pneumoconiosis. In addition, employer contends that the administrative law judge erred in finding that the evidence established total disability and total disability due to pneumoconiosis.[2] Claimant has not filed a brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's argument that the

[1] Claimant filed his first claim on March 29, 1994. Director's Exhibit 1. This claim was finally denied on August 30, 1994, because the evidence did not establish any element of entitlement. *Id*. Claimant filed this claim on July 17, 2002. Director's Exhibit 3.

[2] Additionally, employer urges the Board to reconsider its decision to deny employer's motion for a stay of a 20% penalty on the award of benefits. By Order dated August 17, 2006, the Board denied employer's request for a stay on the basis that employer failed to establish irreparable harm. *Huggins v. Windsor Coal Co*., BRB No. 06-0710 (Aug. 17, 2006)(unpub. order). Upon review, we are not persuaded to reconsider the denial of employer's request for a stay.

administrative law judge erred in declining to consider those portions of a doctor's report that violated the evidentiary limitations.[3]

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).

Initially, employer contends that the administrative law judge erred in granting claimant's motion to compel the discovery of the reports of employer's non-testifying experts, Drs. Fino, Bush, and Wolfe. Specifically, employer asserts that the attorney work-product privilege bars the forced disclosure of the identity and medical findings of its non-testifying experts. Employer also asserts that claimant failed to make a showing of substantial need of the materials.

By Interrogatories to the Employer and Request for Production of Documents dated November 16, 2004, claimant sought the discovery of information in employer's possession. In employer's response dated December 15, 2004, employer refused to disclose medical reports by three non-testifying experts on the ground that they were protected from discovery by the attorney work product privilege. Claimant moved to compel discovery on December 23, 2004, arguing that employer's objections were without merit.

During the January 11, 2005 hearing, the administrative law judge granted claimant's motion to compel the discovery of three reports by employer's non-testifying experts, because they were not protected by the work product privilege and because claimant had shown undue hardship by employer's refusal to produce them. Hearing Transcript at 24-28.

Employer asserts that Federal Rule of Civil Procedure 26(b)(4)(B) supports its argument that the report of a non-testifying expert witness need not be disclosed without a showing of "exceptional circumstances." Fed. R. Civ. P. 26(b)(4)(B). Contrary to employer's assertion, the administrative law judge properly relied on 29 C.F.R. §18.14 of the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges. *Cline v. Westmoreland Coal Co.*, 21 BLR 1-69 (1997).

[3] Because the administrative law judge's length of coal mine employment finding and his finding that claimant established that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Section 18.14 provides, in pertinent part, that a party may obtain discovery regarding any relevant documents and tangible things, not privileged:

> and prepared in anticipation of or for the hearing by or for another party's representative (including his or her attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his or her case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

29 C.F.R. §18.14(c). Thus, the administrative law judge was not required to find exceptional circumstances under the Federal Rule of Civil Procedure in order to allow discovery.

Employer argues that *Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007), makes clear that "non-testifying expert opinions are protected under attorney work product and should not be ordered to be divulged to other parties." Employer's Letter Citing Additional Authority, Mar. 15, 2007. In *Blake*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that draft, expert reports prepared by counsel and provided to testifying experts, and attorney-expert communications that explained the lawyer's concept of the underlying facts, or his views of the opinions expected from such experts, were not entitled to protection under the work product doctrine. *Blake*, 480 F.3d at 303, 23 BLR at 2-470. In rendering its holding, the court distinguished between testifying experts and non-testifying experts with regard to the discovery of draft reports or attorney-expert communications. *Blake*, 480 F.3d at 303 n.25, 23 BLR at 2-470 n.25. The court held that any such draft reports or attorney communications made or provided to non-testifying or consulting experts should be entitled to protection under the work product doctrine. *Id*.

The facts in *Blake* are distinguishable from the facts in the instant case, because the type of information that was sought in *Blake* differed from that sought here. In *Blake*, the information sought consisted of draft reports and attorney-expert communications that claimant's counsel provided to its experts before they formed their medical opinions. Here, by contrast, the information sought consists of medical reports prepared by non-testifying experts. Therefore, employer's reliance on *Blake* is misplaced.

The administrative law judge reasonably found that the information sought by claimant was not protected work product because it consists of medical reports that do not reveal the mental impressions of employer's counsel. Hearing Transcript at 23; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*). In addition, the administrative law judge reasonably found that claimant showed a substantial need for the information that he sought on discovery, because claimant would not have been able

to subpoena Drs. Fino, Bush, and Wolfe to cross-examine Dr. Renn at the hearing without it. *See* 29 C.F.R. §18.14(c). Thus, we reject employer's assertion that the administrative law judge abused his discretion in granting claimant's motion to compel the discovery of the opinions of employer's non-testifying experts.[4] *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007)(*en banc*).

Employer also contends that the administrative law judge erred in allowing claimant to use the medical reports that he obtained in discovery. Specifically, employer argues that the administrative law judge erred in allowing claimant to submit Dr. Fino's report over employer's objection that the report violated the twenty-day rule for the submission of evidence at 20 C.F.R. §725.456(b)(2),(3). In his Decision and Order, the administrative law judge considered Dr. Fino's report with regard to the pulmonary function study evidence.[5] Decision and Order at 5 n.5. The administrative law judge found that Drs. Fino and Michos invalidated two of four qualifying pulmonary function tests that were performed between 2003 and 2004. *Id*. at 22. Because employer was not prejudiced by the administrative law judge's finding that Dr. Fino's report invalidated the January 27, 2004 pulmonary function study, we hold that any error by the administrative law judge in admitting Dr. Fino's report into the record was harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Employer additionally argues that the administrative law judge erred in allowing claimant to use Dr. Bush's report to cross-examine Dr. Renn, because Dr. Bush's report was not in evidence. At the hearing, the administrative law judge allowed claimant's counsel to ask Dr. Renn if Dr. Bush's report was ever disclosed to him. Hearing Transcript at 143-144. The scope of a doctor's testimony is limited to admissible evidence. 20 C.F.R. §725.457(d). However, in his Decision and Order, the administrative law judge chose not to discuss or rely on Dr. Renn's testimony about Dr. Bush's report. Decision and Order at 9 n.6. Therefore, any error by the administrative law judge in allowing claimant's counsel to cross-examine Dr. Renn about Dr. Bush's report was harmless. *Larioni*, 6 BLR at 1-1278.

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[4] Employer argues that the administrative law judge is biased against it. Because employer has not demonstrated any bias or prejudice on the part of the administrative law judge, we reject employer's assertion. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

[5] Dr. Fino reviewed the January 27, 2004 pulmonary function study and opined that the maximal voluntary ventilation was invalid and should not be used as medical evidence of respiratory function. Claimant's Exhibit 4.

Next, employer contends that the administrative law judge erred in reclassifying medical evidence in the record after the hearing without giving the parties any prior notice. Specifically, employer asserts that the administrative law judge erred in determining that Dr. Churg's report submitted by employer was admissible only as a biopsy report, even though the administrative law judge had admitted Dr. Churg's report into the record at the hearing as a medical report, without objection. Contrary to employer's assertion, an administrative law judge is not barred from making a final evidentiary ruling in his decision under the evidentiary limitations. *See* 20 C.F.R. §§725.414 and 725.456. Section 725.456(b)(1) makes plain that the evidentiary limitations are mandatory, and as such, are not subject to waiver by failure to object at the hearing. *Smith v. Martin County Coal Corp*., 23 BLR 1-69 (2004). In his Decision and Order, the administrative law judge reasonably found that "[a]s [e]mployer already designated two medical reports (Dr. Renn and Dr. Spagnolo) for its affirmative case, Dr. Churg's report is only admissible as a biopsy report." Decision and Order at 17 n.11; *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-63 (2004)(*en banc*)(recognizing that an administrative law judge has broad discretion in handling procedural matters). Thus, we reject employer's contention.

Employer also asserts that the administrative law judge selectively analyzed the admissibility of Dr. Green's report, which was submitted by claimant. Specifically, employer argues that, because claimant designated Dr. Green's report as biopsy evidence, it was error for the administrative law judge not to strike the portions of Dr. Green's report that exceeded the biopsy evidence. In his Decision and Order, the administrative law judge acknowledged that claimant identified Dr. Green's report as a biopsy report. Decision and Order at 17 n.10. The administrative law judge, however, determined that Dr. Green's report should be considered a medical report, because Dr. Green reviewed medical records that went beyond the scope of a pathology diagnosis. *Id*. A physician's report that is based on pathological and clinical evidence constitutes both an autopsy rebuttal report and a medical report for purposes of the evidentiary limitations. *Keener*, 23 BLR at 1-239. Because claimant had submitted only one medical report, the administrative law judge did not abuse his discretion in reclassifying Dr. Green's report as both a biopsy report and a medical report for purposes of the evidentiary limitations. *See Dempsey*, 23 BLR at 1-63. We therefore reject employer's argument, and now turn to the administrative law judge's analysis of the medical evidence.

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. Where a miner files a claim 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). Claimant's prior claim was denied because he failed to establish any element of entitlement. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing at least one element of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2),(3).

Employer contends that the administrative law judge erred in finding that the evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304. The administrative law judge considered the reports of Drs. Parker, Green,[6] Spagnolo, and Renn.[7] In a report dated August 7, 2003, Dr. Parker opined that resected lung tissue represented progressive massive fibrosis that exceeded an ILO Category B size lesion. Director's Exhibit 10. During a May 11, 2004 deposition, Dr. Parker opined that claimant has complicated silicosis related to coal dust exposure. Employer's Exhibit 11.

In a report dated December 20, 2004, Dr. Green diagnosed a complicated form of pneumoconiosis with lesions greater than one centimeter in diameter caused by an altered immune response to silica. Claimant's Exhibit 2. Dr. Green listed the differential

[6] Employer asserts that the administrative law judge erred in failing to address the effect that Dr. Green's lack of a license to practice medicine in the United States has on his status as an expert. Dr. Green is licensed to practice medicine in Canada. Claimant's Exhibit 7 at 4. Employer does not explain why the fact that Dr. Green is not licensed to practice medicine in the United States prevents him from rendering a credible consultative opinion based on pathology evidence. Further, employer does not contest that Dr. Green is Board-certified in anatomic pathology. *Id*. at 5. The administrative law judge noted further that Dr. Green is a professor of pathology who "has made invited presentations and has written extensively on pulmonary diseases including black lung. (CX 3)." Decision and Order at 13.

[7] The administrative law judge also considered the reports of Drs. Jaworski and Devabhaktuni. In a report dated June 30, 1994, Dr. Jaworski diagnosed mild to moderate obstructive ventilatory defect by pulmonary function testing and opined that he was uncertain of the etiology of this condition. Director's Exhibit 1. In a report dated October 2, 2002, Dr. Devabhaktuni diagnosed questionable chronic obstructive pulmonary disease. Director's Exhibit 12. The administrative law judge discounted Dr. Jaworski's opinion, based on its age. Decision and Order at 18. Further, the administrative law judge discounted Dr. Devabhaktuni's opinion because it was not as complete or as thorough as the other medical opinions. *Id*. Employer does not challenge the administrative law judge's weighing of the opinions of Drs. Jaworski and Devabhaktuni.

diagnoses for the larger nodular and conglomerate lesions as metastatic cancer or lymphoma, simple and conglomerate silicosis, silico-tuberculosis or some other infectious process complicated by silica exposure, rheumatoid pneumoconiosis, and nodular sarcoidosis. *Id*. Dr. Green opined that, apart from the metastatic cancer or lymphoma, the differential diagnoses may be aggravated or caused by silica exposure, and thus, should be considered different manifestations of complicated pneumoconiosis. *Id*. During a March 3, 2005 deposition, Dr. Green opined that sarcoidosis was probably his most favored of the differential diagnoses that were listed in his report. Claimant's Exhibit 7.

In contrast, in a report dated November 8, 2004, Dr. Spagnolo, diagnosed sarcoidosis and opined that claimant does not have pneumoconiosis or a chronic dust disease of the lung caused by, significantly related to, or substantially aggravated by coal dust exposure. Employer's Exhibit 8.

Lastly, in January 30, 2004 report, Dr. Renn diagnosed simple coal workers' pneumoconiosis, simple silicosis, and pulmonary emphysema. Employer's Exhibit 2. However, in a subsequent report dated October 26, 2004, Dr. Renn opined that it appears clinically that claimant has sarcoidosis. Employer's Exhibit 10. Further, during the January 11, 2005 hearing, Dr. Renn opined that claimant has sarcoidosis unrelated to coal dust exposure. Hearing Transcript at 119, 123, 129. Dr. Renn also opined that there is no evidence of coal workers' pneumoconiosis or silicosis. *Id*. at 112.

The administrative law judge found that the opinions of Drs. Parker, Green, Spagnolo, and Renn were thorough and well reasoned. Nonetheless, the administrative law judge found that the opinions of Drs. Parker and Green outweighed the contrary opinions of Drs. Spagnolo and Renn. Specifically, the administrative law judge accorded the most weight to Dr. Parker's opinion because Dr. Parker is claimant's treating pulmonologist. *Id*. at 18-19. The administrative law judge additionally accorded greater weight to Dr. Green's opinion "based on his pathological diagnoses of the biopsies." *Id*. at 20. Further, the administrative law judge discounted the opinions of Drs. Spagnolo and Renn because their findings that claimant does not have pneumoconiosis were not consistent with the weight of the medical evidence. *Id*. The administrative law judge therefore found that the biopsy-based medical opinions of Drs. Parker and Green established that claimant suffers from complicated pneumoconiosis. Weighing all of the medical evidence together, the administrative law judge found that the existence of complicated pneumoconiosis was established. Decision and Order at 21.

Employer asserts that the administrative law judge erred in relying on Dr. Parker's opinion because Dr. Parker, unlike Drs. Green and Renn, did not diagnose sarcoidosis. Employer maintains that Dr. Parker did not explain why he was able to rule out sarcoidosis. Contrary to employer's assertion, Dr. Parker explained that the lesions on

the pathology slides that he reviewed did not look like sarcoidosis lesions. Employer's Exhibit 11 at 44. Further, contrary to employer's assertion, Dr. Green did not definitively diagnose sarcoidosis. Claimant's Exhibits 2, 7. In considering the opinions of Drs. Parker and Green, the administrative law judge stated, "I find that Dr. Green's opinion, while concluding a likely diagnosis of sarcoidosis which is contrary to Dr. Parker's findings, did not conclude an ultimate finding of sarcoidosis." Decision and Order at 20. The administrative law judge reasonably found "Dr. Parker's opinion to be credible and well-based on the medical evidence of record." *Id*. at 19; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998). Thus, we reject employer's assertion that the administrative law judge erred in relying on Dr. Parker's opinion.

Employer also asserts that the administrative law judge erred in giving greater weight to Dr. Parker's opinion based on Dr. Parker's status as claimant's treating physician. The administrative law judge noted that "Drs. Parker, Spagnolo, and Renn are all [B]oard-certified in internal medicine and pulmonary diseases, and Dr. Renn has additional certifications in forensic medicine and as a forensic medical examiner." Decision and Order at 18. Nonetheless, the administrative law judge accorded greatest weight to Dr. Parker's opinion because he found that Dr. Parker was claimant's treating physician. *Id*. at 19-20.

Section 718.104(d) requires the administrative law judge to "give consideration to the relationship between the miner and treating physician whose report is admitted into the record." 20 C.F.R. §718.104(d). Specifically, the administrative law judge should consider the nature of the relationship, duration of the relationship, frequency of treatment, and the extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). While the treatment relationship may constitute substantial evidence in support of a decision to give that physician's opinion controlling weight in appropriate cases, the weight accorded shall also be based on the credibility of the opinion in light of its reasoning and documentation, as well as other relevant evidence and the record as a whole. 20 C.F.R. §718.104(d)(5).

In considering Dr. Parker's opinion in accordance with the criteria set forth in 20 C.F.R. §718.104(d), the administrative law judge noted that claimant was referred to Dr. Parker after a September 2002 lung biopsy, and Dr. Parker is claimant's treating pulmonologist. Decision and Order at 19. The administrative law judge stated that "Dr. Parker's records do establish he treated the miner every couple of months from 2002 through at least 2004." *Id*. The administrative law judge also stated that "Dr. Parker had a thorough understanding of [c]laimant's past medical history and had even reviewed some of the pathology slides prior to providing his deposition testimony." *Id.* In addition, the administrative law judge reasonably found "Dr. Parker's opinion to be credible and well-based on the medical evidence of record." *Id*.; *see Hicks*, 138 F.3d at

533, 21 BLR at 2-335. The administrative law judge noted further that "Dr. Parker has extensive experience working with and researching occupational lung diseases and has spent considerable time working at NIOSH." Decision and Order at 19. Because substantial evidence supports the administrative law judge's finding that Dr. Parker's opinion is entitled to the greatest weight as claimant's treating physician, we reject employer's assertion that the administrative law judge erred in giving greater weight to Dr. Parker's opinion than to the contrary opinions of Drs. Spagnolo and Renn. *See Consolidation Coal Co. v. Held*, 314 F.3d 184, 22 BLR 2-564 (4th Cir. 2002)(recognizing that the opinions of treating physicians may deserve special consideration).

Employer additionally asserts that the administrative law judge erred in relying on Dr. Green's opinion because it is not reasoned. Specifically, employer asserts that the administrative law judge ignored Dr. Green's concession that the medical literature relied on did not establish a causal relationship between sarcoidosis and coal dust exposure. During the March 3, 2005 deposition, Dr. Green noted that sarcoidosis was one of several differential diagnoses that he could not exclude. Claimant's Exhibit 7 at 18. Further, Dr. Green acknowledged that there were no definitive answers from the scientific publications that he referenced in his report regarding the cause of sarcoidosis. Claimant's Exhibit 7 at 53. However, Dr. Green stated, "I put those references in largely because they established that there was a background of scientific publications linking silica exposure and sarcoidosis." Claimant's Exhibit 7 at 35. The administrative law judge further stated that Dr. Green opined that there is a growing opinion that silica *may* be a cause of sarcoidosis, based on scientific publications and studies. Decision and Order at 19.

Although an administrative law judge may not rely on a medical opinion that is speculative, *United States Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999), it is the administrative law judge's role to evaluate the weight and credibility of a medical opinion. *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999); *Underwood v Elkay Mining Inc*., 105 F.3d 946, 949, 21 BLR 2-23, 2-2-28 (4th Cir. 1997). In this case, the administrative law judge acted within his discretion in according greater weight to Dr. Green's differential diagnosis of sarcoidosis caused by exposure to silica than to the contrary opinions of Drs. Spagnolo and Renn, based on Dr. Green's review of the pathology slides. *See Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Thus, we reject employer's contention.

Employer additionally asserts that the administrative law judge erred in failing to address the fact that Dr. Green read only the abstracts of several of the scientific studies cited in his report because the studies were written in foreign languages, or to address the fact that one of the studies Dr. Green mentioned did not find a causal link between

sarcoidosis and occupational exposure. In asking us to assess in detail the documentation underlying Dr. Green's opinion, employer misapprehends our limited role in reviewing the administrative law judge's findings and credibility determinations. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). In this case, the administrative law judge carefully considered the documentation, reasoning, and thoroughness of Dr. Green's opinion, along with Dr. Green's credentials, and substantial evidence supports the administrative law judge's findings. Decision and Order at 17, 19-21. We therefore reject employer's allegation of error in this regard. *See Mays*, 176 F.3d at 764, 21 BLR at 2-606; *Underwood*, 105 F.3d at 949, 21 BLR at 2-2-28.

Employer further asserts that the administrative law judge erred in failing to consider fully Dr. Renn's testimony at the hearing. Contrary to employer's assertion, the administrative law judge noted that "Dr. Renn appeared at the hearing on January 11, 2005 and testified." Decision and Order at 11. The administrative law judge considered Dr. Renn's evaluation of claimant's condition. Additionally, the administrative law judge considered Dr. Renn's review of Dr. Green's opinion. *Id*. The administrative law judge stated:

> Dr. Renn addressed Dr. Green's report. Dr. Renn stated that he also would diagnose sarcoidosis. Dr. Renn was critical of Dr. Green's referral to the Raffnsson publication as evidence that exposure to silica in the coal mines was the cause of [c]laimant's sarcoidosis. Also, he noted the NIOSH study does not support Dr. Green's opinion that there is some relationship between silica dust and sarcoidosis. (TR at 71-175).

*Id*. Nonetheless, the administrative law judge permissibly found that Dr. Renn's opinion was inconsistent with the weight of the evidence. *Id*. at 20. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson*, 12 BLR at 1-113. Therefore, we reject employer's assertion that the administrative law judge erred in his analysis of Dr. Renn's testimony.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that all the evidence weighed together established the presence of complicated pneumoconiosis and thereby established invocation of the irrebuttable presumption at 20 C.F.R. §718.304.[8] *See Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 23 BLR 2-374 (4th Cir. 2006); *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000).

[8] In view of our disposition of the case on these grounds, we need not address employer's remaining contentions at 20 C.F.R. §§718.202(a)(2),(4), and 718.204.

With regard to the administrative law judge's Attorney Fee Order, employer contends that the administrative law judge erred in finding that claimant's counsel, Robert F. Cohen, Jr., is entitled to an hourly rate of $250.00. Specifically, employer asserts that the administrative law judge erred in granting claimant's counsel an hourly rate that exceeds the rate he charges fee-paying clients.

The award of an attorney's fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Jones v. Badger Coal Co*., 21 BLR 1-102, 1-108 (1998)(*en banc*).

Claimant's counsel filed an Application for Approval of a Representative's Fee in the amount of $33,469.33 for 117.50 hours of legal services performed before the administrative law judge from March 17, 2004 to June 21, 2006 at an hourly rate of $250.00, and for $4,094.93 in costs incurred from May 2004 to April 11, 2005. In a letter attached to his fee application, claimant's counsel stated that he charged a higher hourly rate for black lung work than for other matters because of his expertise and experience in the black lung field. Claimant's Counsel's July 7, 2006 Letter at 5-6. In support of his fee request, claimant's counsel submitted affidavits, *The 1998 Survey of Law Firm Economics* published by Altman & Weil, an order by Judge Thomas E. Evans of the Circuit Court of Jackson County, West Virginia, in *Belcher v. White Chrysler-Plymouth-Dodge of Ripley, Inc*., Civil Action No. 00-C-10 (June 26, 2006), and the decision of the Fourth Circuit court in *Consolidation Coal Co. v. Swiger*, No. 03-1971 (4th Cir. May 11, 2004)(unpub.).

Employer objected to the requested hourly rate and to several time and expense entries. Claimant's counsel replied to employer's objections. On July 31, 2006, the administrative law judge held a telephonic conference on the record. After hearing arguments from employer and claimant, the administrative law judge found that $250.00 an hour was a reasonable rate. 2006 Transcript at 12. Upon review of employer's additional objections and claimant's counsel's responses thereto, the administrative law judge struck 12.37 hours of time, added 4.5 hours of time as a supplement for the defense of the attorney's fee application, and subtracted $192.28 from the expenses. *Id*. at 48-51. Consequently, the administrative law judge awarded a fee of $27,406.90, plus $3,902.65 in expenses. *Id*. at 51. In the ensuing Attorney Fee Order, the administrative law judge again awarded the above-referenced fee and expenses.

The administrative law judge found that the hourly rate of $250.00 was reasonable for claimant's counsel's services in this case, for the reasons stated on the record during the July 31, 2006 telephone conference. Attorney Fee Order at 1. At the conference, in awarding claimant's counsel an hourly rate of $250.00, the administrative law judge stated, "I have described Mr. Cohen in the past as one of the best lawyers I have seen in black lung, and I have the discretion to award the attorney's fee here, and I believe

$250.00 is appropriate for Mr. Cohen." 2006 Transcript at 11-12.

Employer presents no reason to disturb the administrative law judge's discretionary determination. The administrative law judge reasonably found that claimant's counsel was one of the best lawyers that he has seen in black lung cases. *See Zeigler Coal Co. v. Director, OWCP* [*Hawker*], 326 F.3d 894, 902 n.9, --- BLR --- (7th Cir. 2003)(upholding administrative law judge's finding that counsel reasonably charged a higher hourly rate for black lung cases because of his experience in that field); 20 C.F.R. §725.366(b). Thus, we hold that employer has not demonstrated an abuse of discretion in the administrative law judge's determination that the requested hourly rate of $250.00 was reasonable. *Jones*, 21 BLR at 1-108.

Accordingly, the administrative law judge's Decision and Order - Awarding 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