BRB Nos. 04-0186 BLA
and 04-0186 BLA-S

IVAN RANDLE BLAKE	)	
	)	
Claimant- Respondent	)	
	)	
v.	)	DATE ISSUED: 12/28/2004
	)	
ELM GROVE COAL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,) UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits and Attorneys' Fee Order of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

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

Thomas E. Johnson and Anne Megan Davis (Johnson, Jones, Snelling, Gilbert & Davis, P.C.), Chicago, Illinois.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor, Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

McGranery, J.:

Employer appeals the Decision and Order - Awarding Benefits and Attorneys' Fee Order (2002-BLA-5180) of Administrative Law Judge Daniel L. Leland 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). The relevant procedural history of this case is as follows: Claimant filed an application for benefits on August 5, 1986. The district director denied the claim as claimant did not establish any of the elements of entitlement. Claimant filed a second claim on April 4, 2001. Subsequent to the district director's determination of entitlement, employer requested a hearing which was held before Judge Leland (the administrative law judge).

At the hearing, the administrative law judge excluded a number of exhibits proffered by employer on the ground that they exceeded the evidentiary limitations set forth in 20 C.F.R. §725.414. Additionally, the administrative law judge denied employer's motion to compel discovery of letters between claimant's counsel and claimant's medical experts. In the Decision and Order - Awarding Benefits, the administrative law judge determined that claimant demonstrated a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d), because the newly submitted evidence established the existence of pneumoconiosis. On the merits, the administrative law judge found that claimant established that he is totally disabled due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

After considering claimant's counsel's fee petition and employer's objections thereto, the administrative law judge issued an Attorneys' Fee Order in which he awarded $32,512.25 for the work of two attorneys and a paralegal, plus expenses. On appeal, employer challenges the administrative law judge's findings regarding the exclusion of evidence offered by employer, the administrative law judge's weighing of the medical evidence of record, and the award of attorney fees. Claimant has responded and urges affirmance of the award of benefits and attorney fees. The Director, Office of Workers' Compensation Programs (the Director), has also responded and requests that the Board affirm the administrative law judge's evidentiary rulings. Employer has filed a reply brief reiterating its contentions.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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). The Board reviews the administrative law judge's procedural

rulings for abuse of discretion. *Dempsey v. Sewell Coal Co.*, BRB Nos. 03-0615 BLA, 03-0615 BLA-A at 3 (Jun. 28, 2004)(*en banc*)(published); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

As an initial matter, employer contends that 20 C.F.R. §725.414 of the revised black lung regulations is invalid because it is contrary to the Act's requirement that "all relevant evidence shall be considered . . . ." 30 U.S.C. §923(b). We reject employer's argument. Employer has overlooked the statutory authority under which the Department of Labor acted when it promulgated Section 725.414. Specifically, the Department of Labor relied upon other language in Section 923(b) which incorporates a provision of the Social Security Act authorizing the agency to regulate "the nature and extent of the proofs and evidence . . . ." 30 U.S.C. §923(b), incorporating 42 U.S.C. §405(a); Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 62 Fed. Reg. 3338, 3358 (Jan. 22, 1997). Additionally, the Department of Labor relied upon Section 556(d) of the Administrative Procedure Act (APA), 5 U.S.C. §556(d), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), which empowers the agency to "provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence" as "a matter of policy." 5 U.S.C. §556(d), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); 62 Fed. Reg. at 3359. The United States Court of Appeals for the District of Columbia Circuit cited these statutory provisions in upholding the validity of Section 725.414. *Nat'l Mining Ass'n v. Dept. of Labor*, 292 F.3d 849, 873-74 (D.C. Cir. 2002)(*NMA*). We therefore reject employer's contention that Section 725.414 is invalid because it is in conflict with Section 923(b) of the Act. *Dempsey*, BRB Nos. 03-0615 BLA, 03-0615 BLA-A at 6-7.

Employer also relies upon the Fourth Circuit's decision in *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997), which was decided prior to the promulgation of the regulatory revisions.[1] In *Underwood*, the court held that administrative law judges "must consider all relevant evidence, erring on the side of inclusion, but . . . they should exclude evidence that becomes unduly repetitious in the sense that the evidence provides little or no additional probative value." *Underwood*, 105 F.3d at 951, 21 BLR at 2-32. Because the issue in *Underwood* concerned case-by-case rulings by administrative law judges under Section 556(d) of the APA, the court did not decide whether the Department of Labor had the authority to impose limits on the admission of evidence in black

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's qualifying coal mine employment occurred in West Virginia. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

lung claims. Nevertheless, the court recognized "the discretion reposed in agencies when it comes to deciding whether to permit the introduction of particular evidence at a hearing," so long as the agency "is not arbitrary . . . ." *Underwood*, 105 F.3d at 950, 21 BLR at 2-30-32 (citations omitted). Consequently, we reject employer's argument that Section 725.414 is invalid because it conflicts with *Underwood*. *Dempsey*, BRB Nos. 03-0615 BLA, 03-0615 BLA-A at 7-8.

With respect to the administrative law judge's application of Section 725.414, at the hearing, the administrative law judge admitted into the record all of the items marked as Director's Exhibits and Claimant's Exhibits, with the understanding that they might be excluded after he reviewed them. Hearing Transcript at 20-21, 23. With respect to employer's proposed exhibits, the administrative law judge excluded Dr. Wiot's readings of five x-rays, Dr. Shipley's readings of eight x-rays, Dr. Spitz's reading of two x-rays, Dr. Fino's reading of one x-ray, Dr. Renn's reading of one x-ray, and Dr. Morgan's record review. Hearing Transcript at 41-54. The administrative law judge returned these documents to employer's counsel at the close of the hearing.

In his Decision and Order - Awarding Benefits, the administrative law judge excluded Dr. Altmeyer's medical opinion and the x-ray interpretations offered by Drs. Fino, Renn, and Spitz. The administrative law judge also excluded Dr. Cohen's second written opinion as the doctor did not address an x-ray interpretation or medical test that he performed. Decision and Order at 2 nn. 1, 2.

Employer maintains that the administrative law judge erred in excluding relevant evidence and in failing to keep the excluded exhibits with the record. The Director concurs with employer regarding the administrative law judge's decision to return to employer the evidence excluded at the hearing, citing the regulations applying to the Office of Administrative Law Judges and stating that the better practice is to retain the rejected exhibits in case the exclusion is challenged on appeal. Nevertheless, the Director argues that the administrative law judge's error is harmless in this case, as the administrative law judge acted within his discretion in declining to admit this evidence.

We affirm the administrative law judge's decision to exclude the evidence that exceeded the evidentiary limitations. The administrative law judge rationally found employer's argument that the excess evidence should be admitted because it is relevant to be insufficient to establish good cause pursuant to 20 C.F.R. §725.456(b)(1). Hearing Transcript at 45; *see Dempsey*, BRB Nos. 03-0615 BLA, 03-0615 BLA-A at 10-11. Employer raised this argument at the hearing and cited *Underwood* in support. The administrative law judge acted within his discretion in rejecting employer's contention on the grounds that *Underwood* was decided

before the implementation of the new regulations and the decision of the United States Court of Appeals for the District of Columbia in *NMA* established the validity of the evidentiary limitations.

Employer also argues that the administrative law judge should have admitted the medical evidence contained in claimant's application to the State of West Virginia for benefits. This contention is without merit. This evidence does not fall within the exception for hospitalization or treatment records, *see* 20 C.F.R. §725.414(a)(4), nor is it covered by the exception for prior federal black lung claim evidence. *See* 20 C.F.R. §725.309(d)(1). Thus, the administrative law judge properly excluded the evidence developed in conjunction with claimant's application for state benefits, as employer had already reached the limits pertaining to its affirmative case. *Dempsey*, BRB Nos. 03-0615 BLA, 03-0615 BLA-A at 9-10.

Employer further contends that the administrative law judge erred in limiting employer to one reading of each chest x-ray in rebuttal rather than a number of readings equal to those submitted by claimant in his affirmative case. Employer also maintains that the administrative law judge erred by failing to consider the x-ray readings included in the examination reports of Drs. Renn and Fino. We reject these arguments. The administrative law judge properly held that Section 725.414(a)(3)(ii) provides that in rebuttal, the responsible operator may submit "no more than one physician's interpretation of each chest x-ray . . . submitted by the claimant" in his affirmative case. 20 C.F.R. §725.414(a)(3)(ii). In addition, the administrative law judge rationally determined that because Section 725.414(a) explicitly limits the number of x-ray readings permitted by each party in its affirmative case and in rebuttal, these limitations apply to x-ray readings contained in medical reports. 20 C.F.R. §725.414(a).

Employer next argues that the administrative law judge erred in finding that claimant established good cause for submitting Dr. Ahmed's rereading of an x-ray dated June 20, 2001 less than twenty days before the date of the hearing as is required by 20 C.F.R. §725.456. At the hearing, claimant acknowledged that the rereading was submitted late but contended that it should be admitted because employer was aware of the existence of the original, positive reading and because claimant proffered the rereading as rebuttal evidence rather than as a new item in his affirmative case. The administrative law judge concurred with claimant and admitted the rereading. Hearing Transcript at 37-38. We hold that any error by the administrative law judge in admitting this reading is harmless, as even if the administrative law judge had excluded the reading, his determination that a preponderance of the newly submitted x-ray evidence and the x-ray evidence as a whole are positive for pneumoconiosis would not change. *Johnson v. Jeddo-*

Highland Coal Co., 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1983); *see discussion infra* at 7.

The next issue raised by employer concerns the administrative law judge's denial of employer's request that claimant be compelled to produce the letters in which claimant's counsel asked Drs. Cohen and Lenkey to provide medical opinions. During the prehearing period, employer deposed Drs. Cohen and Lenkey. Both physicians testified that portions of their written reports were, or may have been, copied from information supplied by claimant's counsel. Employer requested discovery of the correspondence between claimant's counsel and the doctors. Administrative Law Judge Robert J. Lesnick denied employer's motion to compel, determining that the correspondence sought was protected by the attorney work product doctrine. Employer renewed its request at the hearing. The administrative law judge declined to disturb Judge Lesnick's order. Hearing Transcript at 30-31.

On appeal, employer argues that claimant was required to provide the letters at issue, citing Rule 26(b)(4) of the Federal Rules of Civil Procedure (FRCP), which contains a revised provision that permits the discovery of communications between an attorney and an expert witness. The Director has responded and urges the Board to reject employer's argument, as the FRCP do not apply in cases arising under the Act. The Director also asserts that the regulations applicable to proceedings before the Office of Administrative Law Judges contain no exception to the attorney work product rule. The Director notes further that employer had ample opportunity to challenge the credibility of the physicians' opinions when the physicians were deposed.

We hold that employer's allegations of error have no merit. The Board has held that the FRCP, and specifically Rule 26, do not govern the scope of discovery in black lung cases, but that the standard for the scope of discovery in black lung cases is provided at 29 C.F.R. §18.14, in conjunction with the provisions of 20 C.F.R. §725.455. *Cline v. Westmoreland Coal Co.*, 21 BLR 1-69, 1-76 (1997). Unlike revised FRCP 26(b)(4), Section 18.14(c) continues to protect "against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney" without exempting attorney-expert communications. 29 C.F.R. §18.14(c). Thus, the administrative law judge did not abuse his discretion in declining to order claimant's counsel to produce the letters sent to Drs. Lenkey and Cohen. *Cline*, 21 BLR at 1-76.

We now turn to employer's arguments regarding the administrative law judge's weighing of the evidence relevant to entitlement. 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 a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Employer argues first that the administrative law judge erred in finding that the newly submitted x-ray evidence and the x-ray evidence of record as a whole is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Specifically, employer contends that the administrative law judge improperly applied the "later is better" rule, counted heads, and did not weigh the radiologists' credentials. These contentions are without merit. The administrative law judge considered the qualifications of the physicians who provided the x-ray interpretations – all of whom are Board-certified radiologists and B readers - and rationally determined that claimant established the existence of pneumoconiosis because the preponderance of the x-ray evidence is positive for the disease. Decision and Order at 15; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990). Contrary to employer's assertion, the administrative law judge also properly applied *Adkins'* holding that an administrative law judge may give greater weight to more recent evidence if the evidence is consistent with the principle that pneumoconiosis is a progressive disease, because in this case the x-ray evidence dating from 1986 was negative, while the newly submitted x-ray evidence was predominantly read as positive for pneumoconiosis. *Adkins*, 958 F.2d at 51-52, 16 BLR at 2-65. We therefore reject employer's allegations of error and affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

With respect to the administrative law judge's weighing of the medical opinions relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), employer contends that the administrative law judge erred in finding that the opinions of Drs. Fino and Renn were not well reasoned. We disagree. Regarding Dr. Fino's opinion, the administrative law judge rationally determined that Dr. Fino's opinion ruled out coal mine employment as a cause of claimant's respiratory impairment, which became manifest and progressed after claimant stopped working in the mines, because Dr. Fino mistakenly believed both that claimant did not have clinical pneumoconiosis, contrary to the weight of the x-ray evidence of record, and that only clinical pneumoconiosis progresses. Decision and Order at 14; Director's Exhibit 17; Employer's Exhibit 21. The record supports the administrative law judge's interpretation of Dr. Fino's opinion. At his deposition, Dr. Fino posed a hypothetical to himself to describe the circumstances in which he would find that any part of claimant's lung disease was attributable to coal dust exposure:

> So is there anything that would suggest that this man would be in the five percent that loses more [FEV1 per year than the average person]? Well yes, a very high coal dust exposure history, **an abnormal chest x-ray. At the time you leave the mines, you have significant impairing obstruction. So that is what I look for**.

Employer's Exhibit 21 at 55 (emphasis added). This quotation demonstrates that despite the fact that Dr. Fino acknowledged that "anything is possible," he does not believe that obstructive lung disease caused by coal dust exposure can be latent and progressive. *Id*. at 49. Dr. Fino attributes obstructive disease to coal dust exposure only if the miner already has a "significant impairing obstruction" at the time that he left coal mining and has an abnormal x-ray, *i.e.*, clinical pneumoconiosis.

As the United States Court of Appeals for the Seventh Circuit observed in *Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004), whether legal pneumoconiosis can be latent and progressive is a scientific question and the Department of Labor's regulation on that point is dispositive unless a party offers the kind of medical evidence which would invalidate the regulation.[2] *Shores*, 358 F.3d at 490, 23 BLR at 2-26. It is entirely appropriate, therefore, to discredit a medical opinion which is premised upon a view inconsistent with the regulations. *See Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7, 22 BLR 2-265, 2-281 n. 7 (7th Cir. 2001)(upholding an administrative law judge's discrediting of Dr. Fino's opinion which the court observed was similar to opinions he had voiced during the

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[2] The Comments to the new regulations reflect that the reference to pneumoconiosis in 20 C.F.R. §718.201(c) applies to both clinical and legal pneumoconiosis because scientific studies have shown that both can be latent and progressive:

> [I]t is clear that a miner who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent period. Because the legal definition of pneumoconiosis includes impairments that arise from coal mine employment, regardless of whether a miner shows X-ray evidence of pneumoconiosis, this evidence of deterioration of lung function among miners, including miners who did not smoke, is particularly significant.

65 Fed. Reg. 79971 (Dec. 20, 2000).

rulemaking proceedings and which were found to be contrary to the weight of the scientific literature); *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718, 18 BLR 2-16, 2-25 (4th Cir. 1993)(upholding an administrative law judge's decision to discredit a doctor's opinion that was premised on a view at odds with the statutory and regulatory scheme).[3] Thus, the administrative law judge in this case rationally held that Dr. Fino's opinion, that only clinical pneumoconiosis is progressive, is inconsistent with 20 C.F.R. §718.201(c). Decision and Order at 14. Because Dr. Fino's opinion that claimant did not have a coal dust related disease was premised on a view contrary to the regulations, the administrative law judge properly determined that it was not well-reasoned. *See Shores*; *Summers*; *Thorn*.

We also affirm the administrative law judge's treatment of Dr. Renn's opinion, because the administrative law judge provided valid rationales for discrediting Dr. Renn's determination that claimant has neither clinical nor legal pneumoconiosis. Decision and Order at 14-15; Director's Exhibit 19; Employer's Exhibit 1; *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester & Pittsburg Coal Co.*, 6 BLR 1-378 (1983). The administrative law judge acted within his discretion in finding Dr. Renn's analysis at odds with Section 718.201, as Dr. Renn precluded a diagnosis of legal pneumoconiosis unless a miner suffers from *both* restriction and obstruction.[4] The administrative law judge correctly observed that this view conflicts with the regulatory definition of pneumoconiosis set forth at Section 718.201(a)(2), which provides in relevant part: "'legal pneumoconiosis' is…any chronic restrictive **or** obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2); s*ee Shores*, 358 F.3d at 490, 23 BLR at 2-26; *Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-281 n. 7. In addition, the administrative law judge permissibly determined that Dr. Renn's diagnosis of asthma was specifically rejected by Drs. Cohen and Fino and was not shared by any doctor in claimant's

[3] In an unpublished case presenting similar facts, the United States Court of Appeals for the Fourth Circuit held that the administrative law judge properly discredited Dr. Forehand's opinion because Dr. Forehand assumed that the absence of x-ray evidence of pneumoconiosis precluded a determination that coal dust exposure contributed to the miner's chronic bronchitis. The court also held that the administrative law judge acted rationally in discrediting Dr. Zaldivar's opinion because his analysis disregarded the language of the regulations. *Cannelton Industries, Inc. v. Frye*, No. 03-1232, 93 Fed. Appx. 551, 2004 WL 720254 (4th Cir. April 5, 2004).

[4] Dr. Renn commented that in order to support a diagnosis of coal dust induced lung disease, claimant's lung volume studies must show at least a ten percent decrement in lung capacity, *i.e.*, restriction, in combination with a residual volume of at least 120% of predicted, *i.e.*, obstruction. Employer's Exhibit 1 at 35.

history. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

We therefore affirm the administrative law judge's determination that the opinions of Drs. Fino and Renn were entitled to less weight than the opinions of the physicians who diagnosed pneumoconiosis. Although employer argues that the administrative law judge selectively analyzed the evidence, the record supports the administrative law judge's findings with respect to both of these medical opinions and the administrative law judge, within his discretion as fact-finder, exercised his authority to determine whether these opinions are reasoned. *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *see also Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Underwood*, 105 F.3d at 951, 21 BLR at 2-31-32. That determination will not be overturned on appeal if it is rational and supported by substantial evidence. *Id*. Consequently, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4). We also affirm the administrative law judge's finding that the x-ray and medical opinion evidence, weighed together, established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

We now turn to the administrative law judge's consideration of the evidence relevant to the issue of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge found that Dr. Renn's opinion was entitled to little weight because he "did not actually consider the exertional requirements of claimant's last job and the objective testing results" but rather relied upon a study that did not appear to include claimant's specific job as a foreman, and upon another study that did not include miners who performed jobs with exertional requirements similar to claimant's coal mine work. Decision and Order at 16. Dr. Renn indicated in his written report that claimant suffered from a moderately severe, significantly bronchoreversible obstructive defect and concluded that "when considering only his respiratory system, [claimant] is not totally disabled." Director's Exhibit 19. In his deposition, Dr. Renn characterized claimant's last job as a mine foreman as requiring light to medium work. Employer's Exhibit 1 at 10. Dr. Renn also referred to studies that purportedly supported his determination that a person with the degree of impairment suffered by claimant could perform a job with the same exertional requirements as claimant's job.

Employer argues that the administrative law judge's finding that claimant established total respiratory disability must be vacated, as the administrative law judge erred in finding that Dr. Renn did not have an accurate understanding of claimant's job duties. This contention is without merit. Although the administrative law judge's characterization of Dr. Renn's knowledge was

inaccurate since the record reflects that Dr. Renn reviewed the miner's written statement as to the nature of his job as a mine foreman, Employer's Exhibit 1 at 10, 73, the administrative law judge provided valid alternative reasons for discrediting Dr. Renn's opinion that claimant is not totally disabled. *Searls*, 11 BLR at 1-164; *Kozele*, 6 BLR at 1-382 n.4. The administrative law judge properly found that Dr. Renn relied on research that was not specifically relevant to the exertional requirements of claimant's usual coal mine employment and his physical limitations. Decision and Order at 16-17; *see Clark*, 12 BLR at 1-155. The administrative also acted rationally in determining that the weight of the evidence supported a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), as all of the other physicians who offered an opinion on total disability, *i.e.*, Drs. Fino, Cohen, Lenkey, and Reddy, submitted well-documented and well-reasoned opinions in which they stated that claimant is totally disabled. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997).

Employer also maintains that the administrative law judge erred in determining that the evidence of record, as a whole, establishes that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). We disagree. The administrative law judge determined that the blood gas study evidence and medical opinions of record were sufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(ii) and (iv). Decision and Order at 16. The administrative law judge found that the pulmonary function study evidence did not support a finding of total disability under 20 C.F.R. §718.204(b)(2)(i) and that there was no evidence that claimant has cor pulmonale with right-sided congestive heart failure pursuant to 20 C.F.R. §718.204(b)(2)(iii). *Id*. The administrative law judge concluded, however, that the weight of the evidence as a whole established that claimant is totally disabled. *Id*. at 17. The administrative law judge's finding is supported by substantial evidence, as the physicians whose diagnoses of total disability the administrative law judge credited under 20 C.F.R. §718.204(b)(2)(iv) addressed the nonqualifying pulmonary function studies in their opinions and explained why the objective evidence nevertheless indicated that claimant is totally disabled. Director's Exhibits 17, 21; Employer's Exhibits 2, 4, 12; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*). Consequently, we reject employer's allegations of error and affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2).

Pursuant to 20 C.F.R. §718.204(c), the administrative law judge found total disability due to pneumoconiosis established based upon the opinions of Drs. Cohen, Lenkey, and Reddy. The administrative law judge discredited Dr. Fino's contrary opinion because Dr. Fino did not diagnose legal or clinical pneumoconiosis, citing the decisions of the Fourth Circuit in *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002), and *Toler v. Eastern Associated*

Coal Corp., 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995), in support of his finding. Decision and Order at 17. Employer suggests that the administrative law judge misapplied the Fourth Circuit's holding in *Scott* when he discredited Dr. Fino's opinion. In support of its position, employer maintains that the *Scott* court held that "an administrative law judge may credit physicians' assessments regarding disability or death causation '[sic] ['] if the doctors had diagnosed the claimants with or found symptoms consistent with legal pneumoconiosis'…." Employer's Brief at 54-55, quoting *Scott*, 289 F.3d at 269, 22 BLR at 2-383. Employer also asserts that the decision in *Scott* is no longer good law because the administrative law judge's finding of pneumoconiosis was based upon the application of the true doubt rule.

Employer's quotation from *Scott* regarding the significance of a physician's reference to symptoms consistent with coal dust induced lung disease is misleading. The *Scott* court's statement regarding "symptoms consistent with legal pneumoconiosis" refers to the Fourth Circuit's decision in *Ballard,* holding that an administrative law judge who found legal pneumoconiosis established could credit the opinions of doctors who did not contradict the administrative law judge's finding of legal pneumoconiosis and who, in fact, found signs of legal pneumoconiosis: "symptoms pertaining to anthracosis…"; "anthracosilicosis of bronchial lymph nodes" and "'black pigment which is morphologically consistent with coal dust.'" *Ballard*, 65 F.3d at 1195, 19 BLR at 2-319. The passage quoted by employer also represents a portion of the court's explanation of its holdings in *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), *Hobbs v. Clinchfield Coal Co.[Hobbs II]*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995), and *Toler*. The *Scott* court applied these holdings to the issue before it, *i.e.*, whether the administrative law judge's crediting of the opinions of Drs. Dahhan and Castle, that the miner's totally disabling impairment was not related to dust exposure in coal mine employment, was appropriate. The court concluded that:

> We are of the opinion that the decisions in *Hobbs II* and *Ballard* are distinguishable from the facts at issue in this case. Instead, the facts in this case are nearly identical to those in *Toler*. Both Dr. Dahhan and Castle opined that [the miner] did not have legal or medical pneumoconiosis, did not diagnose any condition aggravated by coal dust, and found no symptoms related to coal dust exposure. Thus their opinions are in direct contradiction to the ALJ's finding that [the miner] suffers from pneumoconiosis arising out of his coal mine employment, bringing our requirements in *Toler* into play. Under *Toler*, the ALJ could only give weight to those opinions if he provided specific and persuasive reasons for doing so, and those opinions could carry little weight, at the most.

Scott, 289 F.3d at 269, 22 BLR at 2-383. Thus, contrary to employer's characterization, the court in *Scott* did not hold that an administrative law judge may credit any opinion regarding causation as long as it contains a reference to general symptoms that might be related to coal dust exposure. Rather, the physician must expressly diagnose medical or legal pneumoconiosis or link the miner's respiratory symptoms to dust exposure in coal mine employment. *Id.*

In this case, the administrative law judge determined correctly that Dr. Fino's opinion is identical in all relevant respects to the opinions of Drs. Dahhan and Castle in *Scott*. Although Dr. Fino reported that claimant experienced shortness of breath, daily cough, exertional dyspnea, and mucus production, Dr. Fino did not acknowledge that any of claimant's symptoms were related to coal dust exposure and specifically opined, contrary to the administrative law judge's appropriate finding, that claimant does not have clinical or legal pneumoconiosis. Thus, the administrative law judge acted within his discretion in determining that Dr. Fino's belief that claimant does not have either clinical or legal pneumoconiosis detracted from the credibility of his opinion regarding the source of claimant's respiratory impairment. *Scott*, 289 F.3d at 268-70, 22 BLR 2-382-84; *Toler v. Eastern Associated Coal Corp.*, 43 F.3d at 116, 19 BLR at 2-83.

Finally, the court's holding in *Scott* did not turn upon the method by which the existence of pneumoconiosis was established, but rather upon the fact that a finding of pneumoconiosis was made by the administrative law judge; hence, the court held that the administrative law judge erred in crediting the causation opinions of doctors who contradicted the administrative law judge's finding. *Scott*, 289 F.3d at 269, 22 BLR at 2-384. Accordingly, employer's argument that *Scott* no longer has precedential value is without merit. We therefore affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c). Consequently, we affirm the administrative law judge's award of benefits.

Employer next challenges the administrative law judge's determination that claimant is entitled to benefits from April 1, 2001 - the first day of the month in which he filed his claim. Decision and Order at 17; Director's Exhibit 1. Citing *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 67, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), employer asserts that 20 C.F.R. §725.503(b), which authorizes the administrative law judge to award benefits to commence as of the date a claim is filed, violates Section 7(c) of the APA. [5] The APA indicates that "[e]xcept as

[5] The pertinent regulation provides that "[w]here the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed." 20 C.F.R. §725.503(b).

otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. §556(d). *Ondecko*, however, made plain that the designation "burden of proof" in Section 7(c) referred only to the "burden of persuasion," and not to "the burden of production" or the burden of going forward with the evidence. Section 725.503 "shift[s] the burden of production, rather than the burden of proof," as it is merely a "rebuttable evidentiary presumption [] enacted to ease the burden on claimants in black lung claims adjudications." *Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47, 70-71 (D.D.C 2001); *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882 (7th Cir. 2002).

Employer also contends that the administrative law judge erred in failing to consider the relevant evidence to identify when claimant became totally disabled due to pneumoconiosis. As a general rule, once entitlement to benefits has been demonstrated, the date for commencement of those benefits is determined by the month in which claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If the date of onset is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless credited evidence establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Owens v. Jewell Smokeless Coal Corp*., 14 BLR 1-47, 1-50 (1990).

Here, the administrative law judge did not err in setting the onset date as the first day of the month of filing. Claimant filed his subsequent claim on April 4, 2001. The administrative law judge found that claimant is totally disabled due to pneumoconiosis based upon objective medical evidence and medical opinions obtained beginning in July of 2001 and extending into 2002. The credited medical evidence showing total disability due to pneumoconiosis does not establish the date of onset but merely indicates that claimant became totally disabled due to pneumoconiosis at some time prior to the date of such evidence. *See Merashoff v. Consolidation Coal Co*, 8 BLR 1-105, 1-109 (1985). The administrative law judge did not credit any evidence that claimant was not totally disabled due to pneumoconiosis at any time subsequent to the filing date of his subsequent claim, nor does employer point to such evidence. *Owens*, 14 BLR at 1-50. Therefore, the administrative law judge properly found that the medical evidence did not establish the onset date, and thus, did not err in setting April 1, 2001 as the date for the commencement of benefits. *See* 20 C.F.R. §725.503(b). Consequently, we affirm the administrative law judge's onset finding.

We now turn to employer's appeal of the administrative law judge's Attorneys' Fee Order. Employer contends that the administrative law judge erred in finding that the hourly rates charged were reasonable, that co-counsel was

necessary, and that certain services were reasonable and necessary to establishing entitlement. The award of an attorney 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*).

Regarding the hourly rates, the administrative law judge determined that Ms. Davis's rate of $205 per hour was her customary billing rate. Employer alleges that the administrative law judge's finding is in error, as Ms. Davis did not provide her customary hourly rate as required by §725.366(a). This contention is without merit. The administrative law judge specifically addressed this issue and rationally determined that $205 was Ms. Davis's customary billing rate in black lung cases based upon her fee petitions and awards in other cases and her level of experience in black lung law. Decision and Order Awarding Attorney Fees at 3; *see Kerns v. Consolidation Coal Co.*, 247 F.3d 133, 22 BLR 2-283 (4th Cir. 2001).

Employer also objects to the hourly rate of $100 charged for the services of Mr. Siegel, a paralegal, as his customary billing rate was not provided. Again, the administrative law judge specifically addressed this issue and rationally determined that $100 per hour was, in fact, Mr. Siegel's customary billing rate based upon the rate charged for Mr. Siegel's services in other types of cases and his level of experience in black lung law. We therefore affirm the administrative law judge's finding on this issue. *See Kerns*, 247 F.3d at 133, 22 BLR at 2-286.

Employer next contends that in light of Ms. Davis's expertise in black lung law, the administrative law judge erred in allowing the 3.17 hours that Ms. Davis billed for familiarizing herself with the case and discussing strategy with Mr. Johnson, the attorney who previously handled the case. This allegation of error is without merit. The administrative law judge rationally determined that the challenged entries did not merely involve Ms. Davis's effort to become familiar with the case, but rather involved formulating a response to employer's motion to compel discovery of written communications between counsel and claimant's medical experts. Decision and Order Awarding Attorney Fees at 2; *Jones*, 21 BLR at 1-108.

Employer further argues that contrary to the administrative law judge's finding, the time that the paralegal spent copying articles from medical journals is not compensable. Claimant's counsel cites the decision of the United States Court of Appeals in *Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894, --- BLR --- (7th Cir. 2003), in support of the proposition that time spent photocopying articles is compensable at the rate charged by the person doing the photocopying – whether an attorney or a paralegal. Although employer is correct in noting that Seventh Circuit case law does not constitute binding precedent in this case arising

within the jurisdiction of the Fourth Circuit, the standard of review endorsed by the court in *Hawker* is consistent with that applied by the Board to the review of an administrative law judge's findings regarding attorney fee petitions - whether the administrative law judge's findings are arbitrary, capricious or an abuse of discretion. 326 F.3d at 902, --- BLR at ---. In this case, the administrative law judge acted rationally in determining that the time that Mr. Siegel spent photocopying articles was reasonable and necessary. The administrative law judge reviewed the specific entries that employer alleges constituted clerical duties and found that Mr. Siegel's work was legal in nature as it was necessary to preparing claimant's experts for deposition and to preparing counsel to rebut employer's experts at deposition and in counsel's closing brief. Discerning no abuse of discretion by the administrative law judge, we affirm his finding with respect to Mr. Siegel's work. *Jones*, 21 BLR at 1-108.

We also reject employer's allegation that the administrative law judge erred in determining that the medical articles were necessary to prepare claimant's counsel for Dr. Cohen's deposition, as this determination was also within the administrative law judge's discretion. *Jones*, 21 BLR at 1-108. Thus, we affirm the administrative law judge's approval of a fee of $32,512.25 for 73.65 hours billed by Ms. Davis at a rate of $205 per hour, 31.59 hours billed by Mr. Johnson at a rate of $205 per hour, 89.48 hours billed by Mr. Siegel at an hourly rate of $100, and $1,990.05 in expenses.

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

BETTY JEAN HALL
Administrative Appeals Judge

Smith, J., concurring and dissenting:

I concur with my colleagues in the affirmance of the administrative law judge's Decision and Order - Awarding Benefits and Attorneys' Fee Order in all respects save one. I must respectfully dissent from their holding concerning the administrative law judge's discrediting of Dr. Fino's opinion under 20 C.F.R. §§718.202(a)(4) and 718.204(c). I would hold that the administrative law judge erred in determining that Dr. Fino's comments regarding the existence of pneumoconiosis were at odds with the new regulations, as Dr. Fino qualified his statements about the progressivity of pneumoconiosis. Dr. Fino indicated in his deposition that clinical or legal pneumoconiosis can progress after coal dust exposure ceases, but that this ***typically*** occurs when the dust burden is visible on x-ray or when the miner has a disabling obstructive impairment at the time he retires from mining. Employer's Exhibit 21 at 41. Dr. Fino did not rule out the possibility that in this particular case, claimant's disabling lung impairment is attributable to dust exposure in coal mine employment. Rather, he determined that claimant's pulmonary condition was caused by cigarette smoking based upon claimant's work, smoking, and medical histories and upon the results of his physical examination. Accordingly, the administrative law judge erred in discrediting Dr. Fino's opinion as to both the existence of pneumoconiosis and total disability due to pneumoconiosis. I would, therefore, vacate the administrative law judge's findings under Sections 718.202(a)(4) and 718.204(c) and remand the case to him for reconsideration of these issues. I would further instruct the administrative law judge that if he credited Dr. Fino's opinion on remand, he must reconsider whether the evidence of record establishes that claimant was not totally disabled due to pneumoconiosis subsequent to the date on which he filed his claim.

ROY P. SMITH
Administrative Appeals Judge