BRB Nos. 11-0852 BLA
and 12-0168 BLA

MICHAEL DALTON, SANDI COLLINS, KATHY MOUDY, and JOYCE GILLIHAN (o/b/o WILLIAM DALTON)	)	
Claimants-Respondents	)	
v.	)	
FRONTIER-KEMPER CONSTRUCTORS, INCORPORATED	)	DATE ISSUED: 12/07/2012
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order and Attorney Fee Order of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Anne Megan Davis (Johnson, Jones, Snelling, Gilbert & Davis, P.C.), Chicago, Illinois, for claimants.

Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2009-BLA-5920) of Administrative Law Judge Alice M. Craft denying employer's request for modification of an award of benefits in a miner's claim filed pursuant to the provisions of the Black Lung Benefits

Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[1] Employer also appeals the administrative law judge's subsequent Attorney Fee Order (2009-BLA-5920).[2]

Procedural History

The miner's claim, filed on June 1, 1999, has previously been before the Board.[3] In its most recent decision, pursuant to employer's appeal, the Board affirmed Administrative Law Judge Rudolf L. Jansen's findings that the miner established twenty-two years and three months of coal mine employment,[4] and that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The Board vacated, however, Judge Jansen's finding as to the miner's smoking history, as well as his finding that the medical opinion evidence established the existence of legal pneumoconiosis,[5] pursuant to 20 C.F.R. §718.202(a)(4), and instructed Judge Jansen to reconsider the miner's smoking history and its effect on the credibility of the relevant medical opinions. Finally, the Board vacated Judge Jansen's finding that the miner's total disability was due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Consequently, the Board remanded the case to Judge Jansen for further consideration of

[1] The recent amendments to the Act, which became effective on March 23, 2010, do not apply to this case, as it involves a miner's claim filed before January 1, 2005.

[2] By Order dated February 17, 2012, the Board consolidated employer's appeals in BRB Nos. 11-0852 BLA and 12-0168 BLA for purposes of decision only.

[3] The complete procedural history of this claim is set forth in the Board's prior decisions. *Dalton v. Frontier-Kemper Constructors, Inc.*, BRB No. 04-0206 BLA (Nov. 26, 2004)(unpub.); *Dalton v. Frontier-Kemper Constructors, Inc.*, BRB No. 06-0596 BLA (Apr. 27, 2007)(unpub.).

[4] The Board will apply the law of the United States Court of Appeals for the Seventh Circuit, as the miner was last employed in the coal mining industry in Illinois. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 2.

[5] A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Clinical pneumoconiosis is a disease "characterized by [the] permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

these issues. *Dalton v. Frontier-Kemper Constructors, Inc.,* BRB No. 06-0596 BLA (Apr. 27, 2007)(unpub.).

On remand, three of the miner's four children moved to be substituted as parties in the miner's claim, on the ground that the miner died in March 2007. Due to Judge Jansen's unavailability, the case was reassigned, without objection, to Administrative Law Judge Joseph E. Kane. In a Decision and Order on Remand issued on August 29, 2008, Judge Kane initially denied the children's Motion to be substituted as parties. Because all benefits to which the miner was entitled had been paid by the Black Lung Disability Trust Fund (the Trust Fund), Judge Kane found that the miner's children had no rights with respect to benefits that might be prejudiced by adjudication of the claim, pursuant to 20 C.F.R. §725.360. Director's Exhibit 82. Considering the merits of entitlement, Judge Kane found that the evidence established that the miner smoked approximately three-quarters of a pack of cigarettes per day, for approximately twenty years, or a total of fifteen pack-years. Judge Kane further found that the medical opinion evidence established the existence of legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4). Director's Exhibit 82. Finally, Judge Kane found that the medical opinion evidence established that the miner's total disability was due to legal pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Accordingly, Judge Kane awarded benefits, commencing as of June 1999, the month in which the miner filed his claim.

Employer appealed Judge Kane's decision, but later withdrew its appeal so that it could pursue a petition for modification, filed with the district director, alleging a mistake of fact in the award of benefits. Director's Exhibits 53, 55. By Order dated February 26, 2009, the Board granted employer's motion, dismissed employer's appeal, and remanded the case to the district director for modification proceedings. Director's Exhibit 56.

The case was eventually reassigned, without objection, to Judge Craft (the administrative law judge) for a decision on the record. On May 12, 2010, all four of the miner's children renewed their Motion to be substituted as parties to the miner's claim. By Order dated June 23, 2010, the administrative law judge granted the motion, over employer's objection. In a decision dated August 23, 2011, the administrative law judge considered both the original evidence and the new evidence submitted by the parties on modification, and found that employer failed to meet its burden to establish a mistake in a determination of fact regarding the award of benefits. Accordingly, the administrative law judge denied employer's request for modification, pursuant to 20 C.F.R. §725.310 (2000).[6] The administrative law judge further found, however, a mistake in Judge Kane's

[6] The 2001 revisions to 20 C.F.R. §725.310 do not apply to claims, such as the miner's, that were pending on January 19, 2001, the effective date of the revised regulations. 20 C.F.R. §725.2(c). Where a former version of a regulation remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations.

determination of the date for the commencement of benefits, and modified the award to reflect benefits commencing as of August 1991, rather than June 1999.

On appeal, employer contends that the administrative law judge erred in substituting the claimants as parties to this claim. Employer also contends that claimants' counsel engaged in ex parte communications with the administrative law judge's office. Regarding the merits of entitlement, employer asserts that the administrative law judge erred in her evaluation of the miner's coal mine employment and smoking histories. Employer also asserts that the administrative law judge erred in weighing the medical opinion evidence relevant to the existence of legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4), and relevant to whether the miner's disability was due to legal pneumoconiosis, pursuant to 20 C.F.R. §718.204(c).[7] Employer also asserts that the administrative law judge erred in modifying the date from which benefits commence. In a separate appeal, employer contests the administrative law judge's award of an attorney's fee to claimants' counsel. The claimants respond, urging affirmance of the denial of employer's request for modification, and the fee award. The Director, Office of Workers' Compensation Programs, has declined to participate in these appeals. In a combined reply brief, employer reiterates its previous contentions.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(en banc).

Claimants' Motion to be Substituted as Parties to this Claim

We first address employer's contention that the administrative law judge erred in finding that the miner's adult children are proper parties to this claim. The applicable regulation provides that a widow, child, parent, brother or sister of a claimant, or the representative of the decedent's estate, who makes a showing that his or her "rights with respect to benefits may be prejudiced by a decision of an adjudication officer, may be made a party." 20 C.F.R. §725.360(b). Employer does not contest the claimants' status

[7] We affirm, as unchallenged, the administrative law judge's findings that employer failed to establish a mistake in fact in the prior determination that the miner suffered from clinical pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(1), (4), and was totally disabled by a respiratory or pulmonary impairment, pursuant to 20 C.F.R. §718.204(b)(2). *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).

as the miner's children. Rather, employer asserts that, because all benefits to which the miner was entitled had been paid by the Trust Fund at the time the claimants sought to become parties, the claimants failed to show that their "rights with respect to benefits may be prejudiced by a decision." Employer's Brief at 7. Thus, employer asserts that the administrative law judge erred in allowing the claimants to be parties to this claim. Employer's Brief at 7. Employer's contention lacks merit.

The administrative law judge properly found that the claimants have a monetary interest in this claim, as they may be entitled to collect from employer an additional twenty percent of the benefits paid, as a penalty for its failure to pay benefits within ten days after they became due.[8] 20 C.F.R. §725.607; *see Crowe v. Zeigler Coal Co.*, 646 F.3d 435, 445, 24 BLR 2-403, 2-420 (7th Cir. 2011); Order Granting Renewed Motion for Substitution at 4-5. We, therefore, reject employer's allegation of error, and affirm the administrative law judge's determination to substitute the miner's children as parties to this claim.[9]

[8] The regulation at 20 C.F.R. §725.607 provides, in pertinent part:

> If any benefits payable . . . are not paid by an operator or other employer ordered to make such payments within 10 days after such payments became due, there shall be added to such unpaid benefits an amount equal to 20 percent thereof, which shall be paid to the claimant at the same time as, but in addition to, such benefits, unless review of the order making such award is sought as provided in section 21 of the [Longshore and Harbor Workers' Compensation Act] and an order staying payments has been issued.

Employer does not contest the administrative law judge's finding that Judge Kane's award of benefits became effective on October 3, 2008, after which employer neither paid benefits nor sought a stay of payment. Order Granting Renewed Motion for Substitution at 4.

[9] Moreover, the regulation governing modification of this claim, filed in 1999, provides that an order issued on modification "may terminate, continue, reinstate, increase, or decrease benefit payments, or award benefits." 20 C.F.R. §725.310(d) (2000). Thus, while employer is correct that all payments to the miner have been made, the regulation also provides for the collection of any benefits paid in error. 20 C.F.R. §725.310(d) (2000). In view of employer's modification request, the miner's children could reasonably deem it necessary to defend the miner's award of benefits, in light of the fact that employer's modification request could result in reversal of the award and allow recovery of the benefits paid by the Trust Fund. *See Old Ben Coal Co. v. Director,*

Ex Parte Communications

We next address employer's assertion that claimants' counsel engaged in improper ex parte communications with the administrative law judge's staff. Employer's Brief at 5-9. Specifically, employer asserts that counsel placed four telephone calls to the administrative law judge's office, between February and May of 2011, without notifying employer,[10] in violation of 29 C.F.R. §18.38(a). *Id.* Employer contends that the fact that the administrative law judge's office entertained counsel's telephone calls evinces that the administrative law judge was disposed to decide this case in claimants' favor. Employer's Brief at 6. Employer's argument lacks merit.

The record reflects that, in response to employer's objection to the alleged improper communication with the administrative law judge, the claimants' counsel explained that she had no contact with the administrative law judge, but telephoned the administrative law judge's office only to inquire about the status of the claim. The claimants' counsel contends this action was reasonably necessary given that this case is more than twelve years old and has been reassigned twice. Counsel emphasized that she never spoke, nor asked to speak, with the administrative law judge, and never discussed any facts or issues in the case with anyone in the administrative law judge's office. Claimants' Brief at 10-11.

The Administrative Procedure Act (APA) defines an ex parte communication as "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given." 5 U.S.C. §551(14), 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); *see* 29 C.F.R. §18.38. The APA further provides, however, that "requests for status reports on any matter or proceeding covered by this subchapter," do not constitute ex parte communications. *Id*. In addition, the APA does not treat a communication with a person who is not "involved in the decisional process of the proceeding," as ex parte. 5 U.S.C. §557(d)(1).

The administrative law judge addressed employer's contentions in her Attorney Fee Order. Attorney Fee Order at 9. Considering the relevant statutory language, and the parties' arguments, the administrative law judge properly found that the communications between the claimants' counsel and the administrative law judge's staff regarding the

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OWCP [*Hilliard*], 292 F.3d 533, 538 n.4, 22 BLR 2-429, 2-438-39 n.4 (7th Cir. 2002). Employer does not address this possibility.

[10] Employer explained that it became aware of the telephone calls when reviewing claimants' counsel's fee petition. Employer's Brief at 5 n.1.

status of the case did not fall within the APA's proscription against ex parte contacts. Attorney Fee Order at 9. As the administrative law judge noted, the communications did not concern the merits of the administrative law judge's proceedings, but rather constituted an inquiry regarding the status of the claim. *See* 5 U.S.C. §551(14); *Elec. Power Supply Ass'n v. FERC*, 391 F.3d 1255, 1258 (D.C. Cir. 2004); Attorney Fee Order at 9.

We therefore, reject employer's argument that the telephone calls between the claimants' counsel and the administrative law judge's staff, regarding the status of the case, were impermissible and constituted a violation of the bar on ex parte communications. Thus, there is no merit to employer's contention that these communications evince bias towards the claimants, requiring that the decision be vacated and remanded for consideration by a different administrative law judge.

Employer's Request for Modification

We now turn to the administrative law judge's evaluation of the evidence in her August 23, 2011 Decision and Order denying employer's request for modification of the award of benefits. The miner previously established that he was totally disabled due to pneumoconiosis arising out of coal mine employment, and, therefore, was awarded benefits. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. As the miner is now deceased, employer may establish a basis for modification of the award of benefits by establishing a mistake in a determination of fact in the previous decision, 20 C.F.R. §725.310(a)(2000); *see Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). The burden of proof to establish a basis for modifying the award of benefits rests with employer. *Branham v. BethEnergy Mines, Inc.*, 21 BLR 1-27, 1-34 (1996). The claimants do *not* have the burden to reestablish the miner's entitlement to benefits. *See Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 139 (1997).

Employer contends that the administrative law judge erred in finding that employer did not demonstrate a mistake in fact in the prior finding that the existence of legal pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(4). Initially, employer contends that the administrative law judge relied on incorrect coal mine dust exposure and smoking histories in evaluating the medical opinions.

Employer first asserts that the administrative law judge erred in finding that the miner's work in coal mine construction involved significant coal mine dust exposure, and thus constituted employment as a "miner." Employer's Brief at 10-11. The administrative law judge initially found, consistent with the Board's prior holding, that the regulations at 20 C.F.R. §725.202, implementing 30 U.S.C. §902(d), include special provisions for coal mine construction workers. 20 C.F.R. §725.202(b); Decision and Order at 7, *citing Dalton v. Frontier-Kemper Constructors, Inc.*, BRB No. 04-0206 BLA

(Nov. 26, 2004)(unpub.), *aff'd on recon., Dalton v. Frontier-Kemper Constructors, Inc.*, BRB No. 04-0206 BLA (May 4, 2005)(unpub.). Construction workers are considered to be "miners" under the Act if they are exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility. *Id.* Such workers are entitled to a rebuttable presumption that they were exposed to coal mine dust during all periods of such employment. *Id.* The presumption may be rebutted by evidence which demonstrates that a worker was not regularly exposed to coal mine dust during his or her work in or around a coal mine or coal preparation facility. 20 C.F.R. §725.202(b)(2)(i), (ii).

In evaluating the evidence relevant to the miner's dust exposure, including affidavits submitted by the miner, by his co-workers, and by employer, describing the nature of the miner's work, the administrative law judge permissibly found that there was no credible evidence in the record contradicting the miner's or his co-workers' accounts that he was exposed to both coal and rock dust in his work for employer as a coal mine construction worker. *Roberts & Schaefer Co. v. Director, OWCP* [*Williams*], 400 F.3d 992, 1000-01, 23 BLR 2-302, 2-319-20 (7th Cir. 2005); Decision and Order at 7. Thus, the administrative law judge acted within her discretion in concluding that employer failed to establish a mistake of fact regarding the previous conclusions that the miner was employed as a miner under the Act for twenty-two years. *See Williams*, 400 F.3d at 1000-01, 23 BLR at 2-319-20; Decision and Order at 7.

We also reject employer's contention that the administrative law judge erred in finding that the miner had a fifteen pack-year smoking history. The administrative law judge properly found that the evidence relevant to the miner's smoking history consists of the miner's January 3, 2003 affidavit, and the medical histories taken by the physicians associated with his claim. In his affidavit, the miner stated that he smoked cigarettes for about twenty years, ending in 1984, and that he most often smoked three-quarters of a pack a day, and never more than a pack a day. Claimants' Exhibit 4. The administrative law judge correctly noted that, while the medical records are generally consistent in recording that the miner stopped smoking in 1984, they differ as to how long, and how heavily, the miner smoked.[11] Specifically, Drs. Jani, Anadkat, and Fowler reported in

[11] The administrative law judge found that some treating physicians, including Drs. Reiti, Dagney, and some physicians who examined the miner in connection with this claim, including Drs. Carandang and Selby, reported fifteen or twenty pack-years of smoking, and Dr. Diaz, who reviewed the miner's records, also relied on a fifteen pack-year smoking history, generally consistent with the miner's sworn statements. Decision and Order at 7-8; Director's Exhibits 9, 20, 39, 54. The administrative law judge also found that Drs. Cohen and Marder took the complete range of potential smoking histories into account when rendering their opinions. Decision and Order at 8; Claimants' Exhibit 7; Employer's Exhibit 5.

hospital summaries that the miner smoked longer, and more heavily, than he reported in his affidavit. Director's Exhibits 9, 20, 54. In addition, Dr. Spagnolo acknowledged the disparate histories in the reports, but questioned the veracity of the miner's affidavit, and concluded that the miner's smoking history was likely more extensive than he admitted.

Considering the various smoking histories, the administrative law judge initially noted, correctly, that both Judge Jansen and Judge Kane concluded that the miner smoked three-quarters of a pack a day for twenty years, for a total of fifteen pack-years. Decision and Order at 8. Contrary to employer's argument, the administrative law judge permissibly discredited Dr. Jani's recorded smoking history as contradictory and unreliable, because Dr. Jani stated, in a September 1996 report, both that the miner had been "a heavy smoker one and a half packs for the last many years," and that the miner had quit smoking in 1984. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); Decision and Order at 7, 22; Director's Exhibit 20 at 87. The administrative law judge further permissibly discounted the smoking histories recorded by Drs. Anadkat and Fowler, because she could not determine whether they took new histories from the miner, or relied on Dr. Jani's discredited report. *Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988); Decision and Order at 7-8. Finally, the administrative law judge acted with her discretion in discounting Dr. Spagnolo's opinion, questioning the veracity of the miner's affidavit and concluding that the miner "likely" had more than a thirty pack-year smoking history, because she found the opinion to be speculative. *See Burns*, 855 F.2d at 501.

Thus, the administrative law judge permissibly concluded that the weight of the credible evidence supported a smoking history of about fifteen pack-years, ending in 1984. *Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987) Therefore, we affirm the administrative law judge's finding that employer failed to establish a mistake in a determination of fact regarding the miner's smoking history. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988).

We next address employer's argument that the administrative law judge erred in her consideration of the medical opinion evidence relevant to the existence of legal pneumoconiosis, at 20 C.F.R. §718.202(a)(4). The administrative law judge properly found that, while all the physicians agree that the miner suffered from severe chronic obstructive pulmonary disease (COPD), Drs. Cohen, Diaz, and Marder attributed the miner's COPD to both coal mine dust exposure and smoking, while Drs. Carandang, Selby, and Spagnolo opined that the miner's COPD was due solely to smoking. Decision and Order at 25-29. Finding that Drs. Cohen, Diaz, and Marder supported their opinions with clinical findings, objective testing, and medical studies, and that their opinions were based on accurate coal mine employment and smoking histories, and were consistent with the prevailing medical view that coal mine dust can cause obstructive disease and

clinically significant impairment, the administrative law judge accorded their opinions probative weight. Decision and Order at 32-33.

In contrast, the administrative law judge found the opinions of Drs. Carandang and Selby to be inadequately explained. Decision and Order at 32. The administrative law judge also discounted the opinion of Dr. Spagnolo, finding it to be based on inaccurate smoking and employment histories, and inadequately explained. Decision and Order at 33. The administrative law judge therefore found that employer failed to demonstrate a mistake in the prior determination that the miner suffered from legal pneumoconiosis. Decision and Order on Remand at 33.

Employer asserts that the administrative law judge erred in crediting the opinions of Drs. Cohen, Diaz, and Marder and in discrediting the opinion of Dr. Spagnolo.[12] Specifically, reiterating its arguments that the miner had a shorter coal mine employment history and a longer smoking history than the administrative law judge found, employer asserts that only Dr. Spagnolo based his opinion on accurate smoking and employment histories. Employer's Brief at 10-12. Employer's argument lacks merit.

Contrary to employer's assertion, the administrative law judge accurately observed that Drs. Cohen, Diaz, and Marder each relied on an occupational history of twenty-two years of coal mine employment, consistent with her own findings. The administrative law judge further accurately observed that Drs. Cohen and Diaz relied on a smoking history of fifteen pack-years, consistent with her own findings, and that Dr. Marder explained that his opinions would remain unchanged whether the miner smoked for fifteen years, or forty years. In contrast, the administrative law judge found that Dr. Spagnolo minimized the miner's coal mine dust exposure and exaggerated his smoking history.[13] As we have affirmed the administrative law judge's findings that the miner had at least twenty-two years of coal mine employment, and a fifteen pack-year smoking history, we reject employer's allegation of error in the administrative law judge's determination to credit the opinions of Drs. Cohen, Diaz, and Marder, and to discount the opinion of Dr. Spagnolo, based on whether the physicians relied on accurate histories.

[12] Employer does not challenge the administrative law judge's discrediting of Dr. Carandang's or Dr. Selby's opinions. Those findings are, therefore, affirmed. *See Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-711.

[13] As the administrative law judge correctly noted, Dr. Spagnolo stated that the miner was "not actually a coal miner," and "appear[ed] to have had very limited exposure to coal dust in his work since his work was in construction not mining." Director's Exhibit 54 at 13. The administrative law judge also accurately observed that Dr. Spagnolo based his opinion on a smoking history of more than thirty pack-years.

See Livermore v. Amax Coal Co., 297 F.3d 668, 672, 22 BLR 2-399, 2-408 (7th Cir. 2002); *Amax Coal Co. v. Beasley*, 957 F.2d 324, 327, 16 BLR 2-45, 2-48 (7th Cir. 1992). Moreover, the administrative law judge acted within her discretion when she determined that Dr. Spagnolo did not adequately explain his reasoning in excluding the miner's more than twenty-two years of coal mine dust exposure as a possible contributor to the miner's COPD. *See Zeigler Coal Co. v. Director, OWCP* [*Villain*], 312 F.3d 332, 336, 22 BLR 2-581, 2-589 (7th Cir. 2002); Decision and Order on Remand at 7. Based on the foregoing, we affirm the administrative law judge's determination that employer did not establish a mistake of fact in the finding of the existence of legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4).

We further affirm the administrative law judge's finding that employer did not meet its burden to demonstrate that a mistake in fact was made in the prior determination that the miner's total disability was due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). The administrative law judge rationally discounted the opinions of Drs. Selby, Carandang, and Spagnolo, the only physicians to opine that the miner's disability was unrelated to coal mine dust exposure, because they did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding at 20 C.F.R. §718.202(a)(4). *See Stalcup v. Peabody Coal Co*., 477 F.3d 482, 484, 24 BLR 2-33, 2-37 (7th Cir. 2007); *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-69, 22 BLR 2-311, 2-318 (7th Cir. 2001); *see also Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 895, 13 BLR 2-348, 2-355 (7th Cir. 1990); Decision and Order at 34-35. We, therefore, affirm the administrative law judge's finding that employer failed to establish a mistake in the prior finding that the miner was totally disabled due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). *See Villain*, 312 F.3d at 335, 22 BLR at 2-589; Decision and Order at 21.

We next address employer's contention that the administrative law judge erred in modifying the date for the commencement of benefits. Initially, we reject employer's assertion that the administrative law judge abused her discretion in addressing the issue of the commencement of benefits date, when the issue was not contested by employer. Employer's Brief at 6-7. Contrary to employer's contention, modification based on a mistake in a determination of fact vests the fact-finder "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 540, 22 BLR 2-429, 2-442 (7th Cir. 2002); *Director, OWCP v. Drummond Coal Co.* [*Cornelius*], 831 F.2d 240, 10 BLR 2-322 (11th Cir. 1987). Thus, the administrative law judge permissibly evaluated the analysis supporting the prior determination of the date for the commencement of benefits.

However, the administrative law judge erred in modifying the date for the commencement of benefits to August 1991, the month in which the miner left his employment. Specifically, the administrative law judge found that when the miner was examined in 1995 by Dr. Beck, a treating physician, he was already completely disabled by his breathing problems. In addition, the administrative law judge noted that Dr. Cohen opined that it was highly unlikely that treatment with medication would have rendered the miner capable of employment from a pulmonary standpoint, as his FEV1 had been between twenty and twenty-nine percent of predicted since 1991. Thus, based on these opinions, the qualifying[14] pulmonary function studies from 1991, and the lack of evidence in the record that the miner was not disabled at any point after he left work in 1991, the administrative law judge concluded that Judges Kane and Jansen mistakenly found that the month in which the miner became totally disabled could not be determined. Hence, the administrative law judge modified the prior decision to reflect commencement of benefits in August 1991. Decision and Order at 35-36.

The regulation at 20 C.F.R. §725.503(b) specifically provides that benefits are payable as of the month of onset of total disability *due to pneumoconiosis* or, if the evidence does not establish the month of onset, as of the month during which the claim was filed, unless medical evidence that was credited by the administrative law judge establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b), (d)(1); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990); *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603-04, 12 BLR 2-178, 2-184-85 (3d Cir. 1989). As neither Dr. Beck nor Dr. Cohen opined that the miner was disabled *due to pneumoconiosis* in 1991, we must vacate the administrative law judge's designation of August 1991, as the date for the commencement of benefits. *See Owens*, 14 BLR at 1-49*; Krecota*, 868 F.2d at 603-04, 12 BLR at 2-184-85; *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182-83 (1989).

We further hold, however, that remand to the administrative law judge for reconsideration of this issue is not required. Here, the medical evidence credited by the administrative law judge establishes only that the miner became totally disabled due to pneumoconiosis at some time prior to the date of that evidence. *See Merashoff v. Consolidation Coal Co*, 8 BLR 1-105, 1-109 (1985). Further, the administrative law judge did not credit any evidence that the miner was not totally disabled due to pneumoconiosis at any time subsequent to the filing date of his claim. Since the medical evidence does not reflect the date upon which the miner became totally disabled due to pneumoconiosis, benefits are payable from the month in which he filed this claim. 20

[14] A "qualifying" pulmonary function study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

C.F.R. §725.503(b). Consequently, we modify the date of commencement of benefits from August 1991, to June 1999, the month and year in which the miner filed his claim. 20 C.F.R. §725.503(b); *Owens*, 14 BLR at 1-49; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990).

Attorney Fee Award

Employer also appeals the administrative law judge's Attorney Fee Order, awarding fees for legal services performed by the claimants' counsel, Anne Megan Davis, and her associates and assistants, in connection with the miner's claim. The administrative law judge awarded claimants' counsel a total fee of $41,404.50, representing 142.37 hours[15] of legal services at an hourly rate of $250.00 (Anne Megan Davis and Thomas E. Johnson), 38.78 hours of legal services at an hourly rate of $100.00 (legal assistants), and $1.934.00 in costs and expenses.

On appeal, employer contends that the administrative law judge's attorney's fee award is excessive. Claimants respond, urging affirmance of the fee award. Employer filed a reply brief, reiterating its contentions on appeal.

The amount of an award of an attorney's fee by the administrative law judge is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989). An attorney's fee award does not become effective, and is thus unenforceable, until there is a successful prosecution of the claim and the award of benefits becomes final. *Coleman v. Ramey Coal Co*., 18 BLR 1-9, 1-17 (1995).

Employer initially asserts that the administrative law judge erred in awarding the claimants' counsel a fee for services performed between March 27, 2007, when the miner died, and June 23, 2010, when the claimants were substituted as parties to the miner's claim. Employer's Attorney Fee Brief at 5-6. Relying on *Old Ben Coal Co. v. Director, OWCP* [*Melvin*], 476 F.3d 418, 23 BLR 2-424 (7th Cir. 2007), employer contends that, as all benefits to the miner had already been paid, the miner's children were not "real part[ies] in interest," as they had no "legally protectable interest" in his claim at the time of his death. Employer's Attorney Fee Brief at 6. Employer concludes that, because there was no real party in interest participating in this claim between March 27, 2007 and June 23, 2010, counsel had no client, and thus the legal services for that period are not compensable. Employer's Attorney Fee Brief at 6.

[15] The administrative law judge disallowed .33 hours of legal services for telephone calls checking the status of the claim. Attorney Fee Order at 9.

Employer's reliance on *Melvin* is misplaced. As set forth above, we have affirmed the administrative law judge's finding that the claimants have shown that their "rights with respect to benefits may be prejudiced by a decision" in this claim, pursuant to 20 C.F.R. §725.360(a), (d). Thus, the administrative law judge properly found that, unlike the situation of *Melvin*, where there was no real party in interest, here the miner's children have a "legally protectable interest" in the outcome of the miner's claim, and thus are real parties in interest. Therefore, we affirm the administrative law judge's determination that counsel retained the authority to pursue the claim on the miner's behalf.

Employer next asserts that the administrative law judge erred in awarding counsel the requested hourly rate of $250.00. We disagree. In awarding the hourly rate of $250.00, the administrative law judge applied the regulatory criteria appropriately, taking into account the complexity of the legal issues involved, as well as claimants' counsel's qualifications, experience, quality of representation, and evidence of counsel's prior fee awards,[16] to find that the requested hourly rate was reasonable. *See* 20 C.F.R. §725.366(b); *see Zeigler Coal Co. v. Director, OWCP* [*Hawker*], 326 F.3d 894, 902 (7th Cir. 2003), *aff'g Hawker v. Zeigler Coal Co.*, 22 BLR 1-177, 1-180 (2001); *Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 895, 22 BLR 2-514, 2-535 (7th Cir. 2002); Attorney Fee Order at 5-6. The administrative law judge further acted within her discretion in approving the requested billing rate of $250.00 an hour for the entire time period in which counsel represented claimants.[17] *See Missouri v. Jenkins*, 491 U.S. 274, 284 (1989); Attorney Fee Order at 6.

Based on the administrative law judge's proper analysis of the regulatory criteria, we hold that the administrative law judge did not abuse her discretion in determining that the claimants' counsel's requested hourly rates were reasonable, and reflected the applicable market rates. 20 C.F.R. §725.366(b); *see Hawker*, 326 F.3d at 902; *Chubb*, 312 F.3d at 895, 22 BLR at 2-535; Attorney Fee Order at 6. We, therefore, affirm the administrative law judge's approval of the requested hourly rates.

Employer also objects to the administrative law judge's calculation of allowable hours. Specifically, employer maintains that the following time entries were not

[16] Claimants' counsel provided copies of black lung cases from 2011 in which she and her associate, Mr. Johnson, were awarded an hourly rate of $250.00. Attorney Fee Order at 5.

[17] Claimants' counsel requested $250.00 per hour for all work performed in this case, but counsel acknowledged that, prior to October 1, 2010, their hourly rate was $235.00. Employer's Attorney Fee Brief at 7.

necessary for the successful prosecution of this claim, and thus are not compensable: 4.66 hours charged by counsel for locating the claimants in this case, 5.5 hours spent drafting a motion to strike employer's reply brief, 1.25 hours for telephone calls to the office of the Solicitor of Labor regarding potential responses to an Order to Show Cause, and 6.75 hours spent for defending their fee petition. Employer's Attorney Fee Brief at 6-9. Employer's arguments lack merit.

The administrative law judge reviewed the time entries challenged by employer and acted within her discretion in finding that the counsels' efforts to locate the real parties in interest in this claim, and counsels' communications to those claimants, constituted necessary, compensable legal work. *See Hawker*, 326 F.3d at 902; Attorney Fee Order at 7. Similarly, the administrative law judge permissibly concluded that the time spent by counsel drafting a motion to strike, and conferring with the Solicitor's Office regarding issues in the case was reasonably necessary to successfully prosecute the claimants' case. *See Hawker*, 326 F.3d at 902; Attorney Fee Order at 8. Moreover, the administrative law judge permissibly found that counsels' work performed defending its fee petition was compensable. *See Hawker*, 326 F.3d at 903; *Kerns v. Consolidation Coal Co.*, 247 F.3d 133, 134, 22 BLR 2-283, 2-286 (4th Cir. 2001); Attorney Fee Order at 10. As employer has not shown that the administrative law judge acted arbitrarily, capriciously, or abused her discretion, we affirm her finding that a total of 181.15 hours of legal services was reasonable under the circumstances of this case. *See* 20 C.F.R. §725.366; *Hawker*, 326 F.3d at 902; Attorney Fee Order at 12.

Finally, employer contends that the administrative law judge erred in approving the expenses for obtaining medical opinions from Drs. Cohen and Diaz. Employer asserts that the claimants' counsel did not adequately support the hourly rate of $250.00 claimed by these physicians. The administrative law judge specifically considered employer's objections to the expenses for Dr. Cohen's and Dr. Diaz's services, and noted that the claimants' counsel submitted statements from other medical experts who averred that they charge $300.00 to $700.00 for similar services. Attorney Fee Order at 12. In light of this evidence, the administrative law judge permissibly concluded that the services provided by Drs. Cohen and Diaz were reasonable and necessary litigation expenses, and that the fees charged were reasonable in light of the services they performed. *See* 20 C.F.R. §725.366(c); *Hawker*, 326 F.3d at 902; *Branham v. Eastern Assoc. Coal Corp*, 19 BLR 1-1, 1-4 (1994); Attorney Fee Order at 11-12. Because we have rejected all contentions of error raised by employer, we affirm the administrative law judge's attorney's fee award.

Accordingly, the administrative law judge's Decision and Order in the miner's claim is affirmed, as modified to reflect June 1999 as the month from which benefits commence, and the Attorney Fee Order is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge