BRB Nos. 09-0616 BLA
and 10-0297 BLA

NORMAN D. BEADLES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MIDWEST COAL COMPANY (formerly known as AMAX COAL COMPANY)	)	DATE ISSUED: 01/27/2011
	)	
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, Attorney Fee Order and Supplemental Attorney Fee Order of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

Scott A. White (White & Risse, L.L.P.), Arnold, Missouri, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits, Attorney Fee Order and Supplemental Attorney Fee Order (2006-BLA-5459) of Administrative Law Judge Alice M. Craft, with respect to a claim filed on July 26, 2004, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and

932(l)) (the Act).[1] After crediting claimant with twenty-two years of coal mine employment, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that claimant established the existence of legal pneumoconiosis arising from his coal mine employment at 20 C.F.R. §§718.202(a)(4), 718.203. In addition, the administrative law judge found that claimant established that he suffers from a totally disabling respiratory impairment due to legal pneumoconiosis at 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

In a subsequent Attorney Fee Order, the administrative law judge considered claimant's counsel's petition for attorney's fees. Employer objected to the number of hours of service claimed and the hourly rate of $220.00. The administrative law judge found that the hourly rate and the hours of service were appropriate and awarded a total fee of $14,462.00. Claimant later filed a supplemental attorney fee application, seeking to recover fees for the time spent defending the original fee application. Employer objected to the request because the administrative law judge's Decision and Order did not specify that a supplemental fee application could be filed and because claimant did not submit a motion seeking leave to file the supplemental petition. The administrative law judge rejected employer's objections and issued an order awarding an additional fee of $920.00.

Employer appeals, arguing in its brief and reply brief, that the administrative law judge erred in excluding Employer's Exhibits 26 and 27, which consist of post-hearing reports from Drs. Repsher and Tuteur. In addition, employer asserts that the administrative law judge did not properly weigh the medical opinion evidence in finding legal pneumoconiosis established at 20 C.F.R. §718.202(a)(4), and disability causation established at 20 C.F.R. §718.204(c). Further, employer indicates that the administrative law judge impermissibly granted claimant's initial attorney fee request because claimant did not provide evidence that the rate she requested is reasonable. Employer also objects to the administrative law judge's consideration of the supplemental application for attorney fees. Claimant responds, urging affirmance of the award of benefits and the

[1] The district director received notice of claimant's intent to file a claim on July 26, 2004, and received the actual claim on October 12, 2004. Director's Exhibits 2, 3. Pursuant to 20 C.F.R. §725.305, the effective date of filing of the claim is July 26, 2004. Based upon this filing date, we agree with claimant and employer, that the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as the claim was filed prior to January 1, 2005. Director's Exhibits 2, 3.

award of attorney fees. The Director, Office of Workers' Compensation Programs (the Director), declined to file a response brief in this appeal.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[3] 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).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

I. Evidentiary Issue

A. The Administrative Law Judge's Findings

At the hearing, held on April 29, 2008, the administrative law judge stated that she would "leave the record open for some period to allow [claimant] to respond to those [employer's] exhibits that came in toward the end" of the deadline for submitting evidence. Hearing Transcript at 14. On September 3, 2008, the administrative law judge issued an order admitting Claimant's Exhibit 5, which contained the supplemental report of Dr. Cohen, and excluding Employer's Exhibits 26 and 27, which contained the supplemental reports of Drs. Repsher and Tuteur.[4] The administrative law judge

[2] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination and her finding that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 3, 41.

[3] The record reflects that claimant's coal mine employment was in Illinois. Director's Exhibits 4, 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4] Dr. Cohen initially submitted a report dated February 29, 2008, based on a review of documentary evidence provided by claimant's counsel, including consultation reports prepared by Drs. Repsher and Tuteur. Claimant's Exhibit 3.

determined that the reports of Drs. Repsher and Tuteur were beyond the scope of the purpose for which she held the record open.

B. Arguments on Appeal

Employer alleges that the administrative law judge erred in admitting Dr. Cohen's supplemental report. Employer also asserts that the supplemental reports by Drs. Repsher and Tuteur constituted its appropriate response to claimant's submission of Dr. Cohen's supplemental report and the administrative law judge erred by not considering them. Claimant responds, arguing that the administrative law judge properly excluded the additional reports by Drs. Repsher and Tuteur as their submission was not responsive to the purpose for which the administrative law judge held the record open. In addition, claimant maintains that Dr. Cohen's supplemental report is admissible, because "[a] physician is entitled to review **all** medical evidence of record in his written report" and "where a party submits evidence on the eve of the twenty-day rule, responsive evidence must be admitted if it is necessary to the full presentation of the opposing party's case." Claimant's Response Brief at 7 (emphasis in original).

The administrative law judge is granted broad discretion in resolving procedural issues, including the admission of evidence into the record. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006). A party seeking to overturn an administrative law judge's resolution of an evidentiary issue must prove that the administrative law judge's action represented an abuse of his or her discretion. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-137 (1989). Employer has not met its burden in this case.

Contrary to employer's contention, the administrative law judge acted within her discretion in permitting claimant to submit Dr. Cohen's supplemental report, in response to evidence that employer exchanged immediately prior to the twenty-day deadline imposed by 20 C.F.R. §725.456(b)(2).[5] *See Clark*, 12 BLR at 1-153; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*, 9 BLR 1-236 (1987)(*en banc*). In addition, the administrative law judge acted within her discretion in excluding the additional reports of Drs. Repsher and Tuteur, which were subsequently submitted in response to Dr. Cohen's supplemental report, as being outside of the scope for which the

[5] In his supplemental report, Dr. Cohen reviewed additional treatment records, Dr. Wiot's comments on Dr. Cohen's interpretation of an x-ray, and the deposition testimony of Drs. Repsher and Tuteur. Claimant's Exhibit 5.

record was left open. *Clark*, 12 BLR at 1-153; *Shedlock*, 9 BLR at 1-200. Moreover, employer has not identified any specific harm it has suffered as a result of the admission of Dr. Cohen's supplemental report and the exclusion of the supplemental reports of Drs. Repsher and Tuteur. We hold, therefore, that it was not error for the administrative law judge to admit Claimant's Exhibit 5 and exclude Employer's Exhibits 26 and 27.

II. 20 C.F.R. §718.202(a)(4)

A. The Administrative Law Judge's Findings

In considering whether claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge reviewed the medical opinions of Drs. Houser, Cohen, Repsher and Tuteur. The administrative law judge gave "probative weight" to Dr. Houser's diagnosis of legal pneumoconiosis, in the form of emphysema due to smoking and coal dust exposure, because she found that, although he did not give as detailed an explanation for his conclusions as the other physicians, his opinion was supported by the evidence and consistent with the regulations. Decision and Order at 35; Director's Exhibit 13. The administrative law judge gave great weight to Dr. Cohen's opinion, that claimant's obstructive lung disease was due to a combination of his coal mine employment and smoking histories, because she determined that it is supported by the objective evidence and is consistent with the conclusions of the Department of Labor (DOL) regarding the link between coal dust exposure and obstructive lung disease. Decision and Order at 36; Claimant's Exhibits 3, 5.

In contrast, the administrative law judge gave less weight to Dr. Repsher's opinion, that claimant's chronic obstructive pulmonary disease (COPD) and centrilobular emphysema are due to cigarette smoking. Decision and Order at 36-37. The administrative law judge found that Dr. Repsher's opinion is not well-reasoned, because he "admitted that his views are contrary to those of the American Thoracic Society, as well as the National Institute for Occupational Safety and Health (NIOSH) and the DOL, and that if those organizations are correct, then coal dust would fairly be identified as a cause" of claimant's COPD. *Id*. at 37; Employer's Exhibits 3, 13. The administrative law judge indicated that Dr. Repsher focused on the effects of clinical pneumoconiosis on claimant's lung function and "[did] not appear to accept the propositions that coal dust exposure and smoking have additive effects on lung function, that dust[-]induced and smoking-induced emphysema occur through similar mechanisms, or that coal dust causes clinically significant obstructive disease." Decision and Order at 36. In addition, the administrative law judge stated that the studies Dr. Repsher relied on pre-dated the adoption of the current DOL regulations and support the minority view in the preamble to the revised regulations. *Id*. at 36-37. Further, the administrative law judge found that Dr. Repsher's analysis was flawed because he applied statistical averages to claimant's individual case. *Id*. at 37.

The administrative law judge also gave less weight to Dr. Tuteur's opinion, that claimant's pulmonary impairment is due solely to smoking, because she found that it is not as well-reasoned as the opinions of Drs. Houser and Cohen. Decision and Order at 38; Employer's Exhibits 7, 12. The administrative law judge determined that, like Dr. Repsher, Dr. Tuteur acknowledged that claimant had obstructive disease, but focused on the effects of clinical pneumoconiosis on lung function. Decision and Order at 37. The administrative law judge indicated that Dr. Tuteur did not address the largely irreversible obstructive defect evident on the pulmonary function testing and refused to acknowledge that smoking and coal dust can have an additive effect. *Id*. at 38. The administrative law judge stated that Dr. Tuteur conceded that the DOL's view differed from his conclusion regarding the incidence of coal dust-induced obstructive lung disease and found that Dr. Tuteur generally disagreed with the studies relied on by NIOSH and the DOL. *Id*.

The administrative law judge concluded that Dr. Cohen's opinion, as supported by Dr. Houser's opinion, was entitled to the greatest probative weight, because it was more consistent with the evidence and the premises underlying the regulations. Decision and Order at 38. The administrative law judge further reiterated that she gave less weight to the opinions of Drs. Repsher and Tuteur, because neither adequately explained why claimant's twenty-two years of coal dust exposure did not contribute to his obstructive lung disease. *Id*. at 38-39. Therefore, the administrative law judge found that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Id*. at 39. Further, the administrative law judge determined that the evidence as a whole was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). *Id*.

B. Arguments on Appeal

Employer asserts that the administrative law judge improperly shifted the burden of proof by requiring employer to establish that there is no relationship between claimant's obstructive impairment and coal dust exposure. In addition, employer argues that the administrative law judge's reasons for crediting the opinions of Drs. Houser and Cohen are flawed and that the administrative law judge did not fully explain her decision to credit their opinions over those of Drs. Repsher and Tuteur. Employer maintains that Dr. Houser's opinion was conclusory and notes that it was error for the administrative law judge to refer to Dr. Houser's report as Director's Exhibit 33, as there are only twenty-eight Director's Exhibits. Employer also states that Dr. Cohen did not determine that coal dust caused claimant's impairment, but only noted that, because coal dust can cause obstruction, it must have been a factor in claimant's case. Further, employer alleges that the administrative law judge was required to discredit Dr. Cohen's diagnosis of legal pneumoconiosis as Dr. Cohen diagnosed clinical pneumoconiosis, contrary to the administrative law judge's finding.

Regarding Dr. Repsher's opinion, employer argues that it was error for the administrative law judge to reject Dr. Repsher's determination, that claimant's COPD was unrelated to coal dust exposure, because it was based on articles that pre-dated the revised regulations. In addition, employer asserts that the administrative law judge improperly relied on the preamble to the regulations to reject the opinions of Drs. Repsher and Tuteur. Employer also contends that the administrative law judge "implicitly found no way to distinguish between the effects of cigarette smoking and coal dust and [im]permissibly substitute[d] her opinion for those of Drs. Repsher and Tuteur [who] testif[ied] that they could." Employer's Brief at 21. Further, employer maintains that the administrative law judge misinterpreted the opinions of Drs. Repsher and Tuteur, as both recognized that coal dust can cause an obstructive impairment, but opined that it did not cause claimant's obstructive impairment.

Employer's contentions are without merit. In weighing the opinions of Drs. Repsher and Tuteur, the administrative law judge did not improperly shift the burden of proof to employer to rule out coal dust exposure as a cause of claimant's respiratory impairment. Rather, the administrative law judge permissibly found their opinions to be less reasoned, because neither offered "any persuasive argument" as to why coal dust exposure did not at least contribute to claimant's emphysema.[6] Decision and Order at 39; *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 13 BLR 2-348 (7th Cir. 1990); *Amax Coal Co. v. Burns*, 855 F.2d 499 (7th Cir. 1988); *Clark*, 12 BLR at 1-155. Regarding the administrative law judge's mistaken reference to Dr. Houser's report as Director's Exhibit 33, rather than Director's Exhibit 13, this error is harmless as the administrative law judge accurately summarized the report's contents. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order at 16-17, 35; Director's Exhibit 13. Furthermore, the administrative law judge acted within her discretion in according some weight to Dr.

[6] As noted by the administrative law judge, Dr. Repsher admitted that his opinion, that it is very unlikely that claimant's coal dust exposure contributed to his chronic obstructive pulmonary disease (COPD), was contrary to the positions of the National Institute for Occupational Safety and Health (NIOSH), the Department of Labor (DOL), and the American Thoracic Society. Employer's Exhibit 13 at 117-18. In addition, the administrative law judge accurately observed that while Dr. Tuteur acknowledged that coal dust exposure can cause the obstruction observed in claimant, he excluded it, based on his belief that there is a twenty percent risk for the development of cigarette smoke-induced COPD and a one percent risk of developing coal dust-induced COPD, which he indicated was contrary to the position of NIOSH and the DOL, as expressed in the preamble to the revised regulations. Employer's Exhibit 12 at 67, 72, 78-79, 82-83. Further, the administrative law judge correctly determined that Dr. Tuteur did not explain why the effects from coal dust exposure and cigarette smoking could not be additive.

Houser's opinion, despite the fact that it is not as detailed as the other physicians' opinions, as it is consistent with the objective medical evidence and the DOL's position regarding the connection between coal dust exposure and obstructive lung disease. *Poole*, 897 F.2d at 895, 13 BLR at 2-355-56; *Burns*, 855 F.2d at 501; *Clark*, 12 BLR at 1-155; Decision and Order at 35.

There is also no merit to employer's arguments with respect to Dr. Cohen's opinion. Dr. Cohen did not merely note that, because coal dust can cause obstruction, it must have contributed to claimant's obstructive impairment. Rather, as the administrative law judge permissibly determined, Dr. Cohen based his diagnosis of legal pneumoconiosis on the objective medical evidence and set forth a rationale consistent with the preamble to the revised regulations. *Poole*, 897 F.2d at 895, 13 BLR at 2-355-56; *Burns*, 855 F.2d at 501; Decision and Order at 35-36. Moreover, the administrative law judge acknowledged that Dr. Cohen's diagnosis of clinical pneumoconiosis was undermined by the administrative law judge's finding that the x-ray and CT scan Dr. Cohen relied on were negative, and the administrative law judge's ultimate determination that clinical pneumoconiosis was not established at 20 C.F.R. §718.202(a). Decision and Order at 35, 38. However, because Dr. Cohen's diagnosis of legal pneumoconiosis was not based on his diagnosis of clinical pneumoconiosis, the administrative law judge acted rationally in according it full probative weight. *See Roberts & Schaefer Co. v. Director, OWCP* [*Williams*], 400 F.3d 992, 23 BLR 2-302 (7th Cir. 2005); *Poole*, 897 F.2d at 895, 13 BLR at 2-355-56; *Burns*, 855 F.2d at 501; Decision and Order at 35-36; Claimant's Exhibit 3.

Concerning the administrative law judge's references to the preamble to the amended regulations, it is permissible for an administrative law judge to evaluate the credibility of a medical opinion in conjunction with the DOL's assessment of the prevailing views of the medical community. *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009). Therefore, it was not error for the administrative law judge to discount Dr. Repsher's opinion, because the administrative law judge found that it was based on articles that pre-dated the revised regulations and represented a view rejected by the DOL.[7] *Id*. at 24 BLR 1-125-26. In addition, the administrative law judge acted within her discretion in crediting the opinions of Drs. Houser and Cohen, despite their inability to distinguish between the effects of cigarette smoking and coal dust exposure of claimant's impairment, as the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has held that it is not necessary for physicians

[7] On cross-examination, Dr. Repsher conceded that if NIOSH, the DOL, and the American Thoracic Society were correct in their official position concerning coal mine-induced COPD, it would not be "out of line" to attribute a portion of claimant's impairment to coal dust exposure. Employer's Exhibit 13 at 118.

to determine, with precision, what percentage of claimant's impairment is attributable to pneumoconiosis and what percentage is due to other causes. Rather, the administrative law judge only has to be persuaded, on the basis of all available evidence, that pneumoconiosis was a contributing cause of the impairment. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001). The administrative law judge rationally determined, therefore, that the opinion of Dr. Cohen, as supported by the opinion of Dr. Houser, was entitled to greater probative weight than the opinions of Drs. Repsher and Tuteur, as it is more consistent with the objective medical evidence and the scientific view endorsed by the DOL in the preamble to the revised regulations. *See Poole*, 897 F.2d at 895, 13 BLR at 2-355-56; *Burns*, 855 F.2d at 501.

Accordingly, we affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

II. 20 C.F.R. §718.203

A. The Administrative Law Judge's Findings

The administrative law judge stated that claimant was entitled to the rebuttable presumption that his pneumoconiosis arose out of coal mine employment, based on his twenty-two years of coal mine employment. Decision and Order at 39. In addition, the administrative law judge determined that, to the extent that claimant has legal pneumoconiosis, the causal relationship was established by the opinions of Drs. Houser and Cohen. *Id*. Therefore, the administrative law judge concluded that claimant's pneumoconiosis was caused by his coal mine employment. *Id*.

B. Arguments on Appeal

Employer acknowledges that the administrative law judge correctly cited 20 C.F.R. §718.203(b), and indicated that, because claimant was employed as a miner for twenty-two years,[8] he was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment. However, employer argues that the administrative law judge's statement concerning legal pneumoconiosis is "circular and self[-]serving" and does not "address the contrary and probative opinions of Drs. Repsher and Tuteur as to the etiology or source of the obstruction." Employer's Brief at 21. We reject employer's allegation of error. Because the administrative law judge found the existence of legal

[8] Employer notes that the parties stipulated to twenty-one years of work in the coal mine industry. However, the administrative law judge found that claimant established twenty-two years of coal mine employment and we have affirmed this finding, as employer has not challenged it on appeal. Slip op. at 3 n.2.

pneumoconiosis established at 20 C.F.R. §718.202(a)(4), based on a thorough analysis of the evidence related to the cause of claimant's obstructive lung disease, she was not required to separately determine the etiology of claimant's legal pneumoconiosis at 20 C.F.R. §718.203, because her findings at 20 C.F.R. §718.202(a)(4) subsumed that inquiry. *Kiser v. L&J Equipment Co*., 23 BLR 1-246, 1-259 n.18 (2006); *see also Henley v. Cowan & Co., Inc*., 21 BLR 1-147 (1999). Because we affirmed the administrative law judge's finding at 20 C.F.R §718.202(a)(4), we also affirm the administrative law judge's determination that claimant's legal pneumoconiosis arose out of his coal mine employment at 20 C.F.R. §718.203(b).

III. 20 C.F.R. §718.204(c)

A. The Administrative Law Judge's Findings

The administrative law judge determined that she could "find no specific and persuasive reasons for concluding that Dr. Repsher's and Dr. Tuteur's judgment[,] that exposure to coal dust did not cause or contribute to the [c]laimant's pulmonary impairment[,] did not rest upon their disagreement with my finding that the [c]laimant has legal pneumoconiosis." Decision and Order at 42. The administrative law judge then found that claimant established total disability causation at 20 C.F.R. §718.204(c), based on Dr. Cohen's opinion. *Id*. at 43. In addition, the administrative law judge indicated that, although she gave little weight to Dr. Houser's determination that claimant is totally disabled at 20 C.F.R. §718.204(b)(2), she credited his opinion that exposure to coal dust contributed to claimant's obstructive impairment.[9] *Id*.

B. Arguments on Appeal

Employer asserts that the administrative law judge did not apply the correct disability causation standard to the medical opinion evidence. Employer also maintains that Dr. Cohen's opinion is equivocal, and insufficient to meet claimant's burden of proof, as he states only that because coal dust exposure could have contributed to claimant's impairment, it must have in this case. Employer also suggests that there is a

[9] The administrative law judge found that Dr. Houser's opinion, that claimant has a totally disabling respiratory impairment, was not well-reasoned because he examined claimant only once, he did not have access to claimant's treatment records, including a prior qualifying pulmonary function study, and did not address the exertional requirements of claimant's last job. Decision and Order at 40. In addition, the administrative law judge determined that Dr. Houser did not explain how he found that claimant was disabled when the pulmonary function study he conducted did not produce qualifying values. *Id*.

similar problem with Dr. Houser's opinion, as neither physician explained how he was able to differentiate between coal dust exposure and smoking as causes of claimant's obstructive impairment. Employer states that Drs. Cohen and Houser concluded that anyone who works in the mines and develops an obstructive impairment will have legal pneumoconiosis. Employer contends that this view "is clearly as hostile to the [r]egulations as a physician never finding a connection between coal dust and pneumoconiosis." Employer's Brief at 26. In addition, employer alleges that the administrative law judge erred in giving the opinions of Drs. Repsher and Tuteur less weight because they failed to diagnose legal pneumoconiosis, while crediting Dr. Cohen's opinion, despite his erroneous diagnosis of clinical pneumoconiosis.

Contrary to employer's contention, the administrative law judge applied the correct standard regarding disability causation. Specifically, the administrative law judge accurately stated: "Claimant must establish that pneumoconiosis is a 'substantially contributing cause' to his disability. A 'substantially contributing cause' is one which has a material adverse effect on the miner's respiratory or pulmonary condition, or one which materially worsens another respiratory or pulmonary impairment unrelated to coal mine employment." Decision and Order at 42, *quoting* 20 C.F.R. §718.204(c); *see Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004); *Kennellis Energies v. Director, OWCP* [*Ray*], 333 F.3d 822, 22 BLR 2-591 (7th Cir. 2003). Further, there is no merit to employer's assertion that the opinions of Drs. Houser and Cohen are insufficient to establish that pneumoconiosis is a substantially contributing cause of claimant's total disability because they were unable to determine the specific extent to which coal dust exposure contributed to claimant's obstructive impairment. As stated *supra*, the Seventh Circuit has held that it is not necessary for physicians to determine with certainty what percentage of a miner's impairment is caused by pneumoconiosis and what percentage is due to other contributing causes. Instead, the administrative law judge only has to be persuaded, on the basis of all available evidence, that pneumoconiosis was a contributing cause of claimant's disability. *Summers*, 272 F.3d at 483, 22 BLR at 2-281.

In addition, employer is incorrect in contending that Drs. Houser and Cohen merely concluded that, because coal dust can cause an obstructive impairment, it did so in this case. While the administrative law judge did not provide detailed findings at 20 C.F.R. §718.204(c), she thoroughly explained, at 20 C.F.R. §718.202(a)(4), that she credited Dr. Houser's opinion, attributing claimant's disabling emphysema to cigarette smoking and coal dust exposure, because it is supported by the underlying evidence and consistent with the regulations. *Poole*, 897 F.2d at 895, 13 BLR at 2-355-56; *Burns*, 855 F.2d at 501; Decision and Order at 35, 43. The administrative law judge also acted within her discretion in according greatest weight to Dr. Cohen's opinion, that claimant's disabling emphysema is due to the combined effects of smoking and coal dust exposure, because it is supported by the evidence and consistent with the premises underlying the

regulations. *Poole*, 897 F.2d at 895, 13 BLR at 2-355-56; *Burns*, 855 F.2d at 501; Decision and Order at 35-36, 43. Moreover, contrary to employer's contention, the administrative law judge properly acknowledged, at 20 C.F.R. §718.202(a)(4), that Dr. Cohen's diagnosis of clinical pneumoconiosis was contrary to her findings, but rationally found that his diagnosis of legal pneumoconiosis, a distinct condition, is reasoned and documented. *Poole*, 897 F.2d at 895, 13 BLR at 2-355-56; *Burns*, 855 F.2d at 501; Decision and Order at 34.

Further, it is permissible for an administrative law judge to discount the opinion of a physician, as to the issue of disability causation at 20 C.F.R. §718.204(c), if the physician did not diagnose the form of pneumoconiosis that the administrative law judge determined was established under 20 C.F.R. §718.202(a). *See Trujillo v. Kaiser Steel Corp*., 8 BLR 1-472 (1986). Therefore, it was not error for the administrative law judge to discount the opinions of Drs. Repsher and Tuteur on this ground. Consequently, we affirm the administrative law judge's determination that claimant established total disability causation at 20 C.F.R. §718.204(c) and further affirm the award of benefits.

IV. Attorney Fees

A. Procedural History

On July 23, 2009, claimant's counsel submitted a petition to the administrative law judge for attorneys' fees of $13,442.00, for 61.10 hours of services performed at an hourly rate of $220.00,[10] and reimbursement of costs totaling $1,020.00. After considering employer's objections, claimant's responses, and the evidence presented, the administrative law judge found that the hourly rate requested, and the time spent by counsel, were reasonable. Attorney Fee Order at 2-3. The administrative law judge rejected employer's objection to awarding fees while the claim was being appealed, finding that ruling on the petition furthered the goal of administrative efficiency. *Id*. at 1-2. Accordingly, the administrative law judge awarded claimant's counsel the amount of $13,442.00 in attorneys' fees, for 61.10 hours of services, and $1,020.00 for reimbursement of costs, for a total award of $14,462.00. *Id*. at 3-4.

On December 2, 2009, claimant's counsel filed a supplemental fee application in the amount of $920.00, reflecting 4.10 hours of services performed at an hourly rate of $220.00, for time spent defending the original fee application. On December 4, 2009, employer requested a ruling from the administrative law judge on whether she would entertain the supplemental application and requested time to respond, if the

[10] The fee petition contained requests for 46.10 hours of service performed by Sandra M. Fogel and 15 hours by Bruce Wissore.

administrative law judge responded in the affirmative. The administrative law judge issued an Order dated December 10, 2009, notifying employer that if it wished to be heard, it should follow the Rules of Practice and Procedure at 29 C.F.R. §18.6. Employer then submitted a motion dated December 15, 2009, in which it sought additional time to respond to the supplemental application and, again, requested a ruling as to whether the administrative law judge would consider counsel's filing. By Order dated December 23, 2009, the administrative law judge denied employer's motion because the time for filing a response to the particulars of the supplemental petition had expired. In addition, the administrative law judge denied employer's request for an extension of time on the ground that employer could have raised its objections to the supplemental fee application in its two prior filings. Supplemental Attorney Fee Order at 1-2. The administrative law judge also rejected employer's procedural objections to the supplemental application on the ground that employer provided no authority for its position and that requiring claimant's counsel to seek leave to file a supplemental fee petition would be judicially inefficient. *Id*. Accordingly, the administrative law judge awarded claimant's counsel an additional $920.00 in fees. *Id*. at 2.

B. Arguments on Appeal

Employer asserts that, because claimant's counsel did not meet her burden of establishing the reasonableness of her requested fee, counsel should be limited to receiving $125.00 per hour, the rate deemed reasonable in the affidavit of an administrator with personal knowledge of market rates for services related to black lung claims in southern Illinois. Employer further alleges that, at most, the hourly rate awarded should be $150.00, based on evidence showing that five Kentucky-based attorneys have requested fees in that range. Employer also states that the fact that counsel's work appears to be performed on a contingency basis is not a valid reason for awarding higher rates. In addition, employer objects to counsel's "numerous [quarter-hour] charges." Employer's Consolidated Petition for Review Brief at 4. With respect to the number of hours claimed, employer indicates that it does not object to Ms. Fogel receiving fees for 29.75 hours of services, but it continues to object to the 15 hours requested by Mr. Wissore.[11]

Employer also objects to the five affidavits submitted by claimant's counsel to support her requested hourly rate. Employer indicates that the affidavits do not "bear on the relevancy of [counsel's] representation of [claimant] in Evansville, Indiana."

[11] In claimant counsel's original fee petition, there were two pages labeled "7." One included a request for 29.75 hours for Ms. Fogel and the other reflected a request of 46.10 hours. The administrative law judge awarded fees to Ms. Fogel based on 46.10 hours of services, which is consistent with the billing entries on the preceding pages.

Employer's Consolidated Petition for Review Brief at 5. In addition, employer argues that the fees awarded in other black lung cases are not evidence of the prevailing market rate. Finally, employer reiterates its assertion that there was no basis for the administrative law judge to permit the filing of the supplemental fee request.[12] Claimant responds, arguing that the fee application complies with 20 C.F.R. §725.366(a), that the requested fee reflects a reasonable hourly rate, and that the administrative law judge permissibly granted the supplemental attorney fee petition.

The amount of an attorney fee award by an administrative law judge is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law. *See Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980); *see also Jones v. Badger Coal Co*., 21 BLR 1-102 (1998)(*en banc*). The regulations provide that an approved fee shall take into account "the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of the fee requested." 20 C.F.R. §725.366(b).

In determining the amount of attorney fees to award under a fee-shifting statute, the United States Supreme Court has held that a court must determine the number of hours reasonably expended in preparing and litigating the case and then multiply those hours by a reasonable hourly rate. This sum constitutes the "lodestar" amount. *Pa. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The lodestar method is the appropriate starting point for calculating fee awards under the Act. *B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 663, 24 BLR 2-106, 2-121 (6th Cir. 2008). An attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). The prevailing market rate is "the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004). The fee applicant has the burden

[12] Employer also states: "Since employer responded [to the supplemental fee application on] December 15, 2009[,] by postmark (the same is considered filed when mailed) it's hard to see Judge Craft's calculation regarding the same being untimely." Employer's Consolidated Petition for Review Brief at 7. However, employer does not challenge the administrative law judge's determination that employer should have submitted its substantive response to claimant counsel's supplemental fee petition in the December 15, 2009 filing. In addition, employer does not identify any prejudice it has suffered as a result of the administrative law judge's denial of employer's motion for time to file a further response to the supplemental fee application.

to produce satisfactory evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896 n.11; *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 617 (6th Cir. 2007).

We disagree with employer's contention that the requested hourly rate was not reasonable. In determining counsel's hourly rate, the administrative law judge relied upon an itemized statement of services, Ms. Fogel's resume and a summary of Mr. Wissore's qualifications, and affidavits from other Black Lung practitioners reporting hourly rates ranging from $200.00 to $225.00, which have been awarded in other cases. The administrative law judge rationally determined that these affidavits established the market rates within the community where claimant's counsel practices. *See Bentley*, 522 F.3d at 664, 24 BLR at 2-122-23; Attorney Fee Order at 2. While employer is correct that, as a general proposition, rates awarded in other cases do not set the prevailing market rate, where there is only a small number of comparable attorneys, a tribunal may look to prior awards for guidance in determining a prevailing market rate. *See Bentley*, 522 F.3d at 664, 24 BLR at 2-122-23.

The administrative law judge also acted within her discretion in considering, and rejecting, an affidavit submitted by employer, from an insurance company supervisor regarding rates paid to defense attorneys, and copies of petitions from other cases where attorneys sought lower hourly rates. Attorney Fee Order at 2. The administrative law judge rationally determined that rates paid to defense attorneys are "not an apt comparison." *Id.*, s*ee Ferland v. Conrad Credit Corp.*, 244 F.3d 1145 (9th Cir. 2001); *Trevino v. Gates*, 99 F.3d 911 (9th Cir. 1996). In addition, the administrative law judge acted within her discretion in finding that the requested rates need not be reduced simply because some claimants' attorneys charge less for their services. *See Zeigler Coal Co. v. Director, OWCP* [*Hawker*], 326 F.3d 894 (7th Cir. 2003), *aff'g Hawker v. Zeigler Coal Co.*, 22 BLR 1-177 (2001)(Decision and Order on Recon.).

There is also no merit to employer's contention that the administrative law judge erred in awarding fees for services billed in quarter-hour increments. As the administrative law judge permissibly found, other entries from the application support counsel's response that her firm does not use a standard charge, but rather bills for actual time spent.[13] Attorney Fee Order at 2.

In awarding claimant's counsel an hourly rate of $220.00 in this case, the administrative law judge also relied upon counsel's skill in representing claimant and the

[13] In the fee application, counsel's billing entries range from .10 to 20 hours. In addition, counsel listed "no charge" for several items and, on a few entries, reduced the time billed from the actual time spent on the task.

nature of the issues involved. Attorney Fee Order at 2. These are relevant factors that an administrative law judge may consider in determining a reasonable hourly rate for claimant's counsel. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 228 (4th Cir. 2009); *Bentley*, 522 F.3d at 664-65, 24 BLR at 2-124; *see also Peabody Coal Co. v. Estate of J.T. Goodloe*, 299 F.3d 666, 22 BLR 2-483 (7th Cir. 2002).

Therefore, based upon the facts of the case, we hold that the administrative law judge did not abuse her discretion in determining that claimant's counsel established that $220.00 represents a reasonable hourly rate. *See Bentley*, 522 F.3d at 663-64, 24 BLR at 2-126; *Bowman v. Bowman Coal Co.*, 24 BLR 1-167 (2010); *Maggard v. Int'l Coal Group, Knott County, LLC*, 24 BLR 1-172 (2010); Attorney Fee Order at 2.

There is also no merit to employer's assertions regarding claimant's supplemental fee petition, as claimant's counsel is entitled to request reasonable fees incurred in litigating an award of attorney's fees. *See Hawker*, 326 F.3d at 903; *Kerns v. Consolidation Coal Co.*, 247 F.3d 133, 22 BLR 2-283 (4th Cir. 2001). The administrative law judge addressed employer's procedural objections in her Supplemental Attorney Fee Order and acted within her discretion in finding that employer did not cite any authority for its contentions and that "[e]mployer's suggested approach would be remarkably inefficient, and a waste of time for the parties and the Court." *See Abbott*, 13 BLR at 1-16; Supplemental Attorney Fee Order at 1-2. Employer has not contested the four entries, totaling 4.10 hours, in the supplemental fee application.

Consequently, we affirm the administrative law judge's determination that the requested fee, in both the original and supplemental attorney fee petitions, was reasonable and affirm the administrative law judge's award of a total fee of $15,382.00, representing 65.20 hours of legal services at the hourly rate of $220.00, and expenses in the amount of $1,020.00.

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge