BRB Nos. 04-0339 BLA
and 04-0339 BLA-A

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<tr><td>JOHN R. McGREEVY

Claimant-Respondent
Cross-Petitioner

v.

CONSOLIDATION COAL COMPANY

Employer-Petitioner
Cross-Respondent

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest</td><td>)
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DATE ISSUED: 03/29/2005

DECISION and ORDER</td></tr>
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Appeal of the Decision and Order and Attorney Fee Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Cheryl Catherine Cowen, Waynesburg, Pennsylvania, for claimant.

Dorothea J. Clark and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Sarah M. Hurley (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (03-BLA-5232) of Administrative Law Judge Michael P. Lesniak awarding benefits 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). Employer and claimant also appeal the administrative law judge's Attorney Fee Order (03-BLA-5232).

This case involves a subsequent claim filed on September 28, 2001.[1] After crediting claimant with thirty years of coal mine employment, the administrative law judge found that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge, therefore, found that claimant had established that one of the applicable conditions of entitlement had changed since the date upon which his prior 1993 claim became final. Consequently, the administrative law judge considered claimant's 2001 claim on the merits. After finding that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), the administrative law judge found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b) and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits. On appeal, employer argues that the administrative law judge erred in finding that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R.§718.202(a)(1) and (a)(4). Employer also argues that the administrative law judge erred in finding the medical opinion evidence sufficient

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[1]The relevant procedural history of this case is as follows: Claimant initially filed a claim for benefits on May 7, 1993. Director's Exhibit 1. The district director denied the claim on November 5, 1993. *Id.* The district director denied the claim because he found that the evidence was insufficient to establish (1) that claimant suffered from pneumoconiosis; (2) that claimant's disease was caused at least in part by coal mine work; and (3) that claimant was totally disabled by the disease. *Id.* By letter dated January 18, 1994, Mr. David W. Costello, claimant's counsel, informed the district director that claimant intended to submit additional evidence in regard to his claim. *Id.* By letter dated January 27, 1994, the district director informed claimant that he could submit any evidence that would support a modification of the previous decision. *Id.* However, the district director informed claimant that this evidence had to be submitted by November 4, 1994. *Id.* The district director advised claimant that no further action would be taken on his claim unless he submitted additional evidence or alleged that a mistake in a determination of fact was made at the time the claim was denied. *Id.* There is no indication that claimant took any further action in regard to his 1993 claim.

Claimant filed a second claim on September 28, 2001. Director's Exhibit 3.

to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer further contends that the administrative law judge erred in finding the evidence sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer also argues that the administrative law judge erred in designating September 1, 2001 as the commencement date of claimant's benefits. In making this last contention, employer contends that 20 C.F.R. §725.503(b) is invalid under the Administrative Procedure Act (APA). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, requesting that the Board reject employer's contention that Section 725.503(b) is invalid. In a reply brief, employer reiterates its previous contentions of error.[2]

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Employer argues that the administrative law judge committed numerous errors in finding the newly submitted x-ray evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). In his consideration of whether the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge stated that:

> Given the positive readings by Drs. Thomier, Fino, Cappiello, Ahmed, Babu and Renn, I find that the x-ray evidence establishes pneumoconiosis under §718.202(a)(1). In this respect, I find their readings outweigh those rendered by Drs. Wiot, Wheeler and Scott. It is to be noted that all of these physicians, with the exception of Drs. Fino, Renn and Babu, are board-certified radiologists and B readers, Drs. Fino and Renn being B-readers as well. Thus, not only is the preponderance of the x-ray

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[2]The Board has held that, in order to establish consistency in determining the applicable law in cases before the Board, it will apply the law of the United States Court of Appeals for the circuit in which the miner most recently performed coal mine employment. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*). In this case, the administrative law judge found that, because claimant's last coal mine employment took place in Pennsylvania, the law of the United States Court of Appeals for the Third Circuit is applicable. Because no party challenges the administrative law judge's finding that claimant's most recent coal mine employment took place in Pennsylvania, we hold that Third Circuit law is applicable in this case. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

evidence positive, but a greater number of the more qualified physicians found that evidence to be positive.

Decision and Order at 7.

Employer initially contends that the administrative law judge erred in excluding Dr. Scott's negative interpretation of claimant's September 18, 2002 x-ray from the record. Employer argues that this "excluded evidence is admissible as all relevant evidence should be considered." Employer's Brief at 1 n.3. Employer also argues that the administrative law judge erred in not finding "good cause" for the admission of this additional evidence.

To the extent that employer asserts that the evidentiary limitations set forth at 20 C.F.R. §725.414[3] are invalid, its contention has no merit. The Board has rejected the argument that Section 725.414 conflicts with Section 923(b) of the Act. 30 U.S.C. §923(b); s*ee Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004). The Board has also rejected the argument that the evidentiary limitations set forth at Section 725.414 are inconsistent with the APA. 5 U.S.C. §557(c)(3)(A), 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); s*ee Dempsey*, *supra*.

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[3]Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). The claimant and the party opposing entitlement may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), (a)(3)(iii). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406." 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (iii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id.* "Notwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

Employer does not dispute that Dr. Scott's negative interpretation of claimant's September 18, 2002 x-ray exceeds the limitations of Section 725.414. Employer contends, however, that good cause exists for its admission into the record. At the hearing, employer argued that "good cause" existed for the admission of Dr. Scott's negative interpretation of claimant's September 18, 2002 x-ray. Transcript at 19. As purported "good cause" for the admission of this additional evidence, employer asserted that it was relevant to the issue of whether or not claimant suffered from complicated pneumoconiosis. *Id.* The administrative law judge indicated, however, that he did not "see any reason to allow any additional x-ray evidence." *Id.* at 20. An administrative law judge is afforded broad discretion in dealing with procedural matters. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Under the facts of this case, we hold that the administrative law judge did not abuse his discretion in determining that good cause did not exist for the admission of employer's additional x-ray evidence.

Employer next contends that the administrative law judge erred in considering the interpretations rendered by Drs. Renn and Fino to be positive for pneumoconiosis. Employer notes that while Drs. Renn and Fino found opacities which would constitute changes that could be consistent with pneumoconiosis pursuant to 20 C.F.R. §718.102(b), Drs. Renn and Fino explained that these observed changes were inconsistent with a finding of coal workers' pneumoconiosis or a coal mine dust induced lung disease. In *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999), the Board held that comments of "no coal workers' pneumoconiosis" made by a physician who has read an x-ray as positive for pneumoconiosis under the ILO-U/C classification system should be considered at 20 C.F.R. §718.203, not Section 718.202(a)(1). In this case, Dr. Renn rendered a positive interpretation of claimant's April 23, 2003 x-ray, Employer's Exhibit 4, and Dr. Fino rendered positive interpretations of claimant's October 10, 2001 and January 31, 2002 x-rays. Director's Exhibit 14. Although each physician included comments regarding the source of the pneumoconiosis, these findings do not undermine the credibility of their respective ILO classifications. Consequently, we reject employer's contention that the administrative law judge erred in considering the interpretations rendered by Drs. Renn and Fino to be positive for pneumoconiosis.

Employer argues that the administrative law judge erred in failing to consider Dr. Renn's interpretations of claimant's January 31, 2002 and September 18, 2002 x-rays and Dr. Fino's interpretation of claimant's April 23, 2003 x-ray. Employer's Brief at 9 n.12. Because these x-ray interpretations are considered positive for pneumoconiosis, the administrative law judge's error, if any, in failing to consider this evidence, is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1284 (1986).

We also reject employer's contention that the administrative law judge erred in not according the x-ray interpretations of Drs. Wheeler and Scott additional weight based upon their professorships in the field of radiology. While an administrative law judge, in

evaluating the relative weight of the x-ray evidence, may consider a physician's status as a professor in the field of radiology, he is not obligated to do so. *See Worach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993).

In his consideration of the x-ray evidence, the administrative law judge correctly noted that an x-ray interpretation rendered by a B reader can be accorded greater weight. *See Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-68 (1985); Decision and Order at 6. The administrative law judge also correctly noted that the x-ray interpretation rendered by a physician dually qualified as a B reader and Board-certified radiologist can be found entitled to greater weight than an interpretation rendered by a physician qualified only as a B reader. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 6. Of the thirteen newly submitted x-ray interpretations, the administrative law judge properly noted that nine are positive for pneumoconiosis. Decision and Order at 6; Director's Exhibits 13, 14; Claimant's Exhibits 2-5; Employer's Exhibits 3, 4. The administrative law judge also found that "a greater number of the more highly qualified physicians" rendered positive x-ray interpretations. Decision and Order at 7. Of the twelve interpretations rendered by physicians qualified as B readers and/or Board-certified radiologists, eight are positive for pneumoconiosis. Of the nine x-ray interpretations rendered by physicians dually qualified a B readers and Board-certified radiologists, five are positive for pneumoconiosis. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted x-ray evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[4]

Employer next argues that the administrative law judge erred in finding that the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer specifically contends

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[4]Employer argues that the administrative law judge erred in not considering Dr. DeMarino's interpretation of claimant's December 17, 2001 x-ray. Dr. DeMarino interpreted claimant's December 17, 2001 x-ray as revealing "interstitial infiltrate superimposed on chronic disease which could be acute pneumonia or edema." Employer's Exhibit 1. An x-ray interpretation that does not mention pneumoconiosis will, in appropriate circumstances, support an inference that a miner does not suffer from pneumoconiosis. *See Marra v. Consolidation Coal Co.*, 7 BLR 1-216 (1984). It is a question of fact for the administrative law judge to resolve. *Id.* In this case, the administrative law judge properly accorded greater weight to the x-ray interpretations rendered by physicians qualified as B readers and/or Board-certified radiologists. Because Dr. DeMarino's radiological qualifications are not found in the record, the administrative law judge's error, if any, in his consideration of Dr. DeMarino's x-ray interpretations is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1284 (1986).

that the administrative law judge erred in crediting Dr. Garson's opinion that claimant suffered from pneumoconiosis over the contrary opinions of Drs. Fino and Renn.[5]

Employer contends that the administrative law judge erred in finding that Dr. Garson's diagnosis of pneumoconiosis was supported by Dr. Basheda's opinion. The administrative law judge found that Dr. Basheda's diagnosis of a diffuse lung disease, which the doctor felt might represent a mixed dust pneumoconiosis, was "equivocal at best, failing to affirmatively diagnose a coal mine dust related condition." Decision and Order at 12. Because the administrative law judge previously discredited Dr. Basheda's opinion, the administrative law judge's reliance upon the opinion as supportive of Dr. Garson's opinion is not rational.

We also agree with employer that the administrative law judge erred in not addressing whether Dr. Garson's opinion was sufficiently reasoned. The administrative law judge failed to address whether Dr. Garson's diagnosis of coal workers' pneumoconiosis was merely a restatement of an x-ray opinion.[6] *See Worhach*, *supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Although the administrative law judge also summarily concluded that Dr. Garson "persuasively explain[ed] the etiology of the [c]laimant's pulmonary condition," *see* Decision and Order at 13, he failed to explain why Dr. Garson's opinion was more persuasive than the contrary opinions of Drs. Fino and Renn.

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[5]The administrative law judge found that Dr. Basheda's opinion was too equivocal to support a finding of the existence of pneumoconiosis. Decision and Order at 12. The administrative law judge also found that Dr. McMonagle's opinion regarding the existence of pneumoconiosis was "neither well-reasoned nor well-documented." *Id.* Because no party challenges these findings, they are affirmed. *See Skrack*, *supra*.

[6]In a report dated October 10, 2002, Dr. Garson diagnosed, *inter alia*, coal workers' pneumoconiosis. Employer's Exhibit 3. In response to a questionnaire, Dr. Garson prepared a subsequent report on November 22, 2002, wherein he noted that there was x-ray evidence of pneumoconiosis. *Id.* During a March 27, 2003 deposition, Dr. Garson further stated that:

> I felt that [claimant] had coal workers' pneumoconiosis, a simple variety. There was the possibility, because of his history, of that being a mixed disease, but by the x-ray, it was a simple pneumoconiosis, coal workers' pneumoconiosis.

Employer's Exhibit 3 at 23.

Dr. Garson also diagnosed chronic bronchitis which he attributed in part to claimant's coal dust exposure. *See* Employer's Exhibit 3 at 26-27. This finding, if credited, is sufficient to support a finding of "legal" pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2). The administrative law judge, however, failed to address whether Dr. Garson's diagnosis of chronic bronchitis partly attributable to coal dust exposure was sufficiently reasoned. Consequently, the administrative law judge, on remand, is instructed to address whether Dr. Garson's respective diagnoses of clinical and legal pneumoconiosis are sufficiently documented and reasoned. *See Clark*, *supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Employer also contends that the administrative law judge erred in discrediting the opinions of Drs. Fino and Renn. Drs. Fino and Renn opined that claimant did not suffer from coal workers' pneumoconiosis or any other coal mine dust related pulmonary disease. Instead, Drs. Fino and Renn opined that claimant suffered from idiopathic pulmonary fibrosis. Although the administrative law judge noted that Drs. Fino and Renn "render[ed] opposing views as to the etiology of [claimant's] pulmonary fibrosis," *see* Decision and Order at 12, both physicians agreed that claimant's pulmonary fibrosis was not attributable to his coal dust exposure.

The administrative law judge found that Dr. Fino ruled out tobacco abuse and coal dust exposure as possible etiologies of claimant's pulmonary condition, "leaving no reasonable explanation for the disease." Decision and Order at 12. Dr. Fino opined that the miner suffered from diffuse interstitial pulmonary fibrosis. Director's Exhibit 14. Dr. Fino explained that he did not know the cause of claimant's diffuse idiopathic interstitial fibrosis. Employer's Exhibit 10 at 37. Dr. Fino stated that:

> The most common cause is this idiopathic pulmonary fibrosis that generally occurs in age 50s, 60s. There's no specific etiology. We know what doesn't cause it, but an exact etiology, we don't know. It's very similar to diseases like lupus, rheumatoid arthritis; they're immunological diseases that we don't know what causes those.

Employer's Exhibit 10 at 37.

Dr. Fino, however, opined that claimant's idiopathic pulmonary disease was not caused by coal dust exposure. Employer's Exhibit 10 at 49. Thus, Dr. Fino explained that while the exact cause of claimant's idiopathic pulmonary fibrosis was not known, this disease was not attributable to coal dust exposure. It is well established that claimant bears the burden of establishing all elements of entitlement. *See generally White v. Director, OWCP*, 6 BLR 1-368 (1983). Employer is not required to establish the etiology of a miner's lung disease. The relevant issue is whether claimant's lung disease is attributable to his coal dust exposure. Thus, the administrative law judge erred in

discrediting Dr. Fino's opinion because he could not provide an exact cause for claimant's idiopathic fibrosis. By finding that claimant did not suffer from any pulmonary disease attributable to his coal dust exposure, the doctor effectively found that claimant did not suffer from pneumoconiosis.

The administrative law judge discredited Dr. Renn's opinion because the doctor indicated that claimant's idiopathic pulmonary fibrosis was probably the result of tobacco smoking, but also indicated that interstitial lung disease can have a mixed dust cause. Decision and Order at 12. The administrative law judge, however, failed to address the fact that, under the facts of this case, Dr. Renn opined that none of claimant's diagnoses were either caused, or contributed to, by his exposure to coal dust. Employer's Exhibit 4. Dr. Renn also explained the bases for his conclusion that claimant did not suffer from coal workers' pneumoconiosis.[7] *See* Employer's Exhibit 11.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the newly submitted medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and remand the case for further consideration. In light of this holding, we also vacate the administrative law judge's finding that the newly submitted evidence, when weighed together, is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

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[7]Dr. Renn explained that claimant's disease presentation was not typical for someone with impairment from coal workers' pneumoconiosis. Employer's Exhibit 11 at 33. Dr. Renn also opined that the results of claimant's objective testing were typical for someone suffering from idiopathic pulmonary fibrosis. *Id.* Dr. Renn indicated that the causes of idiopathic pulmonary fibrosis are not known. *Id.* at 36. The following exchange also took place during Dr. Renn's deposition:

> Q. Although you are not sure what causes idiopathic pulmonary fibrosis, there is a link between cigarette smoking and usual interstitial pneumonitis?
>
> A. Yes, but I didn't say that usual interstitial pneumonitis is idiopathic pulmonary fibrosis. Idiopathic pulmonary fibrosis encompasses usual interstitial pneumonitis, respiratory bronchiolitis, interstitial lung disease, lymphoctyic interstitial pneumonitis. There are different types, but you can't know what type without a biopsy. The most common type in this age group and with this history of tobacco smoking is usual interstitial pneumonitis.

Employer's Exhibit 11 at 36-37.

Consequently, we further vacate the administrative law judge's finding that claimant established that one of the applicable conditions of entitlement had changed since the date upon which his prior 1993 claim became final. *See* 20 C.F.R. §725.309.[8]

In light of our decision to vacate the administrative law judge's finding that claimant established the existence of pneumoconiosis under Section 718.202(a), we also vacate the administrative law judge's findings with regard to total disability causation under 20 C.F.R. §718.204(c). If, on remand, the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis under Section 718.202(a), he must then reconsider the evidence under Section 718.204(c) before reaching his ultimate determination on entitlement.[9]

Employer also argues that the administrative law judge, in his consideration of the merits of claimant's 2001 claim, erred in finding that the medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[10]

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[8]On remand, after reconsidering whether the newly submitted medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge must weigh all of the newly submitted relevant evidence together pursuant to 20 C.F.R. §718.202(a). *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Should the administrative law judge find the newly submitted evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), claimant will have established that one of the applicable conditions of entitlement has changed since the date upon which his 1993 claim became final. *See* 20 C.F.R. §725.309. At that point, the administrative law judge must consider all of the evidence of record and determine whether the evidence is sufficient to establish all of the elements of entitlement. *See* 20 C.F.R. §§718.202, 718.203, 718.204.

[9]In his consideration of the medical opinion evidence, the administrative law judge, on remand, may consider the qualifications of the physicians rendering the opinions, *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988), and the comprehensiveness of the documentation upon which their respective opinions are based. *See Sabett v. Director, OWCP*, 7 BLR 1-299 (1984).

[10]Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), these findings are affirmed. *Skrack*, *supra*.

A physician need not phrase his opinion in terms of "total disability" in order to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The physician, however, must elaborate on the miner's impairment in such a way as to permit the administrative law judge to infer total disability. In this case, several physicians expressed opinions regarding whether claimant was capable, from a pulmonary standpoint, of performing certain tasks. Before an administrative law judge can determine whether a miner is able to perform his usual coal mine work, he must identify the employment that is or was the miner's usual coal mine work and then compare evidence of the exertional requirements of the usual coal mine employment with the medical opinions as to claimant's work capabilities. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988). It is the miner's burden to establish the exertional requirements of his usual coal mine employment to provide a basis of comparison for the administrative law judge to evaluate a medical assessment of disability and reach a conclusion regarding total disability. *Id.*; *Cregger v. U.S. Steel Corp.*, 6 BLR 1-1219 (1984).

In addressing the exertional requirements of claimant's most recent coal mine employment,[11] the administrative law judge stated:

> [Claimant's] last usual coal mine work was performed in April of 1985, and consisted of the position of senior construction engineer. (Tr. 28-29). That position required him to oversee the maintenance, repair and construction of preparation plants. (Tr. 29). The facility was eight stories high and he would sometimes have to go up and down the steps, thirty to forty times a day. (Tr. 32). He would also be required to walk from two to ten miles per shift, at a normal or slow pace. (Tr. 32).

Decision and Order at 4.

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[11] At the hearing, claimant testified that the last coal mine employment position that he held for longer than one year was that of a senior construction engineer. Transcript at 29. Claimant's responsibilities were comprised of overseeing the maintenance, repair and construction of preparation plants. *Id.* Claimant testified that the preparation plants normally had eight floors connected together by steps. *Id.* at 32. Claimant testified that he would typically have to go up and down these steps "30, 40 times a day." *Id.* at 32, 42. Claimant would sometimes have to walk from two to ten miles a day. *Id.* at 32. Claimant indicated that he would normally walk slowly and would walk up the steps slowly. *Id.*

Claimant also noted that, in answering employer's interrogatories, he had indicated that he had to move quickly all day and "probably walked about 10 miles a day with lots of steps." Transcript at 43. Claimant testified at the hearing that this was a correct statement. *Id.*

In his consideration of whether the medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge stated that:

> When reviewing the medical opinion evidence, it is to be noted that evidence dating from the 1970s and 1980s is not particularly helpful in assessing the Claimant's status in 2003. At best, Dr. Basheda, in 1993, found a mild impairment due to causes other than coal mine dust exposure. In 2001, Dr. Basheda makes no assessment regarding disability.
>
> Dr. Fino found that the Claimant is [sic] not disabled after his examination in 2002; however, in his deposition testimony, and when advised of the Claimant's physical activity on the job, finds that the Claimant probably would not have the pulmonary capacity to perform the work. Dr. Renn found that the Claimant would not be able to perform the work from a gas exchange standpoint. Dr. Garson concluded that the Claimant is disabled due to his pulmonary problems. Dr. McMonagle finds the Claimant to be disabled as well. Based on the medical opinions of record, I find that the Claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). In this respect, I find that these medical opinions establish that the Claimant suffers from a pulmonary impairment which prevents him from engaging in his usual coal mine employment.

Decision and Order at 15-16.

Employer initially contends that the administrative law judge erred by not considering whether the opinions of Drs. Garson and McMonagle regarding the extent of claimant's pulmonary impairment are sufficiently reasoned. We agree. The administrative law judge merely stated that Dr. Garson concluded that claimant was "disabled due to his pulmonary problems" and that Dr. McMonagle found that claimant was "disabled." Decision and Order at 16. The administrative law judge erred in not addressing whether these opinions are sufficiently reasoned.[12] *See Clark*, *supra*; *Lucostic*, *supra*.

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[12]Employer also notes that the administrative law judge failed to address the significance of the fact that Dr. McMonagle is claimant's former son-in-law. Dr. McMonagle testified that he remains friends with claimant. Claimant's Exhibit 10 at 24. On remand, the administrative law judge is instructed to address what effect, if any, Dr. McMonagle's relationship to claimant has on the credibility of his opinion.

Employer also argues that the administrative law judge erred in finding that Dr. Fino's opinion supports a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). During his deposition, Dr. Fino indicated that he did not believe that claimant could constantly climb steps and walk at a brisk pace up to ten miles during an eight hour shift. Employer's Exhibit 10 at 11-13. However, the administrative law judge did not find that the exertional requirements of claimant's most recent coal mine employment required the "constant" climbing of stairs or that claimant was required to walk at a "brisk pace." Rather, the administrative law judge found that claimant was required to walk "from two to ten miles per shift, at a normal or slow pace." Decision and Order at 4.

Employer also contends that the administrative law judge erred in finding that Dr. Renn's opinion supported a finding of total disability. During his deposition, Dr. Renn opined that claimant retained the pulmonary capacity to perform heavy work. Employer's Exhibit 11 at 10-11. However, Dr. Renn subsequently opined that claimant had a severe reduction of his diffusing capacity. *Id.* at 27. Based on this finding, Dr. Renn opined that claimant would not be able to perform heavy manual labor. *Id.* Dr. Renn, however, opined that claimant would be able to perform "moderate" labor. *Id.* at 28. Thus, although Dr. Renn opined that while claimant would not be able to perform heavy labor from a pulmonary standpoint, he opined that claimant would be able to perform moderate labor. Because the administrative law judge did not render a finding as to whether claimant's most recent coal mine employment involved "heavy" or "moderate" labor, the administrative law judge, on remand, is instructed to reconsider whether Dr. Renn's opinion supports a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In light of the above-referenced errors, we vacate the administrative law judge's finding that the medical opinion evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) and remand the case for further consideration.

Employer also contends that the administrative law judge erred in determining that claimant's date of entitlement to benefits was the filing date of his claim, September of 2001. 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).[13] Because the date of onset of claimant's total disability could not be determined from the evidence, the administrative law judge found that claimant was entitled to benefits as of September, 2001, the month in which claimant filed the claim. Decision and Order at 16. In light of our decision to

[13]Although Section 725.503 has been revised, the substantive revisions only apply to requests for modification and do not affect the instant case. 20 C.F.R. §725.503.

vacate the administrative law judge's award of benefits, we need not address employer's contention that the administrative law judge erred by awarding benefits payable beginning with the month in which claimant filed his claim, pursuant to the default entitlement date provided for in 20 C.F.R. §725.503.[14]

Citing *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), employer contends, however, that 20 C.F.R. §725.503(b), which allows an administrative law judge to utilize the filing date of a claim as the date from which benefits commence when there is no medical proof submitted by claimant that he had complicated pneumoconiosis or a totally disabling respiratory impairment caused by pneumoconiosis at the time the claim was filed, violates the APA. Employer specifically contends that Section 725.503(b) contravenes Section 7(c) of the APA because it improperly shifts the burden to employer to establish when claimant became totally disabled due to pneumoconiosis. We reject employer's contention. The United States Court of Appeals for the Seventh Circuit is the only Circuit Court to address whether 20 C.F.R. §725.503(b) conflicts with the APA. In *Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002), the Seventh Circuit held that because Section 725.503(b) shifts the burden of production and not the burden of proof, it is permitted by *Greenwich Collieries* and Section 7(c) of the APA.[15] We similarly hold

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[14]If a miner is found entitled to benefits, he is entitled to benefits beginning with the month of onset of his total disability due to pneumoconiosis. *See* 20 C.F.R. §725.503(b); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). Consequently, should an administrative law judge find a miner entitled to benefits, he must determine whether the medical evidence establishes when the miner became totally disabled due to pneumoconiosis. *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989). If the medical evidence does not establish the date on which the miner became totally disabled, then the miner is entitled to benefits as of his filing date, unless there is credited evidence which establishes that the miner was not totally disabled at some point subsequent to his filing date. *Lykins*, *supra*.

[15]Employer cites to an unpublished decision, wherein the United States Court of Appeals for the Fourth Circuit affirmed an administrative law judge's finding that the commencement of benefits should be the month of the medical evidence constituting "the first evidence of complicated pneumoconiosis." *See England v. Director, OWCP*, No. 95-2173 (4th Cir. July 28, 1997). The relevance of this decision to the facts of this case is not clear. Moreover, unpublished decisions are not considered binding precedent in the Fourth Circuit. *See* Local Rule 36(c) of the Fourth Circuit ("Citation of this Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case."). Additionally, it is noted that the Fourth Circuit, in a subsequent unpublished case, recognized that Section 725.503(b) does not conflict with

that Section 725.503(b) does not conflict with Section 7(c) of the APA.

Employer and claimant also appeal the administrative law judge's Attorney Fee Order. The administrative law judge awarded claimant's counsel a total fee of $10,286.97 for 53.05 hours of legal services at an hourly rate of $175.00 and $1,003.22 in expenses. On appeal, employer contends that the administrative law judge's attorney's fee award is excessive. Claimant's counsel contends that the administrative law judge erred in reducing the requested attorney's fee. The Director has not filed a response brief regarding the administrative law judge's attorney's fee award.

The award of an attorney's fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989).

Employer argues that claimant's counsel failed to provide adequate proof of her customary billing rate. An application seeking a fee for services performed on behalf of a claimant must indicate the customary billing rate of each person performing the services. 20 C.F.R. §725.366(a).[16] 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 a letter dated January 20, 2004, claimant's counsel stated, *inter alia*, that:

> [Employer's counsel] initially objects to my fees of $175.00 per hour. He states that I did not indicate what my customary billing rate is. My documentation states that my billing rate is $175.00. Since 2001, I have charged an hourly fee of $175.00. My fees of $175.00 are routinely approved by administrative law judges, the Benefits Review Board and the Third Circuit.

Claimant's Counsel's letter dated January 20, 2004.

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the Administrative Procedure Act. *Milburn Colliery Co. v. Director, OWCP, [Delung]*, No. 02-2223 (4th Cir. July 15, 2003).

[16]The Department of Labor made only technical changes to 20 C.F.R. §725.366. *See* 65 Fed. Reg. 79,925 (2000).

In his Attorney Fee Order, the administrative law judge stated:

> [Claimant's counsel included with her application a copy of her resume, which reflects her particular focus and experience in representing Black Lung Act claimants. [Claimant's counsel's] resume reflects her exceptional experience and expertise in the occupation of coal mining, including two related college degrees. [Claimant's counsel] possesses ten years of underground coal-mine employment experience and Pennsylvania mine foreman certification. In addition, she has been involved in litigation of Black Lung Act claims since 1990. In a letter responding to Employer's objections, [claimant's counsel] further demonstrated the $175 per hour is her customary billing rate and that it has been approved in prior black lung benefits claims.
>
> I take notice of the 1998 *Survey of Law Firm Economics*, published by Altman and Weil, Inc., which reported an average hourly billing rate of $161 for attorneys in the northeastern region of the U.S. with 2-3 years of experience. Absent any adjustment for the five-year lapse of time since these statistics were published, $175 is well within a reasonable deviation for this average hourly fee. In light of [claimant's counsel's] qualifications in the fields of law and mining, the work done, and the quality of the representation, her hourly fee of $175 is reasonable. Accordingly, I find the requested hourly rate of $175 is approved.

Attorney Fee Order at 2.

Because it is not arbitrary, capricious, or an abuse of discretion, we affirm the administrative law judge's approval of an hourly rate of $175.00 in this case.[17]

Claimant's counsel objects to the administrative law judge's reduction in the number of allowable hours. Once a service has been found to be compensable, the adjudicating officer must decide whether the amount of time expended by the attorney in performance of the service is excessive or unreasonable. *See generally Lanning v. Director, OWCP*, 7 BLR 1-314 (1984).

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[17]Employer argues that the administrative law judge erred in taking judicial notice of the survey contained in the 1998 *Survey of Law Firm Economics*. Because the administrative law judge's approval of an hourly rate of $175.00 is reasonable, irrespective of his reliance upon the survey results, we need not address employer's contention. *See Larioni*, *supra*.

The administrative law judge discussed employer's objections to claimant's counsel's attorney fee petition during a teleconference on February 5, 2004. After listening to employer's objections and claimant's counsel's responses, the administrative law judge ultimately disallowed compensation for a total of 12.25 hours of legal services (representing a total of $2,143.75 in requested compensation). *See* Transcript at 21.

In his Attorney Fee Order, the administrative law judge stated that:

> As I stated in the teleconference with the parties, I agree that some of the time [claimant's counsel] spent on disputed tasks is excessive. I am therefore reducing the time spent on the disputed tasks by a total of 12.25 hours. I will therefore approve a total of 53.05 hours of legal services rendered to be assessed against the Employer.

Attorney Fee Order at 3.

Claimant's counsel argues that the administrative law judge erred in reducing the amount of hours allowed for the time that she spent preparing for Dr. Renn's deposition. Claimant's counsel requested compensation for 2.75 hours that she spent on June 11, 2003 preparing for Dr. Renn's June 12, 2003 deposition. The administrative law judge noted that claimant's counsel had spent a considerable amount of time preparing for Dr. Fino's June 9, 2003 deposition; a deposition that took place only three days prior to Dr. Renn's deposition.[18] Transcript at 11. At the teleconference, the administrative law judge informed claimant's counsel:

> [I]n my view, knowing that these depositions were taking place so close in time, in reviewing the record, it seems to me you ought to be preparing for both doctors at the same time. I'm sure you can brush up on the morning of the deposition itself.
>
> I'm going to subtract .75 off of [Dr.] Renn.

Transcript at 15.

In the instant case, the administrative law judge reasonably reduced the number of hours compensable for the time spent by claimant's counsel preparing for Dr. Renn's

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[18]Claimant's counsel requested compensation for 3.50 hours that she spent on June 8, 2003 preparing for Dr. Fino's deposition on June 9, 2003. The administrative law judge found that claimant's counsel was entitled to compensation for 3.00 hours spent in her preparation for Dr. Fino's deposition. Transcript at 10.

deposition from 2.75 hours to 2.00 hours. We hold that the administrative law judge's reduction was not arbitrary, capricious, or an abuse of discretion.

Claimant's counsel next argues that the administrative law judge erred in reducing the amount of hours allowed for the time that she spent preparing claimant's pre-hearing report. Claimant's counsel sought compensation for a total of 5.50 hours spent preparing claimant's pre-hearing report on June 22, 2003 and June 23, 2003. Claimant's counsel also contends that the administrative law judge erred in reducing the compensable hours that she spent meeting with claimant in preparation for the hearing. Claimant's counsel sought compensation for a total of 5.50 hours spent meeting with claimant on June 23, 2003 in order to prepare for the hearing.

Claimant's counsel contends that the administrative law judge erred in reducing the compensable hours for the preparation of claimant's pre-hearing report from 5.50 hours to 4.75 hours and in reducing the compensable hours spent meeting with claimant in order to prepare for the hearing from 5.50 hours to 0.50 hours.

The administrative law judge considered claimant's counsel's request for compensation for the 5.50 hours that she spent in the preparation of claimant's pre-hearing report in conjunction with claimant's counsel's request for compensation for the additional 5.50 hours that she spent on June 23, 2003 preparing claimant for the hearing. Transcript at 15-18. The administrative law judge found that the total of 11.0 hours requested by claimant's counsel was "very excessive." *Id.* at 18. Noting that he was "going to be generous," the administrative law judge indicated that he was going to "give [claimant's counsel] six hours and subtract five hours." *Id.* In this case, the administrative law judge reasonably reduced the number of hours compensable for the time spent preparing claimant's pre-hearing report and preparing claimant for the hearing from 11.0 hours to 6.00 hours. We hold that the administrative law judge's reduction was not arbitrary, capricious, or an abuse of discretion.

Claimant's counsel next argues that the administrative law judge erred in reducing the amount of hours allowed for the time that she spent preparing for Dr. McMonagle's deposition. Claimant's counsel requested compensation for 3.25 hours that she spent on July 9, 2003 preparing for Dr. McMonagle's deposition. After being informed that Dr. McMonagle's report was only two pages long, the administrative law judge reduced the amount of hours compensable from 3.25 to 2.00 hours.[19] We hold that the administrative law judge's reduction was not arbitrary, capricious, or an abuse of discretion.

[19]Contrary to claimant's counsel's assertion, the administrative law judge did not reduce the amount of compensable hours from 3.25 to 1.25. *See* Claimant's Brief at 8.

Claimant's counsel finally argues that the administrative law judge erred in reducing the amount of hours allowed for the time that she spent preparing claimant's closing statement. Claimant's counsel requested compensation for a total of 12.75 hours that she spent on September 11, 2003, September 16, 2003 and September 17, 2003 preparing claimant's closing statement. After being informed that claimant's closing statement was thirteen pages long, the administrative law judge reduced the amount of hours compensable from 12.75 to 8.00 hours. We hold that the administrative law judge's reduction was not arbitrary, capricious, or an abuse of discretion.

Because we have rejected all contentions of error raised by employer and claimant, we affirm the administrative law judge's attorney's fee award.[20]

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion. The administrative law judge's Attorney Fee Order is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[20]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).