BRB Nos. 11-0708 BLA
and 12-0069 BLA

HAROLD S. RENEER, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 10/31/2012
	)	
MIDWEST COAL COMPANY (Formerly Known as AMAX COAL COMPANY)	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and the 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits and the Attorney Fee Order (08-BLA-5134) of Administrative Law Judge Alice M. Craft rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). This case involves a miner's claim filed on February 1, 2007. Director's Exhibit 3.

After finding that the claim was timely filed, the administrative law judge noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (codified at 30 U.S.C. §921(c)(4)). Under Section 411(c)(4), if a miner establishes at least fifteen years of underground coal mine employment or coal mine employment in conditions substantially similar to those in an underground mine, and establishes that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

Applying amended Section 411(c)(4), the administrative law judge found that claimant established at least fifteen years of qualifying coal mine employment.[1] The administrative law judge also found that claimant established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore determined that claimant invoked the rebuttable presumption. Turning to rebuttal, the administrative law judge found that employer did not disprove the existence of pneumoconiosis, or establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. Therefore, the administrative law judge found that employer failed to rebut the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4). Accordingly, the administrative law judge awarded benefits, commencing March 2000, the month in which she determined that the evidence established claimant's total disability. Subsequently, the administrative law judge considered claimant's counsel's petition for a fee, and employer's objections, and awarded a fee of $15,705.02.

On appeal, employer contends that the administrative law judge erred in finding that the claim was timely filed. Employer argues further that the administrative law judge erred in her analysis of the evidence when she found that claimant is totally disabled, and therefore, erred in determining that claimant invoked the Section 411(c)(4) presumption. Additionally, employer contends that the administrative law judge erred

[1] The record reflects that claimant's coal mine employment was in Illinois and Indiana. Director's Exhibit 4; Hearing Transcript at 8. 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, 1-202 (1989) (en banc).

when she found that employer failed to rebut the presumption.[2] Finally, employer contends that the administrative law judge erred in her determination of the commencement date for benefits. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response brief. In a reply brief, employer reiterates its challenges to the award of benefits.

In its appeal of the Attorney Fee Order, employer contends that the administrative law judge erred in determining counsel's hourly rate. Further, employer challenges the administrative law judge's finding that a time charge of 15.5 hours to prepare and file claimant's post-hearing brief, was reasonable. Claimant responds, urging affirmance of the fee award. The Director declined to file a substantive response brief.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Timeliness of Claim

Employer initially contends that claimant's claim was not timely filed. The Act provides that a claim for benefits by, or on behalf of, a miner must be filed within three years of "a medical determination of total disability due to pneumoconiosis . . . ." 30 U.S.C. §932(f). In addition, the implementing regulation requires that the medical determination must have "been communicated to the miner or a person responsible for the care of the miner," and further provides a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §725.308(a), (c). To rebut the timeliness presumption, employer must show that the claim was filed more than three years after a "medical determination of total disability due to pneumoconiosis" was communicated to the miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a); *see Roberts & Schaefer Co. v. Director, OWCP* [*Williams*], 400 F.3d 992, 996-97, 23 BLR 2-302, 2-314-15 (7th Cir. 2005).

In this case, the administrative law judge noted that employer, while generally challenging the timeliness of claimant's claim, did not identify any specific evidence to support a finding that the claim is untimely. Decision and Order at 7. The administrative

[2] Employer does not challenge the administrative law judge's finding that claimant established at least fifteen years of qualifying coal mine employment under 30 U.S.C. §921(c)(4). That finding is, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

law judge therefore found that employer did not rebut the presumption that the claim was timely filed.

On appeal, employer argues for the first time that an April 2, 2001 treatment note contained in Dr. Houser's treatment records triggered the statute of limitations, because Dr. Houser noted there that claimant "appear[s] as though he would qualify for Federal Black Lung." Employer's Exhibit 4 at 9. Employer, however, does not explain how Dr. Houser's notation constituted a reasoned medical determination that claimant was totally disabled due to pneumoconiosis.[3] *See Williams*, 400 F.3d at 996-97, 23 BLR at 2-314-15; *Adkins v. Donaldson Mine Co.*, 19 BLR 1-34, 1-41-43 (1993). Moreover, even assuming that Dr. Houser rendered a medical determination of total disability due to pneumoconiosis, employer bore the burden of demonstrating that it was communicated to claimant. *See* 20 C.F.R. §725.308(a),(c). Employer identifies no evidence that the medical determination was communicated to claimant. Consequently, we reject employer's argument, and affirm the administrative law judge's finding that employer did not rebut the presumption that the claim was timely filed.

Invocation of the Section 411(c)(4) Presumption

Employer argues that the administrative law judge erred in finding that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge noted that all twelve pulmonary function studies of record were qualifying.[4] The administrative law judge found that two of the pulmonary function studies were invalid, based on the opinions of Drs. Repsher and Renn. Of the remaining ten studies, she accorded "the most weight" to the studies conducted on March 22, 2007, October 22, 2007, and August 18, 2008, as they were the three most recent qualifying studies, and

[3] Employer argued to the administrative law judge that Dr. Houser's treatment records were unreasoned and did not address whether claimant was totally disabled due to pneumoconiosis. Employer's Post-Hearing Brief at 28.

[4] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i),(ii). Several of the pulmonary function studies and blood gas studies submitted in this case were contained in claimant's medical treatment records. *See* 20 C.F.R. §725.414(a)(4).

they satisfied the quality standards in the regulations.[5] Decision and Order at 41. Pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii), the administrative law judge found that the seven blood gas studies of record were inconclusive as to whether claimant is totally disabled, and that the record contained no evidence of cor pulmonale with right-sided congestive heart failure. Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that the medical opinions of Drs. Cohen, Murthy, and Renn supported a finding of total disability.[6] Weighing all of the evidence together, the administrative law judge found that the preponderance of the qualifying pulmonary function study evidence and the medical opinion evidence established total disability. Decision and Order at 45.

Pursuant to 20 C.F.R. §718.204(b)(2)(i), employer contends that the administrative law judge erred in relying, in part, on a March 20, 2000 pulmonary function study contained in claimant's treatment records to support a finding of total disability, when that study lacked tracings. Employer's Brief at 28-29. Employer, however, does not challenge the administrative law judge's determination to rely primarily on the pulmonary function studies of March 22, 2007, October 22, 2007, and August 18, 2008, because they were more recent and they complied with the quality standards. That determination is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Thus, we need not address employer's argument that the administrative law judge erred in also according weight to the March 20, 2000 pulmonary function study. Accordingly, we affirm the administrative law judge's finding that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Regarding the medical opinion evidence under 20 C.F.R. §718.204(b)(2)(iv), employer argues only that "[i]t is not clear that Dr. Murthy understood the demands of [claimant's] work," in opining that claimant is totally disabled. Employer's Brief at 29. The record reflects that Dr. Murthy described the duties required by claimant's job as a "fork truck driver," and set forth claimant's specific walking, lifting, carrying, and shoveling requirements in that job. *See Killman v. Director, OWCP*, 415 F.3d 716, 23 BLR 2-250 (7th Cir. 2005); Director's Exhibit 12 at 1. Employer does not specify what it believes was inaccurate in Dr. Murthy's understanding of claimant's job duties. Moreover, the administrative law judge gave "the most weight to the opinions of Drs.

[5] The administrative law judge relied to a lesser extent on the treatment record pulmonary function studies that were unaccompanied by tracings. Decision and Order at 39-40.

[6] The administrative law judge discounted, as equivocal, Dr. Repsher's opinion that claimant is "probably not" able to perform his last coal mine employment. Decision and Order at 43; Employer's Exhibit 12.

Renn and Cohen" that claimant is totally disabled, finding them to be well-explained, and "most consistent with the objective evidence . . . and the documented exertional requirements of claimant's last coal mine job."[7] Decision and Order at 45. As substantial evidence supports the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the finding is affirmed.

Employer also contends that the administrative law judge did not weigh all of the relevant evidence together before concluding that claimant established total disability. Employer's Brief at 29. This argument lacks merit, as the administrative law judge specifically weighed "like and unlike evidence together" in finding total disability established.[8] Decision and Order at 45; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987). We thus affirm the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). As we have also affirmed the administrative law judge's finding that claimant established at least fifteen years of qualifying coal mine employment, we affirm the administrative law judge's determination that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis.

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the administrative law judge properly noted that the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *see Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1320, 19 BLR 2-192, 2-203 (7th Cir. 1995). The administrative law judge found that employer failed to establish rebuttal by either method.

The administrative law judge found that employer disproved the existence of clinical pneumoconiosis,[9] based on the x-ray evidence. Decision and Order at 47-49.

[7] The administrative law judge relied "to a lesser extent" on Dr. Murthy's opinion, because she found that Dr. Murthy did not specifically state the basis for his opinion that claimant is totally disabled. Decision and Order at 45.

[8] The administrative law judge found that, although the blood gas studies were inconclusive, they did not contradict the qualifying pulmonary function studies, because blood gas studies "measure a different aspect of lung function." Decision and Order at 45.

[9] Clinical pneumoconiosis is defined as "those diseases recognized by the medical

With respect to whether employer disproved the existence of legal pneumoconiosis,[10] the administrative law judge considered the opinions of Drs. Repsher, Renn, Murthy, and Cohen. Drs. Repsher and Renn attributed claimant's obstructive impairment to smoking. Director's Exhibit 28 at 5; Employer's Exhibit 5 at 5-6. Drs. Murthy and Cohen attributed claimant's obstructive impairment to both smoking and coal mine dust exposure. Director's Exhibit 12 at 6; Claimant's Exhibit 3 at 11.

The administrative law judge found that the opinions of employer's physicians, Drs. Repsher and Renn, "were not sufficiently well-reasoned to rebut the presumption as to legal pneumoconiosis." Decision and Order at 51. Employer argues that, in so finding, the administrative law judge erred in referring to the preamble of the regulations when she assessed the credibility of its physicians' opinions. Employer's Brief at 23-26. We disagree.

It was within the administrative law judge's discretion to consult the Department of Labor's discussion of sound medical science in the preamble to the amended regulations, when evaluating the reasoning of the medical opinions in this case. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). Further, contrary to employer's contention, the administrative law judge did not utilize the preamble as a legal rule, but merely consulted it as a statement of medical principles that were accepted by the Department of Labor when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See A & E Coal Co. v. Adams*, No. 11-3926, 2012 WL 3932113 at *3-4 (6th Cir. Sept. 11, 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012).

Thus, the administrative law judge provided valid reasons for discounting the opinions of Drs. Repsher and Renn, attributing claimant's obstructive impairment solely to smoking. Specifically, the administrative law judge found that Drs. Repsher and Renn relied, in part, on their shared views that coal mine dust exposure causes a degree of obstructive impairment that is clinically insignificant, and that it does not cause a reduction in the FEV1/FVC ratio measurement of lung function. The administrative law judge permissibly found that the physicians' reasoning was contrary to the prevailing

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community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[10] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

medical science on those issues that was accepted by the Department of Labor when it revised the regulatory definition of pneumoconiosis. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Looney*, 678 F.3d at 313. Additionally, the administrative law judge noted Dr. Repsher's reasoning, that mild obstructive disease due to coal mine dust resolves after the cessation of exposure, and Dr. Renn's reasoning, that it was significant that claimant's symptoms developed years after he began mining and continued after he quit. The administrative law judge reasonably discounted that reasoning as inconsistent with the Department of Labor's recognition that pneumoconiosis "may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c). Finally, the administrative law judge permissibly found that Dr. Renn did not adequately explain why claimant's response to bronchodilators eliminated coal mine dust exposure as a cause of his obstructive impairment. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007). Therefore, we reject employer's allegation of error, and affirm the administrative law judge's finding that employer did not disprove the existence of legal pneumoconiosis.

With regard to the second method of rebuttal, the administrative law judge explained that, for the same reasons she discredited the opinions of Drs. Repsher and Renn that claimant's obstructive impairment is unrelated to coal mine dust exposure, she accorded "little weight" to their opinions that coal mine dust did not contribute to his total disability. Decision and Order at 55. Employer generally challenges the administrative law judge's finding, but sets forth no specific argument pertaining to its physicians' opinions. Employer's Brief at 29. Based on our affirmance of the administrative law judge's analysis of the opinions of Drs. Repsher and Renn regarding legal pneumoconiosis, set forth above, we also affirm her determination that employer did not establish that claimant's impairment did not arise out of, or in connection with, coal mine employment. *See Blakley*, 54 F.3d at 1320, 19 BLR at 2-203. Therefore, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and we affirm the award of benefits. 30 U.S.C. §921(c)(4).

Date for the Commencement of Benefits

The administrative law judge noted that claimant filed his claim on February 1, 2007, and found that when claimant was examined by Dr. Murthy in March 2007, he was already totally disabled. Decision and Order at 56. The administrative law judge further found that claimant's pulmonary function studies were consistently qualifying, back to the earliest study administered in March 2000. Finding that claimant's pulmonary function studies "are the most reliable evidence of when the [c]laimant became totally disabled," the administrative law judge determined that "[c]laimant is entitled to benefits commencing in March 2000, the month in which he first attained qualifying pulmonary function values." *Id*.

Employer argues that the administrative law judge erred in finding that benefits should commence as of the March 2000 qualifying pulmonary function study, because she did not base her determination on evidence that claimant was totally disabled due to pneumoconiosis. Employer's Brief at 29-30; Reply at 3-4. Employer's argument has merit.

The regulation at 20 C.F.R. §725.503(b) specifically provides that benefits commence as of the month in which claimant establishes that his totally disabling respiratory impairment due to pneumoconiosis began. Simply establishing a disabling impairment at that time is not sufficient. *See Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603-04, 12 BLR 2-178, 2-184-85 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182-83 (1989). Here, no physician opined that the results of the March 2000 pulmonary function study demonstrated that claimant's totally disabling respiratory impairment was due to pneumoconiosis. Therefore, we must vacate the administrative law judge's designation of March 2000, as the date for the commencement of benefits. *See Krecota*, 868 F.2d at 603-04, 12 BLR at 2-184-85; *Lykins*, 12 BLR at 1-182-83.

We further hold, however, that a remand to the administrative law judge for reconsideration of this issue is not required. On appeal, claimant states that "the medical evidence does not prove when the miner actually became disabled due to pneumoconiosis," and that "there is no relevant evidence that identifies the particular month in which [claimant] actually became disabled due to pneumoconiosis." Claimant's Brief at 17-18. If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless credited evidence establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990). Here, Dr. Murthy's March 22, 2007 medical opinion, the earliest opinion credited by the administrative law judge, establishes only that claimant became totally disabled due to pneumoconiosis at some time prior to the date of that evidence. *Merashoff v. Consolidation Coal Co*, 8 BLR 1-105, 1-109 (1985). Further, the administrative law judge did not credit any evidence that claimant was not totally disabled due to pneumoconiosis at any time subsequent to the filing date of his claim. Therefore, we modify the date that benefits commence to February 2007, the month in which the claim was filed. 20 C.F.R. §725.503(b); *see Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 891-92, 22 BLR 2-514, 2-530 (7th Cir. 2002); *Owens*, 14 BLR at 1-50.

Attorney's Fees

On July 27, 2011, claimant's counsel submitted an itemized fee petition to the administrative law judge. Counsel requested a fee of $14,088.00, representing 58.70

hours of legal services (46.70 hours by Sandra M. Fogel, and 12.00 hours by Bruce Wissore), performed at an hourly rate of $240.00, and requested reimbursement of costs totaling $1,617.02. After considering employer's objections, the administrative law judge awarded, in full, the requested fee and costs, for a total award of $15,705.02.

The amount of an award of an attorney's fee by the administrative law judge is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Zeigler Coal Co. v. Director, OWCP* [*Hawker*], 326 F.3d 894, 902 (7th Cir. 2003); *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998)(en banc).

Employer contends that the administrative law judge erred in addressing the fee petition when employer's appeal of the benefits award was pending before the Board. We disagree. An attorney's fee may be approved pending a final award of benefits; the fee award is not enforceable until the claim has been successfully prosecuted and all appeals are exhausted. *See* 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); *Goodloe v. Peabody Coal Co*., 19 BLR 1-91, 1-100 n.9 (1995). Employer argues further that the administrative law judge erred in awarding counsel a fee, absent market evidence that their hourly rate is $240.00. Contrary to employer's argument, the administrative law judge rationally relied upon Ms. Fogel's statement that her firm's standard rate has been $240.00 per hour since September 2010, affidavits from other Black Lung practitioners indicating their belief that an hourly rate of $220.00 to $240.00 is reasonable in light of Ms. Fogel's experience and expertise, as well as Ms. Fogel's resume and a summary of Mr. Wissore's qualifications, in awarding the requested hourly rate of $240.00.[11] *See* 20 C.F.R. §725.366(b); *Jeffboat, L.L.C. v. Director, OWCP* [*Furrow*], 553 F.3d 487, 490, 42 BRBS 65, 67(CRT)(7th Cir. 2009); *Chubb*, 312 F.3d at 894-95, 22 BLR at 2-534-36; *Peabody Coal Co. v. Estate of J.T. Goodloe*, 299 F.3d 666, 672, 22 BLR 2-483, 2-493 (7th Cir. 2002). Finally, employer contends that the administrative law judge erred in approving the request of 15.50 hours of "block billed" time, from January 8 through January 12, 2010, to prepare and submit claimant's brief. The administrative law judge committed no abuse of discretion in awarding the requested 15.50 hours, as she rationally found that the fee petition "clearly identifie[d] the work performed," Attorney Fee Order at 4, and that the work was reasonable and necessary.

[11] Contrary to employer's contention, the administrative law judge was not required to find that an hourly rate of $150.00 was the applicable market rate based on the evidence employer presented. The administrative law judge addressed that evidence and reasonably found that it was dated, and that counsel's fee need not be reduced merely because other attorneys charge less for their services. *Zeigler Coal Co. v. Director, OWCP* [*Hawker*], 326 F.3d 894, 902 (7th Cir. 2003); Attorney Fee Order at 3.

See 20 C.F.R. §725.366(b); *Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316-17 (1984). We, therefore, affirm the administrative law judge's Attorney Fee Order.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed, as modified to reflect February 2007 as the date from which benefits commence, and the Attorney Fee Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

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ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, concurring and dissenting:

I concur with my colleagues in that I would affirm the administrative law judge's decision awarding benefits, and her award of attorney's fees. Further, I agree with my colleagues that the administrative law judge's determination, that March 2000 is the benefits commencement date, cannot be affirmed, and that, on this record, benefits must commence as of the month in which the claim was filed. However, I respectfully disagree with my colleagues' decision to modify the benefits commencement date to February 2007, the month in which the district director received claimant's completed claim form. Rather, I would modify the award to reflect a benefits commencement date of November 2006, the month in which the district director received claimant's signed and dated "Notice of Intent" to file a federal claim for Black Lung benefits. As I explain below, because claimant thereafter executed and filed his claim form within the time limit specified in the regulations, his claim is treated as having been filed on November 22, 2006, the date that his written notice of intent was filed.

Pursuant to 20 C.F.R. §725.305, a written, signed statement indicating an intention to claim benefits is considered a claim if the claimant files the required claim form within six (6) months from notification by the district director that he must file a claim form. *See* 20 C.F.R. §725.305(a)(1),(b). Claimant submitted such a writing on November 22, 2006, when he filed a "Black Lung Benefits Notice of Intent to File a Federal Claim." Director's Exhibit 2 at 2.

Consistent with 20 C.F.R. §725.305, the district director notified claimant, on December 29, 2006, that it had received claimant's notice of intent, which "will protect your entitlement back to the date it was received, provided you complete the required . . . claim forms within six (6) months of this letter." Director's Exhibit 2 at 1. Claimant complied with the time limit by filing the required claim form on February 1, 2007. Director's Exhibit 3. His claim was therefore filed as of November 22, 2006.[12] 20 C.F.R. §725.305(a)(1),(b); *see Marx v. Director, OWCP*, 870 F.2d 114, 118, 12 BLR 2-199, 2-204-05 (3d Cir. 1989).

Of relevance, in *Marx*, the United States Court of Appeals for the Third Circuit addressed the filing date of a survivor's claim, and held that:

> Under 20 C.F.R. §725.305(b)(1988), a writing indicating an intent to claim benefits is considered a claim if a formal application is filed within six months after it is requested by the Department of Labor. Mrs. Marx submitted such a writing on February 23, 1981 when she filed a "Survivor's Notification of Beneficiary's Death."

Marx, 870 F.2d at 118, 12 BLR at 2-204-05. Because the Director conceded that Mrs. Marx thereafter filed her claim form within six months of when the Department of Labor requested a formal application from her (the record did not indicate when the department requested it), the court held that "[her] claim was therefore filed as of February 23, 1981.

[12] The record reflects that the district director, claimant, and employer agree that the claim filing date in this case is November 22, 2006. The district director's Schedule for the Submission of Additional Evidence states that claimant "filed an application for benefits under the Black Lung Benefits Act on 11/22/2006." Director's Exhibit 19 at 1. The district director's Proposed Decision and Order states that "a written claim for benefits was timely filed on November 22, 2006." Director's Exhibit 29 at 1. Claimant's response brief states that "[t]he filing date for this claim is November 22, 2006," Claimant's Brief at 17, and employer's reply brief states that "[t]he filing of Ren[e]er's claim (by notice of intent) was November 2006, with an application filed within six (6) months thereafter filed February 2007." Employer's Reply at 3. Thus, no party to this claim has alleged that the filing date is anything other than November 22, 2006.

. . .” *Id*. Based on that determination, the court held that the Board erred in holding that a rebuttable presumption of death due to pneumoconiosis was not available to Mrs. Marx because she filed her survivor’s claim after January 1, 1982. *Id*.

Thus, in this case, the administrative law judge erred in stating that the claim was filed on February 1, 2007. Accordingly, I would not treat February 1, 2007 as the filing date of this claim for purposes of determining the date for the commencement of benefits. Given that the medical evidence does not indicate when claimant became totally disabled due to pneumoconiosis, I would hold as a matter of law that benefits commence as of November 2006, the month in which the claim was filed. *See* 20 C.F.R. §§725.305(a)(1),(b), 725.503(b).

As noted above, I concur in all other respects with the Board’s decision.

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BETTY JEAN HALL
Administrative Appeals Judge