

BRB Nos. 06-0929 BLA
and 06-0929 BLA-S

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| E.B. |) | |
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| Claimant-Respondent |) | |
| |) | |
| v. |) | |
| |) | |
| GOLDEN OAK MINING COMPANY, INCORPORATED |) | |
| |) | DATE ISSUED: 08/28/2007 |
| 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 Granting Benefits and Order Awarding Attorney Fees of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Laura Metcoff Klaus and W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits and Order Awarding Attorney Fees (04-BLA-5694) of Administrative Law Judge Pamela Lakes Wood rendered on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Claimant filed this claim for benefits on July 18, 2002. Director's Exhibit 2. The administrative

law judge credited claimant with 27.94 years of coal mine employment.¹ The administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), (4) and 718.203(b), total disability at 20 C.F.R. §718.204(b), and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits. Subsequently, the administrative law judge considered claimant's counsel's petition for a fee and employer's objections thereto, and awarded a fee of \$7,534.24.

On appeal, employer challenges the administrative law judge's findings at Sections 718.202(a)(1), (4), and 718.204(c), and her award of an attorney's fee.² Claimant responds, urging affirmance of both the award of benefits and the fee award. Employer has filed a reply brief reiterating its contentions. The Director, Office of Workers' Compensation Programs, declined to file a 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Section 718.202(a)(1)

Employer argues that the administrative law judge erred in weighing the x-ray evidence because she did not perform a qualitative evaluation of the conflicting readings. We disagree. The administrative law judge considered all eight readings of three x-rays and considered the radiological qualifications of each reader, when she determined that

¹ The record indicates that claimant's last coal mine employment took place in Kentucky. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

² We affirm the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b), as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

two of the three x-rays were positive for pneumoconiosis. Decision and Order at 4, 15-16; Director's Exhibits 8, 14; Claimant's Exhibits 1, 2, 4; Employer's Exhibit 2. We affirm the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis at Section 718.202(a)(1), because the administrative law judge acted within her discretion to find that the preponderance of the x-ray evidence by the most qualified readers was positive for pneumoconiosis. See *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 60, 19 BLR 2-271, 2-281 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993).

Ordinarily, affirmance of the administrative law judge's finding that the existence of pneumoconiosis was established by the chest x-rays at Section 718.202(a)(1) would obviate the need to review her finding that the medical opinions established the existence of pneumoconiosis at Section 718.202(a)(4). *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). However, the administrative law judge recognized that a critical issue in this case was whether claimant's disabling, chronic obstructive pulmonary disease (COPD) constituted legal pneumoconiosis.³ Decision and Order at 16. Further, errors made by the administrative law judge in analyzing the medical opinions at Section 718.202(a)(4) for the existence of legal pneumoconiosis affected her consideration of the disability causation issue pursuant to Section 718.204(c).

Section 718.202(a)(4)

Employer argues that the administrative law judge erred in weighing the opinions of Drs. Baker, Fino, and Westerfield to find that claimant also established the existence of legal pneumoconiosis, in the form of COPD arising out of coal mine employment. Employer's argument has merit, in part.

Initially, we reject employer's contention that the administrative law judge erred in relying on Dr. Baker's medical opinion, which employer argues was speculative. The adequacy of an opinion's documentation and reasoning is for the administrative law judge to determine. See *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Here, substantial evidence supports the administrative law judge's permissible determination that Dr. Baker's medical report and deposition testimony stating that both coal dust exposure and cigarette smoking contributed to claimant's COPD was adequately reasoned. See *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order at 17-18; Claimant's Exhibit 6 at 23-25.

³ "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).

Employer contends further that the administrative law judge inappropriately applied the “hostility to the Act” doctrine as a basis to discredit the opinions of the physicians who did not diagnose pneumoconiosis. The administrative law judge found that Drs. Fino and Westerfield each rendered opinions that were based in part on assumptions that were contrary to the Act. Specifically, the administrative law judge found that, because Dr. Westerfield stated that claimant’s COPD, if due to coal dust exposure, would have stabilized following the cessation of his coal mine dust exposure, Dr. Westerfield did not appear to acknowledge that pneumoconiosis is a progressive disease that may progress absent further coal dust exposure. Additionally, the administrative law judge found that Dr. Fino emphasized that claimant’s pulmonary function study results ruled out significant fibrosis, whereas fibrosis is not a required element under the definition of legal pneumoconiosis.

Under Sixth Circuit law, in order to reject a medical opinion as hostile to the Act, the administrative law judge must determine: that the physician’s opinion is inconsistent with congressional intent; that it is absolute, *e.g.* forecloses all possibility that simple pneumoconiosis can be disabling; and that the physician’s predisposed belief forms the primary basis for his conclusion. *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 1119, 10 BLR 2-69, 2-72-73 (6th Cir. 1987). The administrative law judge did not apply this standard in her decision. Consequently, we must vacate the administrative law judge’s finding pursuant to Section 718.202(a)(4) and remand this case for the administrative law judge to reconsider the physicians’ opinions in their entirety, applying the Sixth Circuit standard.

Section 718.204(c)

Employer further argues that the administrative law judge erred in weighing the opinions of Drs. Baker, Fino, and Westerfield to find that claimant established that pneumoconiosis is a substantially contributing cause⁴ of his totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c). The administrative law judge

⁴ Pneumoconiosis is a “substantially contributing cause” of the miner’s disability if it:

- (i) Has a material adverse effect on the miner’s respiratory or pulmonary condition; or
- (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

again discounted the opinions of Drs. Fino and Westerfield, that claimant's total disability is related solely to smoking, because she found the opinions to be based in part on assumptions contrary to the Act. Decision and Order at 22. Because we must vacate the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), so that the administrative law judge may consider the medical opinions pursuant to the standard in *Adams*, we must also vacate her disability causation determination pursuant to Section 718.204(c).

Based on the foregoing, we remand the case for the administrative law judge to conduct a full and comparative weighing of all relevant evidence in order to determine whether the evidence of record is sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), and whether pneumoconiosis was a substantially contributing cause of claimant's totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c). *See* 20 C.F.R. §§718.202(a)(4), 718.204(c).

Attorney's Fee Award

Subsequent to the administrative law judge's award of benefits, claimant's counsel requested a fee of \$7,684.24, representing thirty-six hours of services at \$200 per hour, including \$484.24 in expenses. Employer objected to the fee petition, and claimant's counsel responded. After considering employer's objections, the administrative law judge disallowed .75 hours of time charged for clerical tasks, but she found that the remaining hours requested were neither unreasonable nor excessive. Order Awarding Attorney Fees (Order) at 2-3. The administrative law judge additionally found that \$200.00 an hour was a reasonable rate, considering counsel's customary billing rate, and the hourly rate he was awarded previously by administrative law judges, the Board, and the United States Court of Appeals for the Sixth Circuit. Order at 2-3; *see* 20 C.F.R. §725.366(b). Finally, the administrative law judge overruled employer's objection to expert witness fees for a doctor who did not testify at the hearing. Accordingly, the administrative law judge awarded claimant's counsel a total fee of \$7,534.24, representing 35.25 hours of services at the requested hourly rate, plus requested expenses.

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. *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998)(*en banc*).

Number of Hours

Employer first argues that the administrative law judge erred by approving 35.25 hours of services. We disagree. Employer has not shown that the administrative law judge acted arbitrarily, capriciously, or abused her discretion, in finding that the time entries were not excessive or unreasonable, under the circumstances of this case. *See* 20 C.F.R. §725.366; *Whitaker v. Director, OWCP*, 9 BLR 1-216, 1-217, 1-218 (1986);

McNulty v. Director, OWCP, 4 BLR 1-128, 1-132 (1981); Order Awarding Attorney Fees at 2-3. Additionally, the administrative law judge did not err in finding that counsel's practice of billing in quarter-hour increments was reasonable. *See Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230, 237 n.6 (1993). Consequently, we affirm the administrative law judge's finding that 35.25 hours of services were reasonable.

Hourly Rate

Employer argues that the administrative law judge erred in awarding an hourly rate of \$200. In awarding claimant's counsel an hourly rate of \$200, the administrative law judge inappropriately referenced the risk of loss. Risk of loss cannot be factored into the determination of the hourly rate. *City of Burlington v. Dague*, 505 U.S. 557, 567 (1992); *see also Broyles v. Director, OWCP*, 974 F.2d 508, 510, 17 BLR 2-1, 2-3 (4th Cir. 1992); Order Awarding Attorney Fees at 4. However, in awarding the hourly rate of \$200, the administrative law judge also appropriately applied the regulatory criteria, and took into account claimant's counsel's customary billing rate, and the fact that he had previously been awarded an hourly rate of \$200.00, to find that his requested hourly rate was reasonable. *See* 20 C.F.R. §725.366; *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 895, 22 BLR 2-514, 2-535 (7th Cir. 2002); Order Awarding Attorney Fees at 4-5. Based on the administrative law judge's proper analysis of the regulatory criteria, we affirm her finding that an hourly rate of \$200 was reasonable.

Costs for Non-testifying Expert Witness

Employer argues that the administrative law judge abused her discretion in awarding expert witness fees for a doctor who did not attend the hearing. Employer's contention lacks merit. Section 28(d) of the Longshore Act, as incorporated by 30 U.S.C. §932(a), permits the recovery of fees for medical experts who do not attend the hearing. *Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894, 899-902, ---

BLR --- (7th Cir. 2003), *aff'g Hawker v. Zeigler Coal Co.*, 22 BLR 1-177 (2001). Therefore, we reject employer's contention. Because employer has not demonstrated an abuse of discretion in the administrative law judge's award of a fee and expenses, we affirm the fee award. *See Jones*, 21 BLR at 1-108. A fee award is not enforceable until the claim has been successfully prosecuted and all appeals are exhausted. *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 n.9 (1995).

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion, and the Order Awarding Attorney Fees is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge