BRB No. 06-0273 BLA

RUTH BANKS (Widow of ELI BANKS)	)	
Claimant-Respondent	)	
v.	)	
BRIGHT COAL COMPANY, INCORPORATED	)	DATE ISSUED: 05/31/2007
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 – Awarding Benefits and the Attorney Fee Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, P.S.C., Pikeville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits and the Attorney Fee Order (2004-BLA-6371) of Administrative Law Judge Joseph E. Kane rendered on a survivor's 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). The administrative law judge credited the miner with at least forty years of qualifying coal mine employment, and adjudicated this survivor's claim, filed on March 4, 2003, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R.

§718.202(a)(2), and death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's finding of pneumoconiosis pursuant to Section 718.202(a)(2) and death due to pneumoconiosis pursuant to Section 718.205(c)(2), as well as his subsequent approval of attorney fees in the amount of $6,312.50. Claimant responds, urging affirmance, to which employer replies in support of its position. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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).

Employer initially maintains that the administrative law judge was required to consider all relevant evidence together at Section 718.202(a), rather than merely within discrete subsections at Section 718.202(a)(1)-(4). Citing to the decision of the United States Court of Appeals for the Third Circuit in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), and the decision of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), employer contends that the administrative law judge erred in considering the biopsy evidence in isolation, rather than weighing it together with the reviewing opinions of Drs. Fino and Jarboe and the more recent negative x-ray and computerized tomography (CT) scan readings by highly qualified physicians. Employer's arguments are without merit. As this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, we decline to apply Third and Fourth Circuit case law and continue to hold in cases arising within the Sixth Circuit that the methods by which claimant may establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4) are alternate methods. *See* 20 C.F.R. §718.202(a); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985).

In the present case, the administrative law judge determined that Drs. Bensema and Naeye, Board-certified pathologists, reviewed the miner's biopsy slides and agreed that simple pneumoconiosis was present.[1] Decision and Order at 6; Claimant's Exhibit 2;

[1] While Dr. Bensema additionally noted some changes which might indicate the presence of complicated pneumoconiosis, she suggested that the biopsy evidence be considered together with the miner's x-rays to determine if more extensive fibrosis and larger nodules were present to support a diagnosis of complicated pneumoconiosis. Claimant's Exhibit 2. Dr. Naeye found no evidence of complicated pneumoconiosis, as

Employer's Exhibit 3. The administrative law judge, after reviewing all of the relevant evidence, reasonably concluded that the uniformly positive biopsy results constituted the most persuasive evidence and established the existence of pneumoconiosis at Section 718.202(a)(2). Decision and Order at 6-7; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993); *Dixon*, 8 BLR at 1-345. As substantial evidence supports the administrative law judge's findings, they are affirmed.

Employer next maintains that the opinion of Dr. Bielecki, the miner's treating physician, is conclusory and insufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death at Section 718.205(c)(2). Employer asserts that the administrative law judge should not have applied a treating physician preference to Dr. Bielecki's opinion, and failed to provide a valid reason for crediting it over the contrary opinions of Drs. Fino, Jarboe and Naeye, who possess superior qualifications. Employer's arguments are without merit.

The administrative law judge accurately reviewed the conflicting medical opinions of record and determined that Dr. Bielecki, the miner's treating physician, opined that pneumoconiosis was a substantial contributing factor in the miner's death, while Drs. Jarboe, Fino and Naeye all concluded that death was caused by metastatic lung cancer unrelated to pneumoconiosis, and that pneumoconiosis, if it existed, was too mild to have contributed in any way to the miner's death.[2] Decision and Order at 3-8. The administrative law judge noted that Drs. Jarboe, Fino and Naeye, who never examined the miner, based their conclusions in large part on the fact that the miner's 1986 objective test results were normal, and no pulmonary disability was demonstrated until the miner was diagnosed with squamous cell carcinoma and underwent a left pneumonectomy in 1996. Decision and Order at 7-8; Director's Exhibits 19, 21; Employer's Exhibits 1, 3. By contrast, Dr. Bielecki treated the miner frequently for his chronic lung condition from October 1996 until his death on June 14, 2002, and opined that metastatic lung cancer with left pneumonectomy, pneumoconiosis, chronic obstructive pulmonary disease (COPD), and smoking all contributed to the miner's poor pulmonary reserve and

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the nodules associated with fibrosis on the biopsy slides did not reach 2 centimeters in diameter. Employer's Exhibit 3. The administrative law judge concluded that complicated pneumoconiosis was not established, as none of the x-ray interpretations of record supported such a finding. Decision and Order at 8.

[2] The administrative law judge determined that Dr. Naeye diagnosed simple pneumoconiosis, while Dr. Jarboe's reports and statements were not entirely consistent as to whether pneumoconiosis was present, and Dr. Fino opined that pneumoconiosis was not present, contrary to the administrative law judge's findings. Decision and Order at 8; Director's Exhibits 19, 21; Employer's Exhibits 1, 3.

pulmonary death. Decision and Order at 7-8; Director's Exhibits 12, 16; Claimant's Exhibit 4.

After properly considering the factors set forth at 20 C.F.R. §718.104(d), the administrative law judge acted within his discretion in according Dr. Bielecki's opinion controlling weight. *See generally Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002). The administrative law judge determined that Dr. Bielecki treated the miner regularly over a period of approximately six years, and that after her referral of the miner to a pulmonary specialist, who diagnosed lung cancer and removed his left lung in October 1996, Dr. Bielecki continued to follow him closely. Dr. Bielecki's office notes documented frequent office visits, discussions with and advice to the miner regarding her treatment of his metastatic lung cancer and chronic obstructive pulmonary disease, and home visits as the miner's condition deteriorated, especially during the final months before his death on June 14, 2002. Decision and Order at 3, 4, 7. The administrative law judge acknowledged that Dr. Bielecki did not diagnose clinical pneumoconiosis during the miner's lifetime, but found persuasive her statements that, as a Board-certified family physician, she personally was not qualified to diagnose pneumoconiosis by x-ray but instead relied on the diagnoses of pneumoconiosis by appropriately qualified radiologists, pulmonologists and pathologists, and that her treatment of the miner's pulmonary problems would not have varied had she additionally diagnosed pneumoconiosis, along with her findings of COPD and lung cancer. Decision and Order at 7; Director's Exhibits 12, 16; Claimant's Exhibit 4. The administrative law judge noted that Dr. Bielecki also attributed the miner's COPD in part to dust exposure in coal mine employment, which constitutes legal pneumoconiosis as defined at 20 C.F.R. §718.201(a)(2), and found that Dr. Bielecki's opinion was supported by the miner's treatment records, employment and smoking histories, medical reports, x-rays and biopsy diagnoses of pneumoconiosis that she reviewed. Decision and Order at 7-8. The administrative law judge concluded that Dr. Bielecki's opinion was well-reasoned and documented, and thus was sufficient to establish that pneumoconiosis was a substantially contributing cause of the miner's death pursuant to Section 718.205(c)(2). Decision and Order at 8-9; s*ee Peabody Coal Co. v. Groves*, 277 F.3d 828, 22 BLR 2-310 (6th Cir. 2002); *Trumbo*, 17 BLR at 1-89; *Lucostic v. United States Steel Corp*, 8 BLR 1-46 (1985).

The Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Rinkes v. Consolidation Coal Co.*, 6 BLR 1-826 (1984). As the administrative law judge's findings pursuant to Section 718.205(c)(2) are supported by substantial evidence, we affirm his award of survivor's benefits.

Lastly, employer challenges the administrative law judge's award of attorney fees in the amount of $6,312.50. 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, an abuse of discretion, or not in accordance with applicable law. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

Claimant's counsel (counsel) submitted a fee petition to the administrative law judge, requesting a total fee of $10,250.00 for 41 hours of services performed between February 5, 2003 and August 18, 2005, at the rate of $250.00 per hour. After considering employer's objections, counsel's response and employer's reply thereto, the administrative law judge disallowed 13.75 hours of services for the period of February 5, 2003 through March 4, 2004, while the case was not under his jurisdiction. The administrative law judge also disallowed 1.5 hours as excessive and .5 hours as unnecessary, but approved the hourly rate requested, and awarded counsel a fee of $6,312.50, representing 25.25 hours of services at $250.00 per hour.

On appeal, employer argues that the administrative law judge did not have jurisdiction to award fees for work completed before the case was transferred to the Office of Administrative Law Judges on June 8, 2004, specifically time charges for work performed before the district director between March 10, 2004 and May 4, 2004. While employer acknowledges that time charges for work that is performed before a case is referred for hearing may be considered by an administrative law judge when the services are "reasonably integral to preparation for the hearing," *see Vigil v. Director, OWCP*, 8 BLR 1-99, 1-102 (1985), employer asserts that the work counsel performed did not satisfy this standard.[3] We disagree. The administrative law judge properly disallowed all time charges for work performed prior to March 10, 2004, the date counsel received and reviewed employer's disagreement with the district director's proposed award of benefits, and permissibly found that the 3.5 hours of services performed between that date and referral of the case for hearing were allowable as relevant to the proceedings before the administrative law judge. Attorney Fee Order at 2; *see Matthews v. Director, OWCP*, 9 BLR 1-184 (1986); *see generally Abbott*, 13 BLR at 1-16. The administrative law judge's findings are in accordance with applicable law, and thus are affirmed.

Employer next contends that the hourly rate of $250.00 is excessive, unsupported and inconsistent with law. Employer maintains that the administrative law judge incorrectly premised his hourly rate determination on the basis that the rate sought by counsel was consistent with the hourly rates awarded for such services performed by

[3] The disputed services performed included counsel's receipt and review of communications from employer and the Department of Labor following employer's request for a formal hearing, as well as letters to claimant and conferences with claimant to discuss the case.

experienced counsel before the Office of Administrative Law Judges and other tribunals, without considering employer's uncontradicted evidence that the market rate charged by other experienced attorneys in the same geographic location was $140.00 per hour. Contrary to employer's arguments, however, the administrative law judge addressed employer's objections to the fee petition, and permissibly awarded counsel his customary hourly rate for black lung cases based on counsel's expertise developed in twenty-six years of specialized practice in that field. Attorney Fee Order at 3-5. Employer's assertion that an hourly rate of $140.00 would be appropriate and more consistent with the rate obtained by experienced attorneys in rural Kentucky in this area of law is insufficient to meet employer's burden of proving that the rate awarded was excessive or that the administrative law judge abused his discretion in this regard. *See generally Broyles v. Director, OWCP*, 974 F.2d 508, 17 BLR 2-1 (4th Cir. 1992); *Jones v. Badger Coal Co.*, 21 BLR 1-102 (1998)(*en banc*); *Pritt v. Director, OWCP*, 9 BLR 1-159 (1986); *Gillman v. Director, OWCP*, 9 BLR 1-7 (1986). Consequently, we affirm the award of $250.00 per hour as a reasonable hourly rate.

Employer next challenges the administrative law judge's approval of 25.25 hours of services based on counsel's quarter-hour billing practice, arguing that while counsel justified spending 10 hours performing necessary services, the remaining time spent by counsel was either unnecessary, excessive, or clerical in nature. Employer's arguments are without merit. In considering counsel's fee petition, the administrative law judge specifically considered employer's objections to itemized entries, and employer's assertions on appeal are insufficient to meet its burden of proving that the administrative law judge abused his discretion in finding that the hours he approved were reasonable and necessary. Attorney Fee Order at 5-6; *see generally Lanning v. Director, OWCP*, 7 BLR 1-314 (1984). Consequently we affirm the administrative law judge's award of $6,312.50 in attorney fees. *Abbott*, 13 BLR at 1-16.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge