BRB No. 02-0122 BLA

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| JOEL T. COMPTON | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| BETHENERGY MINES, INCORPORATED | ) | DATE ISSUED: |
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| Employer-Petitioner | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order on Remand Awarding Benefits and the Supplemental Decision and Order Granting Attorney Fees of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Crane), Charleston, West Virginia, for claimant.

Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia., for employer.

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

Employer appeals the Decision and Order on Remand Awarding Benefits and the Supplemental Decision and Order Granting Attorney Fees (98-BLA-0014) of Administrative Law Judge Richard A. Morgan 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).[1] This case is before the Board for a fifth time.[2] When this case was most

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

recently before the Board, the Board vacated the administrative law judge's Decision and Order awarding benefits and remanded the case for further consideration. *Compton v. Bethenergy Mines, Inc.*, BRB No. 99-0464 BLA (Sep. 29, 2000). The Board held that the administrative law judge had mischaracterized Dr. Rasmussen's opinion that pneumoconiosis was a major contributing factor to claimant's totally disabling respiratory impairment and that, contrary to the statement of the administrative law judge, the record showed that Dr. Rasmussen examined claimant only once, thereby undermining the administrative law judge's conclusion that Dr. Rasmussen's opinion was based on more than one examination and many objective tests conducted over the years. The Board further held that the administrative law judge's conclusion that Dr. Naeye's opinion supported Dr. Rasmussen's findings was erroneous inasmuch as the administrative law judge used "speculative terms" in reaching that conclusion. Further, the Board concluded that the administrative law judge erroneously relied on the opinions of Drs. Gaziano and Zaldivar as support for Drs. Rasmussen's conclusions, because the administrative law judge had previously found these same opinions to be unreasoned. The Board also instructed the administrative law judge to

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[2] Claimant initially filed a claim for benefits on June 5, 1990, Director's Exhibit 1, which was denied in a Decision and Order issued by Administrative Law Judge Frank D. Marden on January 28, 1993, Director's Exhibit 60. Claimant filed an appeal with the Board, Director's Exhibit 61, but at the same time sought modification before the Office of Administrative Law Judges, Director's Exhibit 67. The Board dismissed claimant's appeal, *Compton v. Bethenergy Mines, Inc.*, BRB Nos. 93-1045 BLA and 93-1045 BLA-A (Order)(Apr. 23. 1993)(unpub.), Director's Exhibit 73, and remanded the case to the district director. Subsequently, Judge Marden issued a Decision and Order denying claimant's request for modification. Director's Exhibit 82. Claimant appealed and the Board vacated the denial of modification and remanded the case for further consideration. *Compton v. Bethenergy Mines Inc.*, BRB No.94-2552 BLA (Mar. 27, 1995)(unpub.), Director's Exhibit 92. On remand, Judge Marden again issued a Decision and Order denying benefits. Director's Exhibit 96. Claimant appealed, and the Board again vacated the denial of benefits. *Compton v. Bethenergy Mines Inc.*, BRB No.95-2204 BLA (Mar. 21, 1996)(unpub.), Director's Exhibit 105. On remand, Judge Marden again issued a Decision and Order denying benefits. Director's Exhibit 110. Claimant once again appealed to the Board and at the same time sought modification before the Office of Administrative Law Judges. Director's Exhibit 118. The Board issued an Order remanding the case for modification proceedings. *Compton v. Bethenergy Mines, Inc.*, BRB No. 97-0156 BLA (Order)(Apr. 24 ,1997)(unpub.). Subsequently, on December 30, 1998, Administrative Law Judge Richard A. Morgan issued a Decision and Order awarding benefits on December 30, 1998. Employer appealed and the Board vacated the award of benefits and remanded the claim for further consideration. *Compton v. Bethenergy Mines, Inc.*, BRB No. 99-0464 BLA (Sept 29, 2000)(2-1 decision with McGranery, J., dissenting)(unpub.).

reconsider, on remand, the opinions of Drs. Crisalli and Kleinerman. Employer's Exhibits 1, 2, 7.

In his most recent Decision and Order in this case, the administrative law judge found that the evidence of record established that the miner's total respiratory disability was due to chronic obstructive pulmonary disease arising out of coal mine employment and awarded benefits. The administrative law judge further concluded, based on the date of Dr. Rasmussen's qualifying pulmonary function study, that the onset date for benefits was July 1, 1990. Subsequent to the Decision and Order on Remand Awarding Benefits, the administrative law judge, on November 7, 2001, issued a Supplemental Decision and Order Granting Attorney Fees. Pursuant to a fee petition submitted by claimant's counsel, the administrative law judge determined that counsel was entitled to a total fee of $1,400.00, representing 5.6 hours of work at an hourly rate of $250.00. The administrative law judge concluded, over employer's objection that the fee was commensurate with the work performed by counsel before the administrative law judge.

On appeal, employer contends that the administrative law judge erred in his analysis of the medical opinion evidence when he concluded that claimant established that his totally disabling respiratory impairment was due to pneumoconiosis. Employer further contends that the administrative law judge erred in determining that benefits should commence from July 1, 1990. Employer subsequently filed a brief challenging the administrative law judge's Supplemental Decision and Order Granting Attorney Fees, in which it asserts that the administrative law judge's award of attorney fees is arbitrary, capricious and an abuse of discretion. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), is not participating in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On appeal, employer contends that the administrative law judge applied an erroneous standard in concluding that the evidence of record supported a finding that claimant's totally disabling respiratory impairment was due to pneumoconiosis. Employer asserts that the administrative law judge improperly accorded claimant with a presumption of total disability due to pneumoconiosis and placed the burden on employer to rebut such a presumption by ruling out coal dust exposure as a source of claimant's disability. Employer further contends that the administrative law judge erred in relying on the unreasoned opinions of Dr. Rasmussen to support a finding of disability causation and erred in rejecting the reports of

those physicians who rendered contrary opinions, Drs. Crisalli, Fino, Tuteur, Castle, Kleinerman, Naeye and Bush, without adequate explanation. Employer also argues that the administrative law judge failed to address the relative qualifications of the physicians in a manner consistent with the holdings of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998) and *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

A claimant must affirmatively establish that pneumoconiosis is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Contrary to employer's assertion, the administrative law judge has not improperly accorded claimant a presumption that his totally disabling respiratory impairment was due to pneumoconiosis. Rather, the administrative law judge concluded, based on his review of all the medical opinion evidence, that Dr. Rasmussen's opinion constituted the best-reasoned and documented opinion. This was rational. *See Hicks, supra*; *Akers, supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Further, contrary to employer's assertion, the administrative law judge permissibly accorded less weight to the opinions of those physicians rendering opinions contrary to Dr. Rasmussen's inasmuch as Dr. Rasmussen provided affirmable bases for his determination. Specifically, the administrative law found that the opinions of Dr. Sobieski and Dr. Daniel, that claimant's obstructive lung impairment arose solely from smoking, were unreasoned and "too old to be of value." Decision and Order on Remand at 9. *See Clark, supra*; *Peskie, supra*; *Lucostic, supra*. Additionally, the administrative law judge permissibly concluded that the failure of both of these physicians to diagnose the presence of total respiratory disability undermined the credibility of their opinions on causation. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984); *see also Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Similarly, the administrative law judge, in a permissible exercise of his discretion, accorded less weight to the opinion of Dr. Naeye because he found that claimant did not suffer from a totally disabling respiratory impairment. *See Mabe, supra*; *Sisak, supra*; *see also Stark, supra*. Likewise, the administrative law judge concluded that those physicians who attributed claimant's chronic obstructive pulmonary disease solely to smoking, *i.e.*, Drs. Naeye, Fino, Castle, Sobieski and Crisalli, failed to adequately address the impact of claimant's lengthy coal mine employment history on his chronic obstructive pulmonary disease. Thus, the administrative law judge permissibly found that such opinions were entitled to less weight. *See Mabe, supra*; *Sisak, supra*; *see also Stark, supra*.

We further reject employer's assertion that the administrative law judge's Decision and Order on Remand is inconsistent with the holding of the Fourth Circuit in both *Hicks, supra*, and *Akers, supra*. A review of the administrative law judge's Decision and Order on

Remand demonstrates that the administrative law judge addressed the relative qualifications of the physicians and accorded weight to the opinions of the physicians in a manner consistent with the Board's remand instructions and the holdings of the Fourth Circuit in *Hicks* and *Akers*. We conclude, therefore that the administrative law judge has complied with our remand instructions and has provided affirmable bases for according the opinion of Dr. Rasmussen greatest weight. Accordingly, we affirm, as supported by substantial evidence, the administrative law judge's finding that the weight of the evidence supports a finding that the miner's totally disabling respiratory impairment was due to pneumoconiosis.[3] *See* 20 C.F.R. §718.204(c).

Employer also argues that the administrative law judge erred in setting the date of onset of claimant's disability at July 1, 1990 based on the July 1990 qualifying[4] pulmonary function study performed by Dr. Rasmussen. Director's Exhibit 7. Employer maintains that the administrative law judge's finding must be vacated, as claimant's eligibility for benefits cannot begin prior to the date of the earlier denial of benefits, that is before January 28, 1993.

[3] We need not address employer's assertions regarding the opinions corroborating Dr. Rasmussen's conclusions because the administrative law judge has provided an affirmable basis for crediting the conclusions of Dr. Rasmussen absent those corroborating opinions. Decision and Order on Remand at 10.

[4] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. §718.204, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii)

The Fourth Circuit has held, however, that in cases involving requests modification in which benefits are ultimately awarded, a claimant is entitled to benefits from a date preceding the original denial if the finding of modification is based on a mistake in a determination of fact. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 1364 20 BLR 2-227, 2-233 (4th Cir. 1996)(en banc), *cert. denied*, 117 S.Ct. 763 (1997); *see Eifler v. Peabody Coal Co.*, 926 F.2d 663, 666, 15 BLR 2-1, 2-4 (7th Cir. 1991).[5] In his Decision and Order on Remand, the administrative law judge stated that he had modified the previous denial and awarded benefits because claimant had established a mistake in a previous determination of fact. Decision and Order on Remand at 3. Thus, because the administrative law judge found that modification in this case, was based on a mistake in a determination of fact, we cannot say that the administrative law judge erred in awarding benefits from a date preceding the original denial of benefits. *Rutter*, *supra*; *Eifler*, *supra*.

Finally, employer contends that the $250.00 hourly fee granted claimant's counsel is exorbitant. Employer asserts that the administrative law judge failed to explain how the issues in the instant case justify the high hourly rate sought by claimant's counsel and further failed to explain how the routine nature of the services performed by claimant's counsel, *i.e.* reviewing documents and preparing a short argument, justifies the hourly rate granted. Employer also asserts that claimant's counsel failed to carry his burden of establishing the reasonableness of the hourly rate sought. Lastly, employer points to previous cases where the same counsel's request for a $250.00 hourly rate was denied.

An administrative law judge's award of attorney fees is discretionary and will be upheld on appeal unless arbitrary, capricious, an abuse of discretion or contrary to law. *Kerns v. Consolidation Coal Co.*, 176 F.3d 802, 21 BLR 2-631 (4th Cir. 1999); *see Abbott v. Director, OWCP*, 13 BLR 1-15 (1989). A review of counsel's fee petition, in this case, shows that, in support of his request for a $250.00 hourly fee, counsel provided a complete

[5] A finding that modification is based on the alternative ground of a change in conditions would mean that the onset date could not be set at a time prior to the initial denial of benefits inasmuch as such a finding would only entitle claimant to benefits from the date of the change. *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 1364, 20 BLR 2-227, 2-233 (4th Cir. 1996)(*en banc*), *cert. denied*, 117 S.Ct. 763 (1997); *see also Eifler v. Peabody Coal Co.*, 926 F.2d 663, 666, 15 BLR 2-1, 2-4 (7th Cir. 1991).

statement of the extent and character of the necessary work done. Counsel also indicated his professional status and his customary billing rate. Further, counsel has provided, through affidavits, evidence pertaining to customary rates for other attorneys in black lung litigation in West Virginia. *See* 20 C.F.R. §725.366(a). In reviewing counsel's fee application, the administrative law judge addressed the objections raised by employer, but concluded that claimant's counsel for claimant has established that both the hourly rate and the total fee requested were commensurate with the work done. Accordingly, the administrative law judge approved the requested fee. We are unable to conclude that the decision of the administrative law judge, in this case, is arbitrary, capricious, an abuse of discretion or contrary to law. *See Kerns, supra*; *Abbott, supra*. The administrative law judge's award of attorney fees is, therefore, affirmed.

Accordingly, the administrative law judge's Decision and Order On Remand Awarding Benefits from July 1, 1993, and the Supplemental Decision and Order Granting Attorney Fees are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge