BRB Nos. 00-0105 BLA
00-0105 BLA-A

MILDRED CLOVIS (Widow of EVERETT CLOVIS)	)	
Claimant-Respondent Cross-Petitioner	)	
v.	)	DATE ISSUED:
FMC MINING EQUIPMENT DIVISION	)	
Employer-Petitioner Cross-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order and Supplemental Decision and Order Awarding Attorney Fees of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Timothy F. Cogan (Cassidy, Myers, Cogan, Voegelin & Tennant, L.C.), Wheeling, West Virginia, for claimant.

Paul E. Frampton (Bowles Rice McDavid Graff & Lowe), Fairmont, West Virginia, for employer.

Sarah M. Hurley (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order (99-BLA-0041) of Administrative Law Judge Daniel L. Leland awarding benefits 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). Employer and claimant also appeal the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees (99-BLA-0041). The instant case involves a survivor's claim filed on July 24, 1997. After crediting the miner with eleven years of coal mine employment, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(2) and (a)(3). The administrative law judge, however, found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that the evidence was sufficient to establish that the miner's death was

[1]Claimant is the surviving spouse of the deceased miner who died on July 10, 1997. Director's Exhibit 3.

[2]The miner filed a claim for benefits during his lifetime. In a Decision and Order dated June 26, 1997, the administrative law judge, after crediting the miner with eleven years of coal mine employment, found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits. By Decision and Order dated July 7, 1998, the Board affirmed the administrative law judge's findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Clovis v. FMC Corp.*, BRB No. 97-1398 BLA (July 7, 1998)(unpublished). The Board, therefore, affirmed the administrative law judge's denial of benefits. *Id.* There is no indication that claimant took any further action in regard to the miner's claim.

due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits. On appeal, employer contends that the administrative law judge erred in finding that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer also contends that the administrative law judge erred in finding that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Claimant responds in support of the administrative law judge's award of benefits. Claimant has filed a cross-appeal, arguing that employer failed to timely request a hearing. Employer responds, arguing that it properly contested the district director's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response to the administrative law judge's award of benefits. The Director, however, argues that the district director properly forwarded the instant case to the Office of Administrative Law Judges for a hearing.

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).

Claimant contends that employer, FMC Mining Equipment Division (FMC), did not file a timely effective request for a hearing. Claimant asserts that it was "Consolidation Coal Company" which expressed dissatisfaction with the district director's award of benefits. Because Consolidation Coal Company is not a party in the instant case, claimant contends that FMC failed to file an effective request for a hearing.

Employer disagrees, noting that claimant's argument rests upon a clerical error. In a letter to the district director dated August 10, 1998, employer's counsel (Jackson & Kelly) stated:

> I have reviewed the Memorandum of Conference with Stipulation of Contested Issues for the above-referenced Federal Black Lung claim. **Consolidation Coal Company** disagrees with the determination that

[3]Inasmuch as no party challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(2) and (a)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4]Employer was represented in 1998 by the law firm of Jackson & Kelly.

> the evidence of record is sufficient to establish the existence of coal workers' pneumoconiosis and death due to pneumoconiosis. **FMC Corporation** requests that this claim be forwarded to the Office of Administrative Law Judges for a *de novo* hearing. Please keep me advised regarding the status of this matter.

Director's Exhibit 29 (emphasis added).

At the top of the letter was a reference to the case *"Mildred Clovis, surviving spouse of Everett Clovis v. FMC Corporation"* and the OWCP number of the instant case. Director's Exhibit 29.

We hold that employer properly and timely filed a request for a hearing. Although employer (FMC) mistakenly referred to itself as Consolidation Coal Company in one part of its request for a formal hearing, employer subsequently clearly stated that: "FMC Corporation requests that this claim be forwarded to the Office of Administrative Law Judges for a *de novo* hearing." There is no evidence that employer's earlier reference in the letter to Consolidation Coal Company resulted in any confusion. Moreover, we note that claimant, at the hearing, never challenged the validity of employer's request for a hearing.

Employer also contends that the administrative law judge made numerous errors in finding that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer initially argues that the administrative law judge erred in finding that Drs. Fino and Renn "summarily" discounted the miner's coal mine employment as a factor in his pulmonary disease. *See* Decision and Order at 7. We agree. The administrative law judge failed to provide a basis for his assertion that Drs. Fino and Renn "summarily" discounted the miner's coal mine employment as a factor in his pulmonary disease.

Employer also contends that the administrative law judge erred in discrediting the opinions of Drs. Fino and Renn. The administrative law judge found that Drs.

[5]Employer notes that the administrative law judge, in his consideration of the miner's claim, held that the opinions of Drs. Fino and Renn were rational and supported by substantial evidence and relied upon their opinions in holding that the miner was not entitled to benefits. Employer contends that the administrative law judge's assessment of these opinions should be considered the law of the case and that the administrative law judge should be collaterally estopped from holding that their opinions are inadequate. The instant case involves a survivor's claim. The

Fino and Renn "asserted with little support that interstitial pulmonary fibrosis [could] not be caused by coal dust exposure and blamed the decedent's respiratory disorder solely on his hiatal hernia." Decision and Order at 7. In regard to Dr. Fino's opinion, the administrative law judge observed that Dr. Fino placed great weight on the absence of rounded opacities on the miner's chest x-rays and CT scans, a finding which the administrative law judge found had little relevance to whether the miner suffered from pneumoconiosis as defined in 20 C.F.R. §718.201. *Id.*

Although Dr. Fino indicated that rounded opacities in the upper zones are necessary to secure a diagnosis of "radiographic pneumoconiosis, " Dr. Fino acknowledged that "a negative x-ray [didn't] rule out completely a diagnosis of coal workers' pneumoconiosis." Employer's Exhibit 2 at 26. Dr. Fino opined that irregular opacities appearing only in the lower zones are, from a radiographic standpoint, not consistent with a coal mine dust induced lung disease. *Id.* at 27.

The administrative law judge also found that Dr. Fino did not adequately explain why the miner's diffusion impairment could not be related to his inhalation of coal mine dust. Dr. Fino, during his July 14, 1999 deposition, cited medical literature in support of his opinion that the miner's diffuse interstitial pulmonary fibrosis was not associated with coal mine dust inhalation. Employer's Exhibit 2 at 30. Dr. Fino opined that the miner's diffuse interstitial fibrosis was either related to recurrent aspiration or was idiopathic in nature. *Id.* at 32. Dr. Fino also provided a basis for his opinion that the miner's fibrosis was not due to his coal mine dust exposure, explaining that he would expect to see a restrictive defect and probably some obstruction if the miner's pulmonary fibrosis was due to his coal mine dust inhalation. *Id.* at 37. Dr. Fino noted that this type of abnormality was not present in the instant case. *Id.*

Employer further disagrees with the administrative law judge's finding that Dr. Renn offered no persuasive reasons for his conclusion that if the miner had interstitial pulmonary fibrosis, it could not be related to his coal mine employment. During his July 15, 1999 deposition, Dr. Renn opined that the miner did not have a coal mine dust related disease. Employer's Exhibit 3 at 22. Dr. Renn indicated that

---

instant case also contains additional deposition testimony from Drs. Renn and Fino, as well as additional opinions from other physicians. Under such circumstances, we hold that the administrative law judge is not precluded from considering whether the opinions of Drs. Renn and Fino are adequately reasoned. *See generally Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999) (*en banc*).

his opinion was based upon clinical findings, the physiologic pattern on the miner's ventilatory studies and the changes on the miner's chest x-rays. *Id.*

Thus, contrary to the administrative law judge's characterization, Drs. Fino and Renn provided support for their opinions that the miner did not suffer from a pulmonary disease caused by his coal mine dust exposure.

Employer also contends that the administrative law judge erred in discrediting Dr. Naeye's opinion that the miner did not suffer from coal workers' pneumoconiosis. The administrative law judge noted that Dr. Naeye was a pathologist who based his opinion on other than biopsy evidence. The

---

[6]Dr. Renn stated that:

> I don't believe that [the miner] did have an interstitial fibrosis. And I base that upon the fact that his chest x-ray revealed changes that are consistent with a recurrent aspiration pneumonitis, but it does not show that he had the diffuse interstitial fibrosis that one would expect in a person who actually had either a [sic] idiopathic or a known etiology caused pulmonary interstitial fibrosis.
>
> By that I mean that he had areas of the lung that would look affected. I believe that he had an area that was in the right mid-zone. But he did not have areas that were diffuse enough to be related to an interstitial fibrosis.
>
> Also, his CT scan, which are [sic] more sensitive than the plain chest x-ray for determining interstitial fibrosis, did not show that he had a diffuse interstitial pulmonary fibrosis.
>
> And then if he did have an interstitial pulmonary fibrosis, he would have had a restrictive ventilatory defect, and we have total lung capacities on at least two occasions that revealed that he did not have restrictive ventilatory defect. And a restrictive ventilatory defect can only be determined accurately by doing lung volume studies. And so he did not have any of the signs, or any of the physiologic studies or any of the radiographic studies that he did have an interstitial pulmonary fibrosis.

Employer's Exhibit 3 at 23-24.

administrative law judge, therefore, found that Dr. Naeye's expertise was less significant and accorded his opinion "little weight." Decision and Order at 7. Although Dr. Naeye acknowledged that there was "no fixed lung tissue...available for review, " Director's Exhibit 30, he reviewed other evidence of record and concluded that there was no evidence that the miner suffered from any form of coal workers' pneumoconiosis. *Id*.; Employer's Exhibit 1 at 10-13. The administrative law judge erred in discrediting Dr. Naeye's opinion solely because he did not base his opinion upon a review of biopsy evidence. Consequently, the administrative law judge, on remand, is instructed to explain his basis for concluding that Dr. Naeye's qualifications are not equal or superior to the qualifications of the other physicians of record.

We also agree with employer's contention that the administrative law judge failed to adequately scrutinize the opinions of Drs. Rasmussen, Al-Asadi, Garson, and Cohen. The administrative law judge merely indicated, without explanation, that the opinions of Drs. Rasmussen, Al-Asadi, Garson, and Cohen "are well reasoned opinions based on adequate documentation." Decision and Order at 7. Consequently, on remand, the administrative law judge is instructed to reconsider whether the opinions of Drs. Rasmussen, Al-Asadi, Garson, and Cohen are sufficiently reasoned. *See Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

In light of the above-referenced errors, we vacate the administrative law judge's finding that the 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.

Subsequent to the issuance of the administrative law judge's Decision and

---

[7]Employer notes that the administrative law judge failed to address Dr. Rasmussen's admission that he could not exclude the possibility of idiopathic interstitial fibrosis and that he could not "state for sure that it was coal dust itself that caused the [miner's] interstitial fibrosis." *See* Claimant's Exhibit 8 at 23.

[8]Employer also contends that the administrative law judge mischaracterized Dr. Garson's qualifications. The administrative law judge indicated that Dr. Garson was Board-certified in Occupational Medicine. Employer correctly notes that Dr. Garson is actually Board-certified in Preventative Medicine. Employer's Exhibit 9 at 7. However, because Dr. Garson explained that the American Board of Preventative Medicine covers occupational medicine and testified that his primary activity under the American Board of Preventative Medicine is occupational medicine, the administrative law judge's error does not appear to be especially significant. *Id.*

Order, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000); *see also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Consequently, on remand, the administrative law judge must weigh all the evidence relevant to 20 C.F.R. §718.202(a)(1), (a)(2) and (a)(4) together in determining whether the miner suffers from pneumoconiosis. *Compton*, *supra*.

Employer also argues that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). In finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis, the administrative law judge credited the opinions of Drs. Thagirisa, Gaziano, Rasmussen, Al-Asadi, Garson and Cohen that the miner's death was due to pneumoconiosis over the contrary opinions of Drs. Naeye, Fino and Renn. Decision and Order at 8. The administrative law judge found that Dr. Thagirisa's opinion was entitled to "great weight" based upon his status as the miner's treating physician. *Id.*

Employer argues that the administrative law judge's treatment of Dr. Thagirisa's opinion pursuant to 20 C.F.R. §718.205(c) is inconsistent with the administrative law judge's treatment of the doctor's opinion pursuant to 20 C.F.R. §718.202(a)(4). Employer accurately notes that the administrative law judge accorded Dr. Thagirisa's opinion little weight at 20 C.F.R. §718.202(a)(4) because he found that his opinion that the miner suffered from pneumoconiosis was "not supported by any reasoning." Decision and Order at 7. The administrative law

[9]The administrative law judge properly found that claimant was not entitled to any of the presumptions set out at 20 C.F.R. §718.202(a)(3). Decision and Order at 6.

[10]Inasmuch as the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). The United States Court of Appeals for the Fourth Circuit has held that pneumoconiosis will be considered a substantially contributing cause of the miner's death if it actually hastened the miner's death. *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

judge erred in not reconciling his disparate treatment of Dr. Thagirisa's opinion at 20 C.F.R. §§718.202(a)(4) and 718.205(c).

Employer also argues that the administrative law judge erred in discrediting the opinions of Drs. Naeye, Fino and Renn that pneumoconiosis did not cause or hasten the miner's death because these physicians failed to diagnose a coal mine dust related pulmonary condition. In light of our decision to vacate the administrative law judge's finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), we also vacate the administrative law judge's finding that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Employer and claimant also appeal the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees. The administrative law judge awarded claimant's counsel a total fee of $18,745.30 for 80.8 hours of legal services at an hourly rate of $195.00, and $3,106.30 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 contends that the administrative law judge erred by awarding claimant's counsel an hourly rate of $195.00 based on a contingency enhancement. In determining the amount of attorney's fees to award under a fee-shifting statute, a court must determine the number of hours reasonably expended in preparing and litigating the case and then multiply those hours by a reasonable hourly rate. This sum constitutes the "lodestar" amount. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The United States Supreme Court has held that fee-shifting statutes do not permit enhancement of a fee award beyond the lodestar amount to reflect the fact that a party's attorneys were retained on a contingent-fee basis. *See City of Burlington v. Dague*, 112 S.Ct. 2638 (1992)

[11]The Supreme Court explained that the lodestar amount incorporates any compensable risk of loss as it is reflected in the increased amount of hours expended to overcome the difficulty of winning or in the higher hourly fee of the more skilled attorney needed to win the case. *City of Burlington v. Dague*, 112 S.Ct. 2638, 2641 (1992).

(no contingency enhancement whatever is compatible with the fee-shifting statutes at issue); *see also Broyles v. Director, OWCP*, 974 F.2d 508, 17 BLR 2-1 (4th Cir. 1992).

Although employer notes that claimant's counsel indicated that his employment rate was $95.00 to $125.00 per hour, claimant's counsel also indicated that he was awarded $260.00 in an employment/disability case in West Virginia. Claimant's counsel also estimated that his effective hourly rate for representation in personal injury cases was well in excess of $200.00 per hour. Claimant's counsel further noted that his ERISA billing rate ranged from $130.00 to $195.00 per hour. The administrative law judge found no evidence that claimant's counsel enhanced his rate to reflect compensation for contingency. Inasmuch as the administrative law judge's finding is reasonable, we affirm the administrative law judge's approval of an hourly rate of $195.00 in the instant case.

Employer argues that the administrative law judge erred in allowing claimant's counsel to recover witness fees for the depositions of Drs. Cohen, Rasmussen and Al-Asadi. Employer specifically argues that the administrative law judge erred in requiring it to reimburse claimant's counsel $250.00 for obtaining Dr. Cohen's deposition, $400.00 for obtaining Dr. Rasmussen's deposition and $300.00 for obtaining Dr. Al-Asadi's deposition.

20 C.F.R. §725.459(c) specifically provides:

> If a claimant is determined entitled to benefits, there may be assessed as costs against a responsible operator, if any, fees and mileage for necessary witnesses attending the hearing at the request of claimant. Both the necessity of the witnesses and the reasonableness of the fees of any expert witness shall be approved by the administrative law judge. The amounts awarded against a responsible operator as attorney fees, or costs, fees and mileage for witnesses, shall not in any respect affect or diminish benefits payable under the Act.

20 C.F.R. §725.459(c); *see also* 33 U.S.C. §928(d), as incorporated by 30 U.S.C. §932(a).

The administrative law judge held that the fees paid for the appearance of claimant's expert witnesses (Drs. Cohen, Rasmussen and Al-Asadi) were reasonable. Inasmuch as it is not arbitrary, capricious, or an abuse of discretion, we

affirm the administrative law judge's finding requiring employer to reimburse claimant's counsel for the costs of obtaining the depositions of Drs. Cohen, Rasmussen and Al-Asadi. *See* 20 C.F.R. §725.459(c); *Branham v. Eastern Associated Coal Corp.*, 19 BLR 1-1 (1994).

Claimant's counsel objects to the administrative law judge's reduction in the number of allowable hours. Claimant's counsel contends that the administrative law judge erred in disallowing all work performed prior to the miner's death. Although claimant's counsel acknowledges that work performed prior to the miner's death was work associated with the adjudication of the miner's claim, claimant's counsel notes that some of this work generated "material which was useful for the decision obtained in the [survivor's] claim." Claimant's Brief at 34.

The test for determining whether claimant's counsel's work is compensable in this case is whether claimant's counsel, at the time he performed the work in question, could have reasonably regarded the work as necessary to establish entitlement to benefits. *See generally Lanning v. Director, OWCP*, 7 BLR 1-314 (1984). Because claimant's counsel was unsuccessful in securing an award of benefits in the miner's claim, claimant's counsel is not entitled to an attorney's fee for services rendered in his pursuit of that claim. Consequently, the administrative law judge properly disallowed claimant's requested fees for services performed and expenses incurred before the miner's death on July 10, 1997. Supplemental Decision and Order at 1-2.

Claimant's counsel also argues that the administrative law judge erred in reducing the amount of hours allowed for the preparation of claimant's post-hearing brief. 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. *Lanning*, *supra*. In the instant case, the administrative law judge reasonably reduced the number of hours compensable for the preparation of claimant's post-hearing brief.

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

[12]We note that an attorney's fee award does not become effective, and is thus unenforceable, until there is a successful prosecution of the claim. *Coleman v. Ramey Coal Co*., 18 BLR 1-9, 1-17 (1995).

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 Supplemental Decision and Order Awarding Attorney Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge