

BRB No. 02-0366 BLA

ELLIOTT ROWE, JR.)	
)	
Claimant-Respondent)	
)	
v.)	
)	
JOHNSON COAL COMPANY)	
)	
and)	
)	DATE ISSUED: _____
KENTUCKY COAL PRODUCERS' SELF-)	
INSURANCE FUND)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	DECISION and ORDER

Party-in-Interest

Appeal of the Decision and Order on Remand of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Prestonsburg, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (99-BLA-0807) of Administrative Law Judge Richard K. Malamphy awarding benefits 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 now before the Board for the fifth time. The Board has previously discussed fully the procedural history of this case. See *Rowe v. Johnson Coal Co.*, BRB No. 00-0782 BLA (June 20, 2001)(unpub.) and *Rowe v. Johnson Coal Co.*, BRB No.97-1140 BLA (May 15, 1998)(unpub.).

In our Decision and Order issued on June 20, 2001, the Board determined that the administrative law judge's analysis was inadequate for the Board to review, as he did not provide reasons for crediting the opinions of Drs. Fino and Westerfield, or explain his reasons for finding a basis for modification established. The Board instructed the administrative law judge to determine whether reopening the claim renders justice under the Act. Accordingly, the Board vacated the administrative law judge's Decision and Order and remanded the case for further consideration. *Rowe v. Johnson Coal Co.*, BRB No. 00-0782 BLA (June 20, 2001)(unpub.).

On remand, the administrative law judge found the x-ray evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. § 718.202(a)(1), and he relied upon the opinion of Dr. Sundaram, finding it sufficient to establish that claimant has been disabled since February 1993. The administrative law judge found that there was no mistake in a determination of fact in the May 1997 Decision and Order and that reopening the record would not render justice under the Act. Consequently, he determined that claimant was entitled to benefits commencing in February 1993. Decision and Order on Remand. (2002 Decision and Order)

Employer appeals, asserting that the administrative law judge erred in his weighing of the evidence regarding the existence of pneumoconiosis, and total disability due to pneumoconiosis. Employer maintains that the administrative law judge erred by not separating his analysis of total disability from his analysis of disability causation. Employer also challenges the administrative law judge's finding that modification would not render justice under the Act.

Claimant responds, urging the Board to affirm the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this appeal.

Claimant's counsel has also filed a petition for attorney's fees for the work performed before the Board during the pendency of the prior appeals identified as BRB Nos. 97-1140 BLA and 00-0782 BLA. Employer has filed objections to claimant's counsel's fee petition.

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).

¹The 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.

Initially, we address the administrative law judge's findings on the merits of entitlement. Section 22 of the Longshore Act, 33 U.S.C. § 922, which has been incorporated into the Act, provides in part:

Upon his own initiative, or upon the application of any party in interest...on the ground of a change in conditions or because of a mistake in a determination of fact by the [administrative law judge], the [administrative law judge] may, at any time prior to one year after the date of the last payment of compensation...or at any time prior to one year after the rejection of a claim, review a compensation case...in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation....

33 U.S.C. § 922.

By its plain language, 33 U.S.C. § 922 is a broad reopening provision that is available to employers and employees alike. *King v. Jericol Mining, Inc.*, 246 F.3d 822, 825, 22 BLR 2-305, 2-310 (6th Cir. 2001). When a request for modification is filed, the fact-finder has the authority, if not the duty, to rethink prior findings of fact and to reconsider all evidence for any mistake in fact. *Jonida Coal Co. v. Hunt*, 124 F.3d 739, 743, 21 BLR 2-203, 2-210 (6th Cir. 1997), including whether the ultimate fact was wrongly decided. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994).

Modification may be established by showing that there has been a change in conditions or a mistake in a determination of fact. 20 C.F.R. § 725.310 (2000). The Board has held that in considering whether a change in conditions has been established, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). In considering whether modification is established based on a mistake in a determination of fact, the administrative law judge must consider the entirety of the evidentiary record. *See Nataloni, supra*.

In this case, the administrative law judge found that the majority of chest X-rays in this case, including the most recent films, have been read as being positive for CWP. 2002 Decision and Order at 6, and he concluded that the evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). The administrative law judge reviewed the medical opinions of Drs. Fino, Westerfield and Sundaram and stated:

Drs. Westerfield and Fino have not only stated that [claimant] does not have an occupationally acquired pulmonary disease but that no respiratory impairment is present. If such were true the undersigned wonders how these physicians rationalize the need for frequent pulmonary treatment.

I find that Dr. Sundaram is in a much better position to evaluate [claimant's] impairment than two non-treating

and non-examining physicians.

2002 Decision and Order at 8. Consequently, the administrative law judge found that claimant was disabled since February 1993, as determined in the 1997 Decision and Order. The administrative law judge noted that the case had been pending for more than eleven years, and he determined that reopening the record after the Board's 1998 denial of benefits would not render justice under the Act. The administrative law judge also concluded that there was no mistake in a determination of fact in the 1997 Decision and Order based on the evidence then of record. *Id.*

As previously noted, in our 2001 Decision and Order, we remanded this case to the administrative law judge to reconsider all of the evidence regarding a mistake in a determination of fact. We vacated the administrative law judge's earlier finding that a mistake of fact was demonstrated and expressly instructed the administrative law judge to include a specific and explanatory discussion of the weight accorded to each physician's opinion, in view of the opinion's documentation and reasoning, the authoring physician's credentials, and any other relevant factors, such as treating physician status. @ *Rowe*, 2001 slip op. at 6. We also instructed the administrative law judge to consider employer's contention that the prior finding of the existence of pneumoconiosis was a mistake in a determination of fact. *Rowe*, 2001 slip op. at 6, n.5. Because the administrative law judge has not analyzed all of the evidence of record as our remand order required, we vacate his 2002 Decision and Order.

Turning first to the x-ray evidence, the administrative law judge summarily stated that the majority of the x-ray films, including the most recent, have been read as positive for pneumoconiosis. 2002 Decision and Order at 6. A review of the record reveals interpretations of twenty-one chest x-rays taken from 1987 through 1999. Director's Exhibits 12, 13, 18, 25, 27, 29, 31, 34, 83; Claimant's Exhibits 1-3, 5-9; Employer's Exhibit 2. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises, has indicated that the administrative law judge should consider the differences in the qualifications of the readers. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Since the administrative law judge's analysis relies primarily on the quantity of the readings and does not address the various qualifications of the physicians who provided those readings, we vacate the administrative law judge's finding at Section 718.202(a)(1), and remand the case for further consideration thereunder.

We reject, however, employer's allegation of error in the administrative law judge's failure to weigh all of the evidence regarding pneumoconiosis pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000) and *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, which has not adopted this method of establishing the existence of pneumoconiosis and, as a result, the Board continues to hold, in cases arising in circuits other than the Third and Fourth Circuits, that the methods of establishing the existence of pneumoconiosis set forth in Section 718.202(a)(1)-(4) are alternative. *See Dixon v. Director, OWCP*, 8 BLR 1-150 (1985). On remand, however, the administrative law judge is advised that if the existence of pneumoconiosis is not established pursuant to Section 718.202(a)(1), he must consider the other methods of establishing the existence of pneumoconiosis contained in 20 C.F.R. ' 718.202(a).

Next, we consider the disability findings rendered by the administrative law judge on remand. The administrative law judge detailed

only the most recent opinions of Drs. Fino, Westerfield and Sundaram. In reviewing the evidence to determine whether there is a basis for modification due to a mistake in a determination of fact, however, the administrative law judge must consider the newly submitted evidence in conjunction with the evidence previously contained in the record. *See Nataloni, supra*. The administrative law judge is instructed to do so on remand.

In addition, the administrative law judge did not address the pulmonary function study evidence, which consists of the results of fourteen pulmonary function studies, *see* Director's Exhibits 9, 18, 25, 29, 31, 34, including one which yielded qualifying values, *see* Director's Exhibit 25. Similarly, the administrative law judge did not consider the blood gas study evidence, which consists of the results of ten studies, *see* Director's Exhibits 11, 25, 27, 29, 30, 34, including two which yielded qualifying resting values, *see* Director's Exhibits 25, 34, and one which yielded qualifying exercise values, Director's Exhibits 11, 25.²

Further, the administrative law judge did not address any of the many other medical opinions of record in considering the issues of total disability and disability causation. The United States Court of Appeals for the Sixth Circuit has held that the opinions of treating physicians must be accorded additional weight where the administrative law judge finds them to be well reasoned and credible. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). The Sixth Circuit has identified relevant factors which the administrative law judge should consider in determining whether to accord greater weight to the opinion of a treating physician, *i.e.*, the nature and duration of the relationship, and the frequency of the relationship. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, --- BLR --- (6th Cir. 2002). Because the administrative law judge has not provided any finding regarding the credibility of Dr. Sundaram's opinion, *see Groves, supra; Tussey, supra*, and since the administrative law judge did not consider all of the relevant evidence, we vacate the administrative law judge's findings regarding disability and disability causation at 20 C.F.R. § 718.204.3

On remand the administrative law judge must consider all of the evidence of record in determining whether it establishes a mistake in

²Although the Board did not specifically direct the administrative law judge to consider this evidence, consideration of the pulmonary function study and blood gas study evidence is a necessary part of the evaluation of the evidence in determining whether a claimant is totally disabled pursuant to Section 718.204(b)(2). *See* 20 C.F.R. § 718.204(b); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987).

³We reject employer's assertion that the administrative law judge has not explained his changed construction of Dr. Sundaram's opinion. The administrative law judge did not rely upon Dr. Sundaram's opinion in his 2000 Decision and Order, *see* 2000 Decision and Order at 8, but relied upon Dr. Sundaram's opinion in his 2002 Decision and Order, *see* 2002 Decision and Order at 8. However, contrary to employer's assertion, we are not persuaded that the administrative law judge construed the physician's opinion in divergent manners.

a determination of fact. *See Nataloni, supra*. In addition, the administrative law judge must provide adequate explanation and rationale for his crediting and weighing of the evidence. *See* Administrative Procedure Act (APA), 5 U.S.C. ' 557(c)(3)(A), as incorporated into the Act by 5 U.S.C. ' 554(c)(2), 33 U.S.C. ' 919(d) and 30 U.S.C. ' 932(a); *Rowe*, 2001 slip op. at 6. Further, the administrative law judge is instructed on remand to evaluate the evidence regarding total disability pursuant to 20 C.F.R. ' 718.204(b), and to then, separately, consider the evidence regarding disability causation pursuant to 20 C.F.R. ' 718.204(c). 20 C.F.R. ' 718.204(b), (c).

Employer also challenges the administrative law judge=s determination that modification would not render justice under the Act. The administrative law judge appears to have found that modification would not render justice under the Act simply because the case has been pending for eleven years. In view of our decision to vacate the administrative law judge=s findings regarding the elements of entitlement and his finding that claimant has not established a basis for modification, we also vacate the administrative law judge=s concomitant finding that reopening the claim would not render justice under the Act. On remand, after further evaluation of all of the evidence of record, the administrative law judge is instructed to reconsider whether reopening this claim will render justice under the Act. *Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533, --- BLR c (7th Cir. 2002).

We now consider the attorney=s fee issue presented in this case. While the current appeal was pending before the Board, claimant=s counsel submitted a fee petition for services performed during the two prior appeals to the Board in BRB Nos. 97-1140 BLA and 00-0782 BLA. Claimant=s counsel submitted a fee petition requesting a total of \$6,661.25. Claimant=s counsel requests \$6,518.75 for thirty-seven and one-quarter hours of legal services at an hourly rate of \$175.00, and \$142.50 as an enhancement for the delay for the fees awarded in 1997. In response to this fee petition, employer challenges both the number of hours claimed by claimant=s counsel and the requested hourly rate. In addition, employer suggests that the fee request is premature, and objects to counsel=s request for enhancement.

As an initial matter, we reject employer=s contention that it is premature for the Board to address the attorney=s fee issue. Nonetheless, we note that the award of attorney=s fees does not become effective, and thus is not enforceable, until there is successful prosecution of the claim and the award of benefits becomes final. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993).

Employer asserts that claimant=s counsel requests excessive amounts of time for drafting, revising and editing claimant=s briefs, reflecting duplicative activities. A review of the fee petition indicates that much of the requested time was spent preparing claimant=s briefs. We hereby allow these hours, given the nature and complexity of the instant case, as reasonably commensurate with the necessary work done. *See* 20 C.F.R. ' 725.366(b); *Lanning v. Director, OWCP*, 7 BLR 1-314 (1984). Employer also contends that the hourly rate requested by claimant=s counsel is excessive and should be reduced. Claimant=s counsel has asserted in his fee petition, however, that his usual billing rate per hour at the time of service was \$175.00. We hold that the hourly rate of \$175.00 is reasonable in this case. *See* 20 C.F.R. ' 725.366; *Gillman v. Director, OWCP*, 9 BLR 1-7 (1986).

We now address employer=s challenge to claimant=s counsel=s request for an enhancement due to delay of the fee awarded by the Board in 1997. An adjustment for delay in payment is an appropriate factor in determining what constitutes a reasonable attorney=s fee. *See Missouri v. Jenkins*, 109 S.Ct. 2463 (1989); *Kerns v. Consolidation Coal Co.*, 247 F.3d 133, 22 BLR 2-283 (4th Cir. 2001). We hold that claimant=s counsel=s request for a \$142.50 fee enhancement due to the five and one half year delay in receipt of his fee award is reasonable,

and we allow it as augmentation to the attorney=s fees previously awarded by the Board. *Id.*

Accordingly, the administrative law judge's Decision and Order on Remand is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. Moreover, claimant's counsel is awarded a fee of \$6,661.25, to be paid directly to counsel by employer in the event claimant is ultimately successful in his claim for benefits. 33 U.S.C. § 928, as incorporated by 30 U.S.C. § 932(a); 20 C.F.R. § 802.203.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge