

NELLIE HASTINGS	)	
(Widow of JOSEPH R. HASTINGS)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING	)	DATE ISSUED: <u>Nov. 9, 2000</u>
AND DRY DOCK COMPANY	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order, Supplemental Decision and Order Awarding Attorney Fees, and Order Denying Employer's Motion for Reconsideration of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Gary R. West (Patten, Wornom & Watkins, L.C.), Newport News, Virginia, for claimant.

Jonathan H. Walker (Mason, Cowardin & Mason), Newport News, Virginia, for self-insured employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order, the Supplemental Decision and Order Awarding Attorney Fees, and the Order Denying Motion for Reconsideration (97-LHC-2748) of Administrative Law Judge Fletcher E. Campbell, Jr., awarding benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g.,*

*Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant's husband (decedent) worked for employer from 1942 to 1983 as a welder. Throughout the course of his employment, decedent was exposed to asbestos. He was admitted to the hospital on August 7, 1994, after fracturing his left hip. On August 10, 1994, he sustained cardiac arrest and was placed on a respirator. Multiple system failure followed, which led to decedent's death on August 16, 1994. The direct cause of death was attributed to sepsis and acute peritonitis from intestinal blockage and gangrene. EXS 1, 2. Lung tissue revealed pathologic evidence of welder's pneumoconiosis, silicosis, and smoking-related emphysema. A large number of asbestos bodies also were observed. Claimant filed a claim for death benefits, 33 U.S.C. §909, alleging that decedent's death was hastened due to work-related asbestosis.

In his Decision and Order, the administrative law judge found that claimant invoked and employer rebutted the Section 20(a), 33 U.S.C. §920(a), presumption that decedent's death was hastened due to work-related asbestosis. Upon consideration of the record as a whole, the administrative law judge, after discussing the relevant medical evidence, credited the opinion of Dr. Maddox and found that decedent had work-related asbestosis, which contributed to his death. Accordingly, claimant was awarded death benefits.<sup>1</sup> Employer appeals the award, contending that the administrative law judge erred by crediting the opinion of Dr. Maddox over medical evidence that decedent did not have asbestosis and, assuming, *arguendo*, he did have asbestosis, that decedent's lung disease did not contribute to his death. Claimant responds, urging affirmance.

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<sup>1</sup>Prior to the issuance of the administrative law judge's decision, the Director, Office of Workers' Compensation Programs, determined that employer is entitled to relief from the Special Fund should the administrative law judge find decedent's death related to his employment. See 33 U.S.C. §§908(f), 944.

Claimant's counsel subsequently submitted a fee petition to the administrative law judge requesting a fee of \$10,494.47, representing compensable services of \$9,383.85 and expenses totaling \$1,784.60.<sup>2</sup> In his Supplemental Decision and Order, the administrative law judge found counsel entitled to a fee at an hourly rate of \$185, and he allowed all of the requested hours for both attorney and paralegal services and approved the requested expenses. Claimant's counsel was therefore awarded a fee of \$10,366.20. Employer filed a motion for reconsideration, alleging that the administrative law judge erred in not considering its specific objections to the fee petition. In his Order Denying Employer's Motion for Reconsideration, the administrative law judge acknowledged that employer's specific objections had not been addressed, as they had not been associated with the case record at the time the fee award was issued. The administrative law judge considered employer's objections, and claimant's response thereto, and found no merit to employer's general objections to the hourly rate requested, alleged quarter-hour billing method and the form of the fee petition. He also rejected employer's specific objections to individual entries in the fee petition, and reinstated his initial fee award. Employer appeals the administrative law judge's fee award and his rejection of its specific objections. Claimant urges affirmance.

Employer contends that the administrative law judge erred by giving less weight to the opinions of Drs. Churg and Ross that decedent did not have asbestosis and that asbestosis, or any other lung disease, did not contribute to decedent's death. Moreover, employer contends that the greater weight of the medical evidence establishes that decedent's death was not hastened by an occupational lung disease, and that therefore, the administrative law judge erred in relying on the opinion of Dr. Maddox, whom, employer alleges, has credentials inferior to those of Dr. Churg, and whose opinion is not well-reasoned.

Claimant is entitled to death benefits if a work-related injury caused or hastened decedent's death. *See Fineman v. Newport New Shipbuilding & Dry Dock Co.*, 27 BRBS 104 (1993); *see also Shuff v. Cedar Coal Co.*, 967 F.2d 977 (4<sup>th</sup> Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993). We affirm the administrative law judge's award of death benefits based on his weighing of the evidence as a whole, as the administrative law judge's decision to credit the opinion of Dr. Maddox is rational, and as Dr. Maddox's opinion constitutes substantial evidence in support of the administrative law judge's award. The administrative law judge applied a four-part analysis to the medical opinions of record in order to determine the weight to be assigned to these opinions. Specifically, the administrative law judge stated that he would evaluate the opinions relative to the CAP-NIOSH standards for diagnosing asbestosis,<sup>3</sup>

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<sup>2</sup>Specifically, counsel's fee petition requested a fee for 1.25 hours of attorney time at \$165 per hour, 22.02 hours of attorney time at \$185 per hour, 23.84 hours of attorney time at \$210 per hour, 1.5 hours of paralegal work at \$40 per hour, and .75 of an hour of paralegal work at \$50 per hour.

<sup>3</sup>CAP-NIOSH stands for "College of American Pathologists and the National Institute of Occupational Safety and Health." A committee sponsored by these organizations authored a paper to guide the diagnosis and grading of asbestosis. Dr. Churg was on this committee.

would determine if the opinions were reasoned, whether they were supported by generally applicable medical studies, and the degree to which the opinions were supported by the other medical evidence of record. Decision and Order at 8.

Dr. Maddox, a Board-certified pathologist, opined that decedent had asbestosis which contributed to and hastened his death as decedent's capacity to overcome sepsis, peritonitis, and being placed on a respirator was reduced due to his fibrotic lung disease. Tr. at 22-25, 46. He concluded that decedent had "severe chronic fibrotic lung disease with three apparent components: iron, silica, and asbestosis." CX 3 at 1. He stated that decedent's lung disease was a combined process with elements of severe welders' pneumoconiosis, bullous emphysema, and "probably some degree of silicosis," along with moderate asbestosis. Tr. at 22; CX 3 at 2. He acknowledged that the CAP-NIOSH criteria are less applicable when, as here, a patient is exposed to a mixture of fibrotic agents, as the criteria are focused on "pure" asbestosis cases. CX 9 at 71-72. Dr. Maddox was not able to state how much longer decedent might have lived if not for the work-related lung disease, but he stated that the lung disease, superimposed on the peritonitis, made decedent less able to fight off the infection, and thus hastened his death. Dr. Maddox stated that peritonitis is not always fatal. Tr. at 23, 28.

Dr. Churg is a Board-certified pathologist and a professor of pathology at the University of British Columbia. He stated that the pattern and location of decedent's fibrotic lung disease was not asbestosis, but was siderosilicosis caused by exposure at work to sand and welding fumes, and that this disease normally results in no functional impairment. EXS 11, 12 at 12-15. Dr. Churg, therefore, stated that decedent did not have any occupationally-related lung disease which hastened decedent's death; he concluded, "I believe that this patient would have died in the same fashion and at the same time whether or not he had any type of underlying lung disease." EX 11 at 3. Dr. Churg stated that the mere presence of asbestos bodies in the lungs does not equate to "asbestosis." Dr. Maddox disagreed with Dr. Churg's requirement that asbestos bodies must be "diffuse" as opposed to "discrete" in order to have a diagnosis of asbestosis. CX 9 at 20-22; EX 12 at 12-13.

Dr. Ross opined that decedent did not have asbestosis and that, regardless of the cause of his lung disease, it did not cause or hasten death. EX 4. Dr. Ross based his opinion on his review of the medical records and Dr. Churg's interpretation of decedent's lung tissue slides. Dr. Fuentes-Parilla, who performed the autopsy, wrote a letter stating that decedent suffered from some type of pulmonary fibrosis, but that it neither caused nor hastened death. EX 10.

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EX 12 at 10. Contrary to employer's contention, substantial evidence supports the administrative law judge's finding that the CAP-NIOSH criteria are indeed used for diagnosing, as well as grading the severity of, asbestosis. See CX 8(f); CX 9 at 36.

The administrative law judge gave determinative weight to Dr. Maddox's opinion, because the administrative law judge found it better supported by the CAP-NIOSH criteria, Dr. Maddox identified medical studies supporting his opinion, his opinion was based on all of the relevant medical data and reports (autopsy slides, x-rays, medical reports), and he testified that decedent also had lower zone interstitial fibrosis, which is consistent with a diagnosis of asbestosis, CX 9 at 42, in addition to the mixed fibrosis in the upper lobes. The administrative law judge gave little weight to Dr. Churg's opinion that decedent did not have asbestosis, finding it inconsistent with the CAP-NIOSH criteria. Specifically, the administrative law judge found that Dr. Churg testified that his standard for diagnosing asbestosis is more stringent than the CAP-NIOSH criteria, EX 12 at 16, and that Dr. Churg's elimination of a diagnosis of asbestosis solely because of the pattern and location of the nodules is not supported by CAP-NIOSH. *See* CX 8ss.<sup>4</sup> Moreover, the administrative law judge noted that Dr. Churg did not cite to medical literature supporting his diagnosis other than published works he authored.

The administrative law judge also gave little weight to the opinions of Dr. Ross and Dr. Fuentes-Parilla. The administrative law judge stated that Dr. Ross's opinion was flawed in that it relied primarily on Dr. Churg's opinion and Dr. Churg's reputation. With regard to Dr. Fuentes-Parilla, the administrative law judge noted that her credentials are not in the record, and there is no indication that she reviewed decedent's other medical records.

It is well-established that the administrative law judge is entitled to weigh the medical evidence of record and to draw his own inferences and conclusions from the evidence. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5<sup>th</sup> Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5<sup>th</sup> Cir. 1962); *Parks v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 90 (1998), *aff'd mem.*, 202 F.3d 259 (4<sup>th</sup> Cir. 1999) (table). In the instant case, the administrative law judge thoroughly weighed the evidence of record, and provided a rational basis for relying on the opinion of Dr. Maddox over those of the other physicians of record. *See Parks*, 32 BRBS at 94. Contrary to employer's contention, the administrative law judge was not required to find that Dr. Churg has superior credentials in view of Dr. Maddox's status as a Board-certified pathologist, nor was he required to decide the case based on the numerical superiority of the evidence supporting employer's position. *See generally Adkins v. Director, OWCP*, 958 F.2d 49 (4<sup>th</sup> Cir. 1992); *Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996). Based on Dr. Maddox's opinion, therefore, we affirm the administrative law judge's conclusion that

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<sup>4</sup>The CAP-NIOSH criteria state, "Diffusely distributed small, rounded opacities generally are not expected as the result of exposure to "pure" asbestosis, but are encountered when there also has been exposure to silica dust." CX 8ss.

decedent had work-related asbestosis that hastened his death, as this conclusion is supported by substantial evidence.<sup>5</sup> Consequently, the administrative law judge's Decision and Order awarding death benefits is affirmed.

Turning to employer's appeal of the fee award, employer contends that the administrative law judge erred in rejecting its specific objections to the fee petition because it failed to submit any "evidence" supporting its objections. Employer contends that the administrative law judge is obligated to ascertain the reasonableness of the entries in the fee petition in light of employer's objections, and that it is not required to submit evidence in support of its objections.

We reject employer's contention of error. The administrative law judge stated in regard to certain specific objections, "Employer's counsel has not submitted any evidence supporting its assertions contained in these paragraphs. Thus, they amount to nothing more than general (and non-probative) allegations that the charges are unreasonable." Order Denying Employer's Motion for Reconsideration at 2. While employer is correct in stating that it need not "introduce evidence" into the record to support its assertions that the fee claimed is excessive, it must make a persuasive argument that the hours documented are excessive, repetitive or otherwise non-compensable. The administrative law judge is required to evaluate the fee petition in light of employer's objections, the degree of claimant's success, the amount of benefits obtained, the quality of the representation, and the complexity of the issues involved in the case. *See generally Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Moyer v. Director, OWCP*, 124 F.3d 1378, 31 BRBS 134(CRT) (10<sup>th</sup> Cir. 1997); *Jensen v. Weeks Marine, Inc.*, 33 BRBS 97 (1999); 20 C.F.R. §702.132(a).

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<sup>5</sup>We find no error in the administrative law judge's not explicitly addressing the opinion of Dr. Reid that asbestosis did not contribute to decedent's demise. Dr. Reid's opinion is attached to employer's application for Section 8(f) relief, EX 6, and it was solely relied upon in employer's post-hearing brief to corroborate the opinions of Drs. Churg and Ross. Employer's Post-Hearing Brief at 15.

Viewed in these terms, the administrative law judge did not err in rejecting employer's objections to claimant's counsel's fee petition. The administrative law judge stated he considered both employer's general and specific objections, as well as claimant's counsel's response to the objections in which he explained, obviously to the administrative law judge's satisfaction, why employer's objections were unfounded.<sup>6</sup> *See Moyer*, 124 F.3d at 1378, 31 BRBS at 134(CRT); *Parks*, 32 BRBS at 94-98; *Forlong v. American Security & Trust Co.*, 21 BRBS 155 (1988). After a thorough review of employer's specific objections and claimant's counsel's response to employer's objections to the fee petition, we hold that employer has failed to show that the administrative law judge abused his discretion in rejecting its objections. We therefore affirm the administrative law judge's attorney's fee award.

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<sup>5</sup>For example, employer objected to a \$900 deposition fee for which no other information was given in the fee petition. Claimant's counsel explained that this represented Dr. Maddox's fee for the deposition, and was in addition to the costs associated with actually taking the deposition.

Accordingly, the administrative law judge's Decision and Order, Supplemental Decision and Order Awarding Attorney Fees, and Order Denying Employer's Motion for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge

MALCOLM D. NELSON, Acting  
Administrative Appeals Judge