U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 21-0468 BLA,
21-0578 BLA, and 22-0003 BLA

CHESTER K. CLINE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MINGO LOGAN COAL COMPANY	)	
	)	DATE ISSUED: 9/19/2022
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 Granting Benefits and Supplemental Decision and Order Award of Attorney's Fees and Costs of Francine L. Applewhite, Administrative Law Judge, and the Proposed Order Supplemental Award Fee for Legal Services of Wade C. Samples, Claims Examiner, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Scott A. White (White & Risse, LLC), Arnold, Missouri, for Employer.

Steven Winkelman (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, ROLFE, and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Francine L. Applewhite's (the ALJ) Decision and Order Granting Benefits (2019-BLA-06150) rendered on a claim filed on June 12, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). Employer also appeals the ALJ's Supplemental Decision and Order Award of Attorney's Fees and Costs and the Proposed Order Supplemental Award Fee for Legal Services (Supplemental Award) of Claims Examiner Wade C. Sample (the district director) on Claimant's counsel's (Counsel) attorney fee petitions.

ALJ's Decision and Order

In her Decision and Order, the ALJ determined Employer is the properly designated responsible operator and credited Claimant with twenty-six years of underground coal mine employment. The ALJ found Claimant established complicated pneumoconiosis, and thus invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). She further found Claimant established complicated pneumoconiosis arising out of coal mine employment, 20 C.F.R. §718.203, and awarded benefits.

On appeal, Employer argues the ALJ lacked the authority to hear and decide the case because she was not appointed in a manner consistent with the Appointments Clause of the United States Constitution, Art. II § 2, cl. 2.[1] It also argues the removal provisions applicable to the ALJ rendered her appointment unconstitutional. Further, it challenges its

[1] Article II, Section 2, Clause 2, sets forth the appointing powers:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

designation as the responsible operator and the ALJ's finding that Claimant established complicated pneumoconiosis.[2]

Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, urging the Benefits Review Board to reject Employer's constitutional challenges to the ALJ's appointment and removal protections. The Director also urges the Board to affirm the ALJ's determination that Employer is the properly designated responsible operator. Employer filed a reply brief, reiterating its contentions.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Appointments Clause

Employer urges the Board to vacate the ALJ's decisions and remand the case to be heard by a different, constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[4] Employer's Brief at 6-8; Employer's Reply Brief at 1-2. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointments of all sitting Department of Labor (DOL) ALJs, but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. Employer's Brief at 10-11.

[2] We affirm, as unchallenged on appeal, the ALJ's finding that Claimant established twenty-six years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3-4.

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit because Claimant performed his last coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Tr. at 24-25.

[4] *Lucia* involved a challenge to the appointment of a Securities and Exchange Commission (SEC) ALJ. The United States Supreme Court held that, similar to Special Trial Judges at the United States Tax Court, SEC ALJs are "inferior officers" subject to the Appointments Clause. *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044, 2055 (2018) (citing *Freytag v. Comm'r*, 501 U.S. 868 (1991)). The Department of Labor (DOL) has conceded that the Supreme Court's holding applies to its ALJs. *Big Horn Coal Co. v. Sadler*, 10th Cir. No. 17-9558, Brief for the Fed. Resp. at 14 n.6.

Thus, it argues the ALJ in this case was appointed improperly and lacked authority to decide the case. *Id*. at 8-10; Employer's Reply at 1-2.

The Director argues the ALJ had the authority to decide this case because the Secretary's September 12, 2018 appointment[5] conforms to the Appointments Clause, is presumptively valid, and Employer has failed to demonstrate otherwise. Director's Brief at 6-8. We agree with the Director's argument.

Congress has authorized the Secretary to appoint ALJs to hear and decide cases under the Act. 30 U.S.C. §932a; *see also* 5 U.S.C. §3105. An appointment by the Secretary need only be "evidenced by an open, unequivocal act." Director's Brief at 6 (quoting *Marbury v. Madison*, 5 U.S. 137, 157 (1803)). Under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with the burden on the challenger to demonstrate the contrary. *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016) (citing *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001)).

Prior to ALJ Applewhite's assignment to this case,[6] the Secretary specifically appointed her as an ALJ in the DOL to "execute and fulfill the duties of that office according to law and regulation and to hold all the powers and privileges pertaining to that office. U.S. Cons. Art. II, § 2, cl. 2; 5 U.S.C. §3105." Secretary's September 12, 2018 Letter to ALJ Applewhite. Under the presumption of regularity, it thus is presumed the Secretary properly discharged his official duty. *Advanced Disposal*, 820 F.3d at 603. Employer does not allege the Secretary's action was either not open or equivocal, or otherwise explain how it was improper. Having put forth no contrary evidence or argument, Employer has not overcome the presumption of regularity. *Butler*, 244 F.3d at

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[5] The Secretary of Labor (Secretary) issued a letter to the ALJ on September 12, 2018, stating:

> Pursuant to my authority as [Secretary], I hereby appoint you as an [ALJ] in the U.S. [DOL], authorized to execute and fulfill the duties of that office according to law and regulation and to hold all the powers and privileges pertaining to that office. U.S. Cons. Art. II, § 2, cl. 2; 5 U.S.C. §3105. This action is effective upon transfer to the U.S. [DOL].

Secretary's September 12, 2018 Letter to ALJ Applewhite.

[6] On May 18, 2020, the ALJ notified the parties of her assignment to this case. Notice of Assignment and Pre-Hearing Order at 1. She held a telephonic hearing on November 24, 2020.

1340. Based on the foregoing, we hold that the Secretary's action constituted a valid appointment of the ALJ.

We further reject Employer's argument that Executive Order 13843, which removes ALJs from the competitive civil service, supports its Appointments Clause argument because incumbent ALJs remain in the competitive service. Employer's Reply Brief at 2. The Executive Order does not state that the prior appointment procedures were impermissible or violated the Appointments Clause. It also affects only the government's internal management and, therefore, does not create a right enforceable against the United States and is not subject to judicial review. *See Air Transport Ass'n of Am. v. FAA*, 169 F.3d 1, 8-9 (D.C. Cir. 1999). Moreover, Employer has not explained how the Executive Order undermines the Secretary's appointment of the ALJ, which we have held constituted a valid exercise of his authority, bringing her appointment into compliance with the Appointments Clause.

Thus, we reject Employer's argument that this case should be remanded for a new hearing before a different ALJ.

Removal Provisions

Employer challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 6-12; Employer's Reply Brief at 2-4. Employer generally argues the removal provisions in the Administrative Procedure Act, 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the Solicitor General's argument in *Lucia*. Employer's Reply Brief at 3. It also relies on the United States Supreme Court's holdings in *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), and *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183 (2020). Employer's Brief at 6, 8-9; Employer's Reply Brief at 3-4.

We reject Employer's arguments as the only circuit court to squarely address this precise issue has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137-38 (9th Cir. 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs).

In *Free Enterprise Fund*, the Supreme Court held dual for-cause limitations on removal of members of the Public Company Accounting Oversight Board (PCAOB) are "contrary to Article II's vesting of the executive power in the President[,]" thus infringing upon his duty to "ensure that the laws are faithfully executed, [and to] be held responsible for a Board member's breach of faith." 561 U.S. at 496. The Court specifically noted, however, that its holding "does not address that subset of independent agency employees who serve as [ALJs]" who, "unlike members of the [PCAOB], . . . perform adjudicative rather than enforcement or policymaking functions." *Id.* at 507 n.10. Further, the majority

in *Lucia* declined to address the removal provisions for ALJs. *Lucia*, 138 S. Ct. at 2050 n.1. In *Seila Law*, the Court held that limitations on removal of the Director of the Consumer Financial Protection Bureau (CFPB) infringed upon the President's authority to oversee the Executive Branch because the CFPB was an "independent agency led by a single Director and vested with significant executive power."[7] 140 S. Ct. at 2201. It did not address ALJs.

Employer has not explained how or why these legal authorities should apply to DOL ALJs or otherwise undermine the ALJ's ability to hear and decide this case. Congressional enactments are presumed to be constitutional and will not be lightly overturned. *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). The Supreme Court has long recognized "[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)). Employer does not even attempt to show that Section 7521 cannot be reasonably construed in a constitutionally sound manner. *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner"). Thus, Employer has not established the removal provisions at 5 U.S.C. §7521 are unconstitutional as applied to DOL ALJs. *Pehringer*, 8 F.4th at 1137-38.

Responsible Operator

The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). To meet the regulatory definition of a "potentially liable operator," the operator must have employed the miner in coal mine employment for a cumulative period of at least one year.[8] 20 C.F.R. §725.494(a)-(e). The district director is initially charged

[7] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the Consumer Financial Protection Bureau is empowered to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *Seila Law v. CFPB*, 591 U.S. , 140 S. Ct. 2183, 2191, 2200 (2020).

[8] For a coal mine operator to meet the regulatory definition of a "potentially liable operator," each of the following conditions must be met: a) Claimant's disability or death must have arisen at least in part out of employment with the operator; b) the operator or its successor must have been in business after June 30, 1973; c) the operator must have employed Claimant for a cumulative period of not less than one year; d) at least one day of

with identifying and notifying operators that may be liable for benefits, and then identifying the "potentially liable operator" that is responsible. 20 C.F.R. §§725.407, 725.410(c), 725.495(a), (b). Once the district director designates the responsible operator, it may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits or another operator financially capable of assuming liability more recently employed the miner for at least one year. 20 C.F.R. §725.495(c).

The ALJ found Employer is the responsible operator because it was the most recent potentially liable operator to employ Claimant for at least one year, from 1992 to 2006. Decision and Order at 5. She further found Employer is financially capable of assuming liability for benefits and it did not submit evidence establishing that another financially capable operator employed Claimant more recently for at least one year. *See* 20 C.F.R. §725.494(a)-(e); Decision and Order at 5.

Employer argues the Black Lung Disability Trust Fund should be liable for the payment of benefits because Claimant's subsequent work for the DOL as a federal mine inspector from 2006 to 2017 constitutes coal mine employment. Employer's Brief at 12-13; Employer's Reply Brief at 5-6. We disagree.

Contrary to Employer's argument, Claimant's work as a federal mine inspector does not constitute the work of a miner under the Act. *See Navistar, Inc. v. Forester*, 767 F.3d 638, 645-47 (6th Cir. 2014); *Spatafore v. Consolidation Coal Co.*, 25 BLR 1-181, 1-188 (2016); Decision and Order at 5. Moreover, the regulations specifically state that "[n]either the United States, nor any State, nor any instrumentality or agency of the United States or any State, shall be considered an operator." 20 C.F.R. §725.491(f). Therefore, the DOL cannot be a potentially liable operator. 20 C.F.R. §725.494. Because it is supported by substantial evidence, we affirm the ALJ's finding that Employer is the responsible operator.

Invocation of the Section 411(c)(3) Presumption – Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or

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the employment must have occurred after December 31, 1969; and e) the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

(c) when diagnosed by other means, is a condition that would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

The United States Court of Appeals for the Fourth Circuit has held that "'[b]ecause prong (A) sets out an entirely objective scientific standard' - i.e., an opacity on an x-ray greater than one centimeter - x-ray evidence provides the benchmark for determining what under prong (B) is a 'massive lesion' and what under prong (C) is an equivalent diagnostic result reached by other means." *E. Assoc. Coal Corp. v. Director* [*Scarbro*], 220 F.3d 250, 256 (4th Cir. 2000), *quoting Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243 (4th Cir. 1999). In determining whether Claimant has invoked the irrebuttable presumption, the ALJ must weigh all evidence relevant to the presence or absence of complicated pneumoconiosis. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 283 (4th Cir. 2010); *Scarbro*, 220 F.3d at 255-56; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

Employer contends the ALJ erred in finding Claimant established complicated pneumoconiosis based on the x-rays and medical opinions and in consideration of the evidence as a whole.[9] 20 C.F.R. §718.304(a), (c); Decision and Order at 5-8.

Section 718.304(a) – X-rays

The ALJ considered six interpretations of five x-rays dated March 30, 2000, September 8, 2016, August 24, 2017, May 25, 2018, and July 19, 2018. Decision and Order at 6-7. An unidentified reader interpreted the March 30, 2000 x-ray as negative for pneumoconiosis. Employer's Exhibit 12. Dr. Tallaksen read the September 8, 2016 x-ray as negative for pneumoconiosis.[10] Employer's Exhibit 13. Dr. Crum, a dually-qualified Board-certified radiologist and B reader, read the August 24, 2017 x-ray as positive for complicated pneumoconiosis, category B, and small opacities of pneumoconiosis, profusion 2/3, in all lung zones.[11] Director's Exhibit 16. Dr. Forehand, a B reader, also read the August 24, 2017 x-ray as positive for complicated pneumoconiosis, category B,

[9] The record does not contain biopsy evidence. *See* 20 C.F.R. §718.304(b).

[10] Dr. Tallaksen's report indicates he is an F reader, which means a licensed clinical health care facility determined he is qualified to interpret chest radiographs. Employer's Exhibit 13; "Study Syllabus for Classification of Radiographs of Pneumoconioses," Centers for Disease Control and Prevention, https://www.cdc.gov/niosh/learning/b-reader/radiograph/subset1/2.html (last modified August 5, 2020).

[11] Dr. Gaziano, a B reader, read the August 24, 2017 x-ray for film quality only. Director's Exhibit 14.

and small opacities of pneumoconiosis, profusion 2/1, in all lung zones. Director's Exhibit 13. Dr. Crum read the May 25, 2018 x-ray as positive for complicated pneumoconiosis, category B, and small opacities of pneumoconiosis, profusion 1/2, in all lung zones. Director's Exhibit 15. Dr. Adcock, a dually-qualified Board-certified radiologist and B reader, read the July 19, 2018 x-ray as positive for complicated pneumoconiosis, category B, and small opacities of pneumoconiosis, profusion 2/2, in the upper and middle lung zones. Director's Exhibit 17.

The ALJ determined three of the five x-rays support a finding of both simple and complicated pneumoconiosis. She thus found the preponderance of the x-ray evidence established complicated pneumoconiosis. Decision and Order at 7-8; 20 C.F.R. §718.304(a).

Employer asserts the ALJ erred in finding the x-ray evidence sufficient to establish complicated pneumoconiosis because she failed to address Dr. Crum's classifications showing "a regression of the opacities" from a profusion of 2/3 on the August 24, 2017 x-ray to a profusion of 1/2 on the May 25, 2018 x-ray. Employer's Brief at 13-15; Employer's Reply Brief at 6-7. Contrary to Employer's assertion, Dr. Crum's x-ray classifications for simple pneumoconiosis do not undermine his x-ray classifications for complicated pneumoconiosis. 20 C.F.R. §718.304(a) (complicated pneumoconiosis is established when diagnosed by x-ray that yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C). As the ALJ correctly found, and Employer concedes, Dr. Crum's interpretations of the August 24, 2017 and May 25, 2018 x-rays identify a category B opacity.[12] Decision and Order at 7; Employer's Brief at 14; Director's Exhibits 15, 16. Moreover, the ALJ correctly found Dr. Forehand's interpretation of the August 24, 2017 x-ray and Dr. Adcock's interpretation of the July 19, 2018 x-ray also identify a category B opacity. Decision and Order at 7; Director's Exhibits 13, 17. Because it is supported by substantial evidence, we affirm the ALJ's finding that the preponderance of the x-ray evidence established complicated pneumoconiosis. 20 C.F.R. §718.304(a); *see Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992); Decision and Order at 7.

Section 718.304(c) – Medical Opinions

The ALJ considered the opinions of Drs. Forehand and Farney. Dr. Forehand diagnosed complicated coal workers' pneumoconiosis with progressive massive fibrosis.

[12] Employer concedes that "[a] review of the B-read chest x-rays of evidence unequivocally identify complicated pneumoconiosis." Employer's Brief at 14.

Director's Exhibit 13. Dr. Farney did not render an opinion regarding the presence or absence of complicated pneumoconiosis. Director's Exhibit 19. The ALJ concluded Dr. Forehand's opinion supports a finding that Claimant has complicated pneumoconiosis. Decision and Order at 8. Weighing the x-ray and medical opinion evidence together, the ALJ found Claimant established complicated pneumoconiosis by a preponderance of evidence and therefore invoked the irrebuttable presumption. Decision and Order at 8.

Employer argues the ALJ erred in crediting Dr. Forehand's diagnosis of complicated pneumoconiosis because it is equivocal.[13] Employer's Brief at 15. We disagree.

Contrary to Employer's assertion, Dr. Forehand unequivocally diagnosed complicated coal workers' pneumoconiosis based on Claimant's shortness of breath, prolonged exposure to excessive levels of coal mine dust, and chest x-ray. Director's Exhibit 13. He stated Claimant's complicated pneumoconiosis is a result of his work for twenty-one years at the face of a poorly ventilated coal mine in which "the ventilation curtains were not always hung" and "roof bolt equipment malfunctioned . . . allowing fibrogenic silica and coal dust to backfire and blow into [C]laimant's face." *Id.* He also stated "[C]laimant was working adjacent to and downwind of the continuous miner, which produced a constant cloud of silica and coal dust without the protection of required ventilation." *Id.* He explained the prolonged and constant exposure to excessive fibrogenic silica and coal dust "triggered a severe fibrotic reaction in [C]laimant's lungs" resulting in "complicated coal workers' pneumoconiosis with progressive massive fibrosis on a background of simple coal workers' pneumoconiosis." *Id.* Further, he stated there is "no evidence of any additional or alternative disease of [C]laimant's lungs such as cancer, pneumonia, tuberculosis, histoplasmosis, sarcoidosis, hypersensitivity pneumonitis, granulomatous lung disease, fungal lung disease, or rheumatoid lung disease."[14] *Id.*

[13] Employer also argues Dr. Forehand's opinion is insufficient to establish complicated pneumoconiosis because the pulmonary function studies and blood gas studies do not point to a pulmonary impairment. Employer's Brief at 16-18. Contrary to Employer's assertion, a Claimant need not establish total disability to invoke the Section 411(c)(3) irrebuttable presumption. 20 C.F.R. §718.304(a)-(c).

[14] While Employer states "the treatment records note the possibility of underlying tuberculosis, neoplastic lesion (cancer), as well as the potential for [progressive massive fibrosis]," Employer's Brief at 15, the treatment records also support a finding of complicated pneumoconiosis. *See* Employer's Exhibits 7, 8. Specifically, Dr. Forehand read the October 20, 2011 x-ray as positive for complicated pneumoconiosis; Dr. Shoukry interpreted the findings on the May 21, 2009 x-ray as suggestive of complicated

The ALJ permissibly found Dr. Forehand based his opinion on a physical examination, objective tests, the nature and dust conditions of Claimant's various jobs in the coal mines, and x-ray evidence of the disease.[15] *Adkins*, 958 F.2d at 52; Decision and Order at 8. Thus we see no error in the ALJ's weighing of the medical opinion evidence. Having rejected Employer's challenges to the ALJ's findings at 20 C.F.R. §718.304(a), (c), we affirm her finding that Claimant established complicated pneumoconiosis by a preponderance of evidence. *See Scarbro*, 220 F.3d at 255-56.

Employer's arguments on complicated pneumoconiosis are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Because the ALJ's findings are supported by substantial evidence, we affirm her conclusion that Claimant established complicated pneumoconiosis and therefore invoked the irrebuttable presumption. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304.

We further affirm, as unchallenged, the ALJ's finding that Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8-9. Thus, we affirm the award of benefits.

Attorney Fee Requests

On June 16, 2021, Counsel submitted an itemized fee petition, requesting a fee for legal services performed before the district director from April 10, 2018 to June 25, 2019. Counsel requested attorney fees in the amount of: $3,362.50, representing $1,662.50 for 4.75 hours of legal services performed by attorney Joseph E. Wolfe at an hourly rate of $350.00; $1,000.00 for 5 hours of legal services performed by attorney Brad A. Austin at an hourly rate of $200.00; $375.00 for 2.5 hours of legal services performed by attorney Victoria S. Herman at an hourly rate of $150.00; $150.00 for 1 hour of legal services

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pneumoconiosis; and Dr. Knapp, in a June 25, 2009 radiology report, noted findings suggestive of complicated coal workers' pneumoconiosis based on a CT scan and x-ray. Employer's Exhibit 8.

[15] During his May 24, 2018 deposition, Dr. Forehand testified Claimant's objective testing did not show evidence of a respiratory impairment, but that testimony did not preclude him from diagnosing a totally disabling respiratory impairment because Claimant's x-ray showed a category B opacity, which is evidence of complicated pneumoconiosis. Director's Exhibit 43 at 10-11. He testified Claimant "has the worst form of coal workers' pneumoconiosis" and "it cannot get any worse than what he has." *Id.* at 11.

performed by attorney Rachel Wolfe at an hourly rate of $150.00; $175.00 for 1.75 hours of work performed by legal assistants at an hourly rate of $100.00; and expenses of $80.00. After considering the fee petition, the regulatory criteria at 20 C.F.R. §725.366, and Employer's objections, the district director reduced the requested hourly rate for Mr. Wolfe from $350.00 to $300.00 and allowed the requested time entries as compensable legal work. The district director therefore awarded $3,125.00 in attorney fees and $480.00 in expenses.

On June 16, 2021, Counsel filed a Motion for Approval of Attorney Fees and an itemized statement requesting a fee for services performed from July 25, 2019 to May 25, 2021 before the Office of Administrative Law Judges (OALJs). 20 C.F.R. §725.366. Counsel requested a fee of $5,525.00, representing $2,887.50 for 8.25 hours of legal services by attorney Joseph E. Wolfe at an hourly rate of $350.00; $850.00 for 4.25 hours of legal services by attorney Brad A. Austin at an hourly rate of $200.00; $862.50 for 5.75 hours of legal services by attorney Rachel Wolfe at an hourly rate of $150.00; $925.00 for 9.25 hours of services by legal assistants at an hourly rate of $100.00; and expenses of $225.00.

The ALJ found the requested hourly rates of $350.00 for Mr. Wolfe, $200.00 for Mr. Austin, $150.00 for Ms. Wolfe, and $100.00 for the legal assistants are reasonable. She disallowed several entries requested for services that were excessive and billed at attorney rates for work more appropriately performed by legal assistants, and found all claimed expenses reasonable. Thus, the ALJ awarded a total fee of $4,693.75 for legal services and $225.00 in expenses.

On appeal, Employer challenges the hourly rates that the district director and the ALJ awarded to Mr. Wolfe and Mr. Austin, and Counsel's use of quarter-hour billing. Employer also challenges the amount of the expenses the district director awarded.[16] Counsel responds, urging affirmance of the attorney's fee awards. The Director has not responded to Employer's appeal of the fee awards. Employer filed a reply brief, reiterating its arguments.

[16] Employer does not challenge the ALJ's finding that the expenses were reasonable. Therefore, we affirm this determination. *See Skrack*, 6 BLR at 1-711; Supplemental Decision and Order at 4.

District Director's Supplemental Attorney Fee Award for Legal Services

Employer argues the district director's award of a $300.00 hourly rate to Mr. Wolfe and a $200.00 hourly rate to Mr. Austin is unsupported and should be reduced. Employer's Brief at 19-20, 23; Employer's Reply Brief at 13-17, 20. We disagree.

The amount of an attorney's fee award is discretionary and will be upheld on appeal unless the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law. *See B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 661 (6th Cir. 2008); *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc). The regulations provide an approved fee must take into account "the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of the fee requested." 20 C.F.R. §725.366(b).

In determining the amount of an attorney's fee to be awarded under a fee-shifting statute, the Supreme Court has held that 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. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The lodestar method is the appropriate starting point for calculating fee awards under the Act. *Bentley*, 522 F.3d at 663.

An attorney's reasonable hourly rate is "calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). "[T]he rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record" comprises the market rate. *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004); *see also Bentley*, 522 F.3d at 663. The fee applicant has the burden to produce satisfactory evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896 n.11; *Gonter v. Hunt Valve Co.*, 510F.3d 610, 617 (6th Cir. 2007).

The district director evaluated Counsel's fee application in light of the regulatory factors pursuant to 20 C.F.R. §725.366(b), and found "the complexity of the issues, the qualifications of the representative, and the level at which the claim was decided" warranted the reduction of Mr. Wolfe's hourly rate from $350.00 to $300.00. Supplemental Award Fee at 1. He explained this is a "routine case which did not call for special ability and effort" and "the approved rate is comparable to that being charged by other highly qualified attorneys within the same geographical location who also have

considerable experience in the handling of Federal Black Lung claims." *Id*. Employer fails to explain why the district director's award of a $300.00 hourly rate to Mr. Wolfe and a $200.00 hourly rate to Mr. Austin is arbitrary, capricious, or an abuse of discretion. *See Bentley*, 522 F.3d at 661; *Jones*, 21 BLR at 1-108. We therefore affirm it.

We likewise reject Employer's contention that Counsel improperly billed in quarter-hour increments. *See Bentley*, 522 F.3d at 661; *Jones*, 21 BLR at 1-108; Employer's Brief at 20-23; Employer's Reply Brief at 17-19. The Fourth Circuit has held attorneys may bill in quarter-hour increments in black lung cases. *Eastern Assoc. Coal Corp. v. Director, OWCP* [*Gosnell*], 724 F.3d 561, 576 (4th Cir. 2013). Employer does not explain why the district director's allowance of the time entries as compensable legal services was arbitrary, capricious, or an abuse of discretion. *See Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316-17 (1984); *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980). Thus, we affirm the district director's determinations in this regard.

However, Employer's argument that the district director erred in awarding Counsel $480.00 in expenses has merit. Employer's Reply Brief at 12, 20. In his attorney fee petition to the district director, Counsel requested only $80.00 for the cost of Dr. Crum's x-ray reading. Consequently, we modify the district director's award of expenses from $480.00 to $80.00.

As Employer raises no other challenges, we affirm the district director's award of $3,125.00 in attorney fees and modify his award of expenses to $80.00. *Skrack*, 6 BLR at 1-711.

ALJ's Supplemental Attorney Fee Award for Legal Services and Costs

Employer argues Counsel failed to support the hourly rates of $350.00 for Mr. Wolfe and $200.00 for Mr. Austin with market evidence, i.e., what fee-paying clients pay counsel or similarly qualified attorneys charge by the hour in comparable cases. Employer's Brief at 19-20, 23; Employer's Reply Brief at 13-17, 20.

Contrary to Employer's argument, evidence of fees received in other black lung cases may be an appropriate consideration in establishing a market rate. *See Bentley*, 522 F.3d at 664; *see also Gosnell*, 724 F.3d at 572; *Cox*, 602 F.3d at 290. The ALJ noted Counsel provided a list of sixty-eight black lung cases in which the district director, ALJs, the Board, or the United States Courts of Appeals awarded attorney fees to his firm and found they support hourly rates of $350.00 for Mr. Wolfe and $200.00 for Mr. Austin. Supplemental Decision and Order at 3. Because the ALJ acted within her discretion and

explained her findings, we affirm the award of $350.00 per hour for Mr. Wolfe's services and $200.00 per hour for Mr. Austin's services.[17] *Bentley*, 522 F.3d at 666.

We again reject Employer's challenge to Counsel's use of quarter-hour minimum billing increments. Employer's Brief at 20-23; Employer's Reply Brief at 17-19. The ALJ has the discretion to award a fee based on quarter-hour minimum increments. *See Bentley*, 522 F.3d at 666. In addition, she appropriately evaluated each quarter-hour entry to determine whether the amount billed was reasonable. *Bentley*, 522 F.3d at 666-67; Supplemental Decision and Order at 4. In reviewing the itemized time charges, the ALJ agreed certain entries were "for work more appropriately performed" by a less experienced attorney or a legal assistant, and thus reduced them. Supplemental Decision and Order at 4. She similarly found several tasks excessive and reduced them. *Id*. Employer has not established the ALJ abused her discretion in rendering these findings. *See Bentley*, 522 F.3d at 666-67; *Whitaker v. Director, OWCP*, 9 BLR 1-216 (1986). Therefore, we affirm the ALJ's attorney's fee award in all respects.

[17] Employer does not challenge the ALJ's award of $150.00 per hour for Ms. Wolfe, and $100.00 per hour for the legal assistants. Therefore, these findings are affirmed. *See Skrack*, 6 BLR at 1-711; Supplemental Decision and Order at 3; *see also* Employer's Brief at 23.

Accordingly, we affirm the ALJ's Decision and Order Granting Benefits and Supplemental Decision and Order Award of Attorney's Fees and Costs. Further, we affirm in part and modify in part the district director's Proposed Order Supplemental Award Fee for Legal Services.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge