BRB Nos. 11-0512 BLA
and 11-0805 BLA

ISAAC WALTERS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ROBERT COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 04/30/2012
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Attorney Fee Order of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Attorney Fee Order (09-BLA-5011) of Administrative Law Judge Alice M. Craft rendered on a

subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §901-944 (2006) *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). Adjudicating the claim pursuant to 20 C.F.R. Parts 718 and 725, the administrative law judge credited claimant with fourteen years of coal mine employment, and found that the recent amendments to the Act, which became effective on March 23, 2010, were inapplicable because claimant established less than the requisite fifteen years of qualifying coal mine employment. The administrative law judge determined that new evidence submitted in support of this subsequent claim was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Considering the entire record, the administrative law judge found the weight of the evidence sufficient to establish the existence of both clinical pneumoconiosis and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

EMPLOYER'S APPEAL OF THE AWARD OF BENEFITS

Employer challenges the administrative law judge's findings of legal pneumoconiosis at Section 718.202(a)(4) and disability causation at Section 718.204(c), and argues that the administrative law judge failed to properly resolve the conflicts in claimant's cigarette smoking history. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response. Employer has filed a reply brief, reiterating its arguments.[2]

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[1] Claimant, Isaac Walters, filed his first application for benefits on August 25, 1995, which was denied by the district director on May 6, 1996. Director's Exhibits 1-3, 1-192. Claimant's second claim, filed on February 14, 2003, was denied by the district director on January 20, 2004, based on claimant's failure to establish total respiratory disability. Director's Exhibits 2-35, 2-184. Claimant filed a request for modification on January 7, 2005, which the district director denied on March 29, 2005. Director's Exhibits 2-9, 2-27. Claimant's third claim, filed on April 13, 2007, is pending herein on appeal. Director's Exhibit 4.

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings with regard to the length of claimant's coal mine employment, and her findings that claimant established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (a)(4), total respiratory disability pursuant to 20 C.F.R. §718.204(b), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 6, 7, 46-47, 63-72.

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.[3] 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).

Employer initially contends that the administrative law judge erred in failing to properly resolve the discrepancies in claimant's reported cigarette smoking histories by assessing the reliability of the various smoking histories recorded by the physicians. Employer asserts that the administrative law judge's determination to merely "average" the reported pack-year histories to conclude that claimant had "at least" a 26 pack-year cigarette smoking history fails to comport with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). We disagree.

The administrative law judge reviewed the various smoking histories contained in claimant's deposition testimony, formal hearing testimony, and the medical reports of record, and found that the reported histories varied in length from twelve to forty pack-years.[4] Decision and Order at 5. Based on her determination that "[t]here [was] little

[3] The law of the United States Court of Appeals for the Sixth Circuit is applicable, as claimant's coal mine employment occurred in Kentucky. Director's Exhibits 1, 2, 4; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] The administrative law judge reviewed the medical opinions in evidence and found the following cigarette smoking histories recorded for claimant: Dr. Fritzhand recorded one pack per day from 1949 to 1987 (38 pack-year history); Dr. Broudy recorded ½ pack per day starting between the ages of 18 and 20, and stopping in 1987 (16-17 pack-year history); Dr. Mettu noted one pack per day beginning at age 16 and stopping in 1980 (29 pack-year history); Dr. Ammisetty reported 15 cigarettes per day from 1950 to 1990 (30 pack-year history); Dr. Rosenberg reported one pack per day from age 12 or 13, stopping 20 to 30 years prior to the 2007 examination (20-30 pack-year history); Dr. Baker recorded ½ pack per day for 20-25 years and estimated a 12-13 pack-year history; Dr. Agarwal reported ½ pack per day from 1951 to 1982 and estimated a 16 pack-year history; and Dr. Jarboe estimated a 40 pack-year history, based on one pack per day from age 15 or 16 and continuing to the 2009 examination. Director's Exhibits 1-121, 1-161, 2-152, 13, 18-3; Claimant's Exhibits 1, 2; Employer's Exhibit 6. In addition, claimant's formal hearing testimony revealed a history of ½ pack per day for approximately 25 years, stopping 25 years ago. Hearing Transcript at 16. Claimant's November 18, 2003 deposition testimony revealed a history of one pack per day, starting when he was a teenager and stopping 15-16 years prior to the deposition. Director's Exhibit 2-129. Similarly, claimant's November 5, 1995 deposition revealed a ½ pack per

consistency in both the reported duration of the Claimant's smoking history and the quantity that he smoked," the administrative law judge rationally averaged the reported pack-year histories and concluded that claimant had a smoking history of at least 26 pack-years. As the length and extent of claimant's smoking history is a factual, not medical, determination that is committed to the administrative law judge's discretion, and as no abuse of discretion has been demonstrated, we affirm the administrative law judge's finding that claimant smoked for at least 26 pack-years. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); Decision and Order at 6.

Employer next challenges the administrative law judge's weighing of the medical opinion evidence in finding the existence of legal pneumoconiosis established at Section 718.202(a)(4). Employer argues that the administrative law judge failed to provide valid reasons for discrediting the opinions of Drs. Jarboe and Rosenberg, which employer asserts are better reasoned and documented than those of Drs. Ammisetty, Baker, and Agarwal, and that she improperly measured the credibility of the medical opinions against the discussion in the preamble to the revised regulations. Employer also maintains that the administrative law judge subjected the opinions of Drs. Jarboe and Rosenberg to a higher level of scrutiny, when compared to her analysis of the opinions of Drs. Ammisetty, Baker, and Agarwal. Employer's arguments lack merit.

At the outset, we note that the administrative law judge may properly consider whether a medical opinion is based on beliefs that conflict with the definition of legal pneumoconiosis and the prevailing view of medical science underlying the current regulations, as determined by the Department of Labor (DOL) and set forth in the preamble to the revised regulations. *See Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 256-57, 24 BLR 2-369, 2-383 (3d Cir. 2011); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). Hence, we reject employer's assertion that the administrative law judge erred by relying on the preamble and the regulatory definition of legal pneumoconiosis as factors in determining the credibility of the medical opinion evidence in this case.

In evaluating the conflicting medical opinions of record, the administrative law judge accurately summarized all of the physicians' opinions and the underlying bases for their conclusions. Decision and Order at 35-44. The administrative law judge credited Dr. Jarboe's diagnosis of clinical pneumoconiosis, but acted within her discretion in finding that his opinion, that claimant's disabling obstructive impairment was not caused by coal dust exposure, but by "long-standing bronchial asthma with airway remodeling

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day history, or "sometimes" one pack per day, for "about thirty years." Director's Exhibit 1-62-63.

and cigarette-induced pulmonary emphysema," was not persuasive because it was inconsistent with the regulations and legislative facts on several grounds. Decision and Order at 41, 58-61; Employer's Exhibit 6 at 6. In so finding, the administrative law judge determined that Dr. Jarboe's opinion was premised on the belief that claimant's pulmonary function study, which demonstrated a "well-preserved FVC with a disproportionately reduced FEV_1," was "not characteristic of a coal dust-induced lung disease," contrary to DOL's position that coal dust exposure may cause chronic obstructive pulmonary disease with associated decrements in FEV_1 and the FEV_1/FVC ratio. *See* 65 Fed. Reg. 79,943 (Dec. 20, 2000); Decision and Order at 59; Employer's Exhibit 6 at 4, 14-20. Further, the administrative law judge found that Dr. Jarboe's reliance on claimant's marked elevation of residual volume as indicative of a smoking-induced lung disease and not a coal dust-related disease characterized by mild elevations of residual volume at most, was contrary to DOL's finding that the effects of coal dust exposure and smoking may be additive and may impair the lungs similarly. *See* 65 Fed. Reg. at 79,940 (Dec. 20, 2000); Decision and Order at 59-60. Likewise, the administrative law judge determined that Dr. Jarboe's opinion, that claimant's emphysema was caused solely by smoking, failed to address whether coal dust exposure was at least a contributing or aggravating factor in claimant's emphysema, and was contrary to DOL's conclusion that "dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms." Decision and Order at 60-61; 65 Fed. Reg. 79,943 (Dec. 20, 2000). The administrative law judge additionally found that Dr. Jarboe's position, that post-bronchodilator improvement on pulmonary function testing is inconsistent with coal dust-induced lung disease, is contrary to applicable case law that stands for the proposition that a miner's improvement after bronchodilation does not necessarily foreclose a finding of legal pneumoconiosis. Decision and Order at 60; *see Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007). As substantial evidence supports the administrative law judge findings, we affirm her conclusion that Dr. Jarboe's opinion is entitled to little weight.

Similarly, the administrative law judge permissibly concluded that Dr. Rosenberg's opinion, that claimant's disabling obstructive lung disease was unrelated to coal dust exposure, was entitled to little weight, as it was based on pulmonary function study findings of a "marked decrease in … FEV_1 and FEV_1/FVC ratio … consistent with a smoking-related form of obstructive lung disease," Employer's Exhibit 3 at 11, contrary to DOL's finding that coal dust exposure may cause chronic obstructive pulmonary disease, with associated decrements in FEV_1 and the FEV_1/FVC ratio. Decision and Order at 56; 65 Fed. Reg. 79,943 (Dec. 20, 2000). As substantial evidence supports her credibility determination, we affirm the administrative law judge's discounting of Dr. Rosenberg's opinion at Section 718.202(a)(4). *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

We find no support for employer's assertion that the administrative law judge failed to subject the opinions of Drs. Ammisetty, Baker, and Agarwal, that claimant has legal pneumoconiosis, to the same scrutiny as those of Drs. Jarboe and Rosenberg. In assessing the probative value of the physicians' opinions, the administrative law judge considered any discrepancies between her findings with regard to claimant's coal mine employment and cigarette smoking histories, and that relied upon by each physician, and acted within her discretion in concluding that, while "Drs. Ammisetty, Rosenberg, Baker, Agarwal, and Jarboe all recorded coal mine employment histories of 20 to 21 years, which is greater than my finding of 14 years," the discrepancy did not significantly detract from the reliability of their opinions. Decision and Order at 53; *see Sellards v. Director, OWCP*, 17 BLR 1-77, 1-81 (1993). Conversely, however, the administrative law judge determined that Dr. Baker's reliance on a smoking history of 12-13 pack-years was "substantially less than my finding that the Claimant has at least a 26 pack-year history." Decision and Order at 57; Claimant's Exhibit 1. Consequently, the administrative law judge rationally found that, while Dr. Baker's reliance upon an inaccurate smoking history did not render his opinion "wholly unreasoned," the opinion was entitled to only "some weight."[5] *Id.*; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Similarly, the administrative law judge accorded only "some weight" to Dr. Agarwal's opinion, as it was based on a 16 pack-year smoking history, which was "substantially less" than the administrative law judge's finding. Decision and Order at 58; *see Trumbo*, 17 BLR at 1-89. The administrative law judge acted within her discretion in finding that Dr. Ammisetty's diagnosis of legal pneumoconiosis was well-reasoned, well-documented, and entitled to full probative weight, as it was based on an accurate smoking history and was supported by the evidence available to him and the evidence in the record. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 54-55. As substantial evidence supports the administrative law judge's credibility determinations, we affirm her finding that the weight of the evidence was sufficient to establish legal pneumoconiosis at Section 718.202(a)(4).

Lastly, we reject employer's contention that the administrative law judge erred in finding disability causation established at Section 718.204(c). The administrative law judge properly discredited the opinions of Drs. Jarboe and Rosenberg, that coal dust exposure did not cause or contribute to claimant's total disability, on the grounds that the physicians did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding, and their conclusions "are contrary to the regulations, objective evidence,

[5] The administrative law judge additionally noted that Dr. Baker's pulmonary function study was invalidated by Dr. Vuskovich, but found that Dr. Baker's opinion was still entitled to probative weight because his finding of an obstructive impairment was consistent with the other pulmonary function study results in the record. Decision and Order at 57.

and law governing this case." Decision and Order at 73. Based on the opinions of Drs. Ammisetty, Baker, and Agarwal, the administrative law judge acted within her discretion in finding that claimant met his burden of establishing that pneumoconiosis was a substantially contributing cause of his disability pursuant to Section 718.204(c), and we affirm her findings thereunder, as supported by substantial evidence. Consequently, we affirm the administrative law judge's award of benefits.

EMPLOYER'S APPEAL OF THE ATTORNEY FEE ORDER

Subsequent to the issuance of the administrative law judge's Decision and Order awarding benefits, claimant's counsel (counsel) submitted a fee petition requesting a fee of $12,713.75 for work performed before the administrative law judge between July 21, 2008 and March 31, 2011, representing 28.25 hours of legal services performed by Joseph E. Wolfe at an hourly rate of $300.00; 8.75 hours of legal services performed by Ryan C. Gilligan at $225.00 per hour; 2.00 hours of legal services performed by W. Andrew Delph at $200.00 per hour; 18.25 hours of services by full-time legal assistants at $100.00 per hour; and 0.75 hours of services by part-time legal assistants at $60.00 per hour. Employer objected to the requested hourly rates and to the number of hours billed. After considering counsel's fee petition, and employer's objections thereto, the administrative law judge approved the number of hours and the hourly rates requested by Attorneys Wolfe and Delph as reasonable. The administrative law judge determined that the number of hours actually performed by Attorney Gilligan totaled 9.50, rather than 8.75 as requested, but she disallowed 0.75 hours as duplicative, and reduced the hourly rate to $200.00. The administrative law judge also disallowed 5.75 hours of services performed by the full-time legal assistants and reduced the hourly rate to $75.00; and disallowed 0.25 hours of services performed by the part-time legal assistants, but approved the requested hourly rate. Accordingly, the administrative law judge awarded claimant's counsel a total fee of $11,577.50 for legal services performed while the case was before the Office of Administrative Law Judges.

On appeal, employer contends that the hourly rates awarded by the administrative law judge to counsel and the legal assistants were not reasonable. Employer asserts that counsel failed to produce specific evidence of the prevailing market rate for legal services, and that the administrative law judge improperly relied on past fee awards, Altman & Weil's *Survey of Law Firm Economics*, and "amorphous factors" such as counsel's qualifications, services rendered, expertise involved, type of case, and ultimate benefits to claimant, to support the hourly rates awarded. Counsel responds, urging affirmance of the attorney fee award. The Director, Office of Workers' Compensation

Programs, has not filed a response to employer's appeal. Employer has filed a reply brief, reiterating its arguments.[6]

The amount of an attorney's fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980); *see also Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc).

In the present case, the administrative law judge properly considered all of the relevant evidence provided by both parties as to the prevailing market rate for black lung attorneys in the relevant geographic area, in conjunction with the factors set forth in 20 C.F.R. §725.366(b), and adequately explained her determination that hourly rates of $300.00 for Attorney Wolfe, $200.00 for Attorneys Gilligan and Delph, $75.00 for full-time legal assistants, and $60 for part-time legal assistants were reasonable under the facts of this case. Within a proper exercise of her discretion, the administrative law judge relied on the following considerations: comparable hourly rates for attorneys in the area; past hourly rates received by counsel; the nature of the issues involved and the services rendered in this case; the qualifications and expertise of the attorneys; Altman & Weil's *Survey of Law Firm Economics*, reporting a range of hourly rates for attorneys in various regions based on years of practice and experience; and the ultimate benefit to claimant. *See B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008)(adjudicator might need to consider one or more specific factors, including experience and complexity of the case, to determine where the particular attorney's representation lies along the spectrum of the market for legal services). While acknowledging that the Atman & Weil survey alone does not provide sufficient information for a determination of the market rate, the administrative law judge permissibly concluded that this evidence, considered in conjunction with the other factors, including evidence of fees counsel received in the past, was appropriately included within the range of sources from which to ascertain a reasonable rate. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 289, 24 BLR 2-269, 2-291 (4th Cir. 2010); *Maggard v. International Coal Group, Knott County, LLC*, 24 BLR 1-172 (2010) (Order); *Bowman v. Bowman Coal Co.*, 24 BLR 1-165, 1-170 n.8 (2010) (Order); *Parks v. Eastern Assoc. Coal Corp.*, 24 BLR 1-177, 1-181 n.5 (2010) (Order). Because employer has failed to satisfy its burden of proving that the hourly rates awarded were excessive or that the administrative law judge abused her discretion in this regard, we

[6] We affirm, as unchallenged on appeal, the administrative law judge's determinations regarding the individual time entries and total time awarded for work performed on this case while it was pending before the Office of Administrative Law Judges. *See Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-710; Attorney Fee Order at 4-11.

affirm the administrative law judge's award of an attorney fee in the total amount of $11,577.50.

Accordingly, the Decision and Order Awarding Benefits and the Attorney Fee Order of the administrative law judge are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge