BRB No. 04-0212 BLA

WILLIAM HERCULES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 12/28/2004
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 on Remand – Awarding Benefits and Awarding Attorney Fees of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits and Awarding Attorney Fees (2001-BLA-0469) of Administrative Law Judge Michael P. Lesniak 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). This case

is before the Board for the second time.[1] In the administrative law judge's prior Decision and Order, he found that the instant case involves a duplicate claim filed on September 28, 1999 and that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R §718.202(a)(4). Weighing all of the relevant evidence together, the administrative law judge then found that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant 20 C.F.R. §718.202(a) and a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[2] The administrative law judge further found that the evidence was sufficient to establish that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Accordingly, the administrative law judge awarded benefits. In a Supplemental Decision and Order, the administrative law judge awarded claimant's counsel a total fee of $19,999.10, representing 84.2 hours of legal services at an hourly rate of $195.00, and $3,580.10 in expenses. Employer appealed the administrative law judge's award of benefits as well as his supplemental decision awarding attorney's fees.

The Board, in its Decision and Order, vacated the administrative law judge's award of benefits and remanded the case for further consideration of the medical evidence pursuant to Section 718.202(a)(4). In particular, the Board instructed the administrative law judge to reassess the medical opinions of Drs. Cohen, Fino, Branscomb and Altmeyer. Moreover, as the administrative law judge's findings at Sections 725.309 (2000) and 718.204(c) were based on his Section 718.202(a)(4) findings, the Board also vacated these findings. *Hercules v. Consolidation Coal Co.*, BRB No. 02-0541 BLA (May 2, 2003)(unpub.). The Board rejected employer's contentions that the current application was untimely filed and that, based on prior findings and stipulations, claimant is precluded from establishing that pneumoconiosis is a necessary condition of his disability. *Id*. at 5. Additionally, the Board vacated the administrative law judge's decision to award claimant's counsel an hourly rate of $195.00, holding that the administrative law judge failed to adequately explain the basis for his decision. *Id*. at 11-12.

On remand, the administrative law judge noted the specific questions raised by the Board in its decision and stated that he would address each question individually within his weighing of the relevant medical evidence. The administrative law judge

[1] The relevant procedural history of this case was fully and accurately set forth in the Board's 2003 Decision and Order and, therefore, will not be restated herein. *See Hercules v. Consolidation Coal Co.*, BRB No. 02-0541 BLA, slip op. at 2-3, n.3 (May 2, 2003)(unpub.).

[2] The amendments to the regulations at 20 C.F.R. §725.309 (2000) do not apply to claims, such as the instant miner's claim, which were pending on January 19, 2001. 20 C.F.R. §725.2(c).

reconsidered the newly submitted medical evidence and found the evidence sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a), and thus a material change in conditions under Section 725.309 (2000). Decision and Order at 17. Based on his finding of legal pneumoconiosis, the administrative law judge further found that claimant's total disability is due to pneumoconiosis. Decision and Order at 16. The administrative law judge then weighed all of the evidence of record, old and new, and found that claimant established the existence of legal pneumoconiosis. Decision and Order at 18. The administrative law judge additionally found that claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204(c). Decision and Order at 5. Consequently, the administrative law judge again found that claimant established entitlement to benefits. Accordingly, the administrative law judge awarded benefits, commencing as of September 1, 1999. In addition, the administrative law judge awarded claimant's counsel a total fee of $16,419.00, representing 84.2 hours of legal services at an hourly rate of $195.00, plus an additional $3,580.10 in expenses.

On appeal, employer contends that claimant is precluded from establishing a material change in conditions, based on the stipulations and findings made in his prior denied claim. Additionally, employer contends that the administrative law judge erred in according determinative weight to the medical opinion of Dr. Cohen over the contrary opinions of Drs. Fino, Branscomb and Altmeyer. Employer further contends that the administrative law judge erred in awarding claimant's counsel an hourly rate of $195.00. Claimant has not responded in this appeal. The Director, Office of Workers' Compensation Programs, has filed a limited response to employer's appeal, urging the Board to reject employer's contention that claimant is precluded from establishing a material change in conditions and precluded from establishing that his total disability is due to pneumoconiosis.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Initially, we reject employer's contention that claimant cannot demonstrate a material change in conditions given the stipulations and findings in the prior denied

claim. Specifically, employer contends that in the prior claim, the parties agreed, and the Director found, that claimant was totally disabled by a pulmonary condition that did not arise out of coal mine employment but rather, was due to cigarette smoking. Thus, employer contends, in order to now establish a material change in conditions, claimant must establish that his total disability is due to pneumoconiosis. This contention lacks merit.

As the Board held in its prior Decision and Order,

> Contrary to employer's characterization, the Board did not affirm a finding that claimant was totally disabled by a pulmonary disease caused by his smoking. The Board's affirmance of the administrative law judge's denial of claimant's 1993 claim was based upon its affirmance of the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis. *See Hercules v. Consolidation Coal Co.*, BRB No. 95-1670 BLA-A (May 23, 1996) (unpublished).

Hercules, BRB No. 02-0541 BLA, slip op. at 5. Therefore, the administrative law judge properly found that claimant may establish a material change in conditions by establishing that he now has pneumoconiosis, as this was one of the elements of entitlement previously adjudicated against him.[3] Decision and Order at 5, 16; *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). Consequently, we reject employer's contention that claimant is precluded from establishing a material change in conditions, as this issue was addressed by the Board in its previous decision and employer has raised no basis for finding that the doctrine of the law of the case should not apply. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Employer also contends that the administrative law judge rendered improper findings in stating that it logically follows that chronic obstructive pulmonary disease (COPD) meets the legal definition of pneumoconiosis. Employer's Brief at 10. Rather, employer contends that only if COPD is shown to have arisen out of coal mine employment can COPD be found to be legal pneumoconiosis. *Id*. Contrary to employer's contention, the administrative law judge did not apply any type of

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner's most recent coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

presumption in finding that the existence of legal pneumoconiosis was established pursuant to Section 718.202(a)(4). Rather, the administrative law judge properly required claimant to prove that his COPD arose out of his coal mine employment and thus fell within the legal definition of pneumoconiosis pursuant to Sections 718.201 and 718.202(a). Decision and Order at 15, 16; 20 C.F.R. §§718.201, 718.202(a); *see Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999); *Handy v. Director, OWCP*, 16 BLR 1-73 (1990). We therefore reject employer's contention.

Employer contends that the administrative law judge erred in weighing the medical evidence in finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). Specifically, employer contends that the administrative law judge erred in crediting the medical opinion of Dr. Cohen, that claimant's respiratory condition is due to both cigarette smoking and coal dust exposure, because Dr. Cohen's opinion is not well reasoned. In addition, employer contends that the administrative law judge did not adequately consider the contrary evidence of record because he failed to adequately explain why the opinions of Drs. Fino, Altmeyer and Branscomb, that claimant's respiratory disability is due solely to cigarette smoking, were not credited. Based on its allegations of error, employer contends that the administrative law judge's findings at Sections 718.202(a)(4), 718.203 and 718.204(c) are flawed and must be vacated.

The United States Court of Appeals for the Fourth Circuit has held that, in determining whether a party has met its burden of proof, an administrative law judge should consider the qualifications of the physicians, the explanations of their medical opinions and the documentation underlying their opinions. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). Here, the administrative law judge examined the relevant medical evidence of record and determined that Dr. Cohen's opinion attributing claimant's COPD to both cigarette smoking and coal dust exposure was well reasoned, based on the evidence reviewed by the physician and on his discussion of the contrary opinions of record. Decision and Order at 7-15.

Contrary to employer's contentions, it was not error for the administrative law judge to find Dr. Cohen's opinion well documented and reasoned even though Dr. Cohen did not review the biopsy evidence of record. A medical report need not be based on all of the medical evidence of record to be considered documented, but rather, must set forth the clinical findings, observations, facts and other data on which the physician relied. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984). The administrative law judge considered all aspects of Dr. Cohen's opinion, including the fact that the x-ray evidence did not establish the existence of coal workers' pneumoconiosis and that Dr. Cohen did not personally review the biopsy

evidence. Decision and Order at 5-7, 15. Nevertheless, the administrative law judge discussed all of the evidence considered by Dr. Cohen and, within a reasonable exercise of his discretion as trier-of-fact, found his opinion to be well documented and reasoned. Decision and Order at 6; *see Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*).

However, as employer correctly contends, the administrative law judge has not adequately explained his weighing of the contrary medical opinions of record. Specifically, the administrative law judge has not adequately explained his finding that the opinions of Drs. Fino and Altmeyer, that claimant's respiratory disability was entirely due to cigarette smoking, are not credible. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984). The administrative law judge found that Drs. Fino and Altmeyer relied on the lack of physical findings of medical pneumoconiosis in order to rule out the existence of legal pneumoconiosis. Decision and Order at 15, 17. However, the Board in its 2003 Decision and Order, held that this finding was erroneous and remanded the case for the administrative law judge to reassess the medical evidence. *See Hercules*, BRB No. 02-0541 BLA, slip op. at 8, 9. As the administrative law judge has again relied on this assessment of the opinions of Drs. Fino and Altmeyer, we must vacate the administrative law judge's weighing of these opinions and remand the case to the administrative law judge for further consideration. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336 (requiring administrative law judges to give valid reasons both for crediting certain medical opinions and for discrediting others). Consequently, as the administrative law judge has not provided a sufficient explanation for his weighing of the contrary medical opinions of record, we must vacate his finding that the newly submitted medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and remand the case for further consideration of the relevant evidence.

On remand, the administrative law judge must consider the entirety of the opinions of Drs. Fino and Altmeyer in assessing the credibility of the physicians' opinions. *See Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Underwood*, 105 F.3d at 951, 21 BLR 2-31-32. In particular, the administrative law judge must consider the deposition testimony of Dr. Fino, wherein the physician provides a detailed explanation of his analysis of the objective evidence of record, specifically, the significance of the biopsy evidence in his analysis of why claimant's respiratory impairment is unrelated to coal mine dust exposure. *See* Employer's Exhibit 13 at 31-34. Similarly, the administrative law judge must more fully explain his finding that Dr. Altmeyer's statement that the pattern of claimant's objective studies is not consistent with pneumoconiosis but is consistent with smoking, is not a credible explanation of why claimant is not suffering from legal pneumoconiosis. *See* Employer's Exhibit 4.

If, on remand, the administrative law judge again finds the newly submitted medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), he must then weigh all of the newly submitted evidence relevant to Section 718.202(a)(1), (a)(2) and (a)(4) together in determining whether claimant suffers from pneumoconiosis. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Moreover, as the administrative law judge's finding of a material change in conditions was based upon his finding that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), the administrative law judge's Section 725.309 (2000) finding is also vacated. Moreover, as the administrative law judge also relied on his Section 718.202(a) findings in determining that the newly submitted evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(c), we also vacate this finding.

On remand, should the administrative law judge again find the newly submitted evidence sufficient to establish a material change in conditions pursuant to Section 725.309 (2000), he must then consider and weigh all of the evidence of record, old and new, in assessing the merits of claimant's 1999 claim. *Rutter*, 86 F.3d at 1362, 20 BLR 2-235.

Lastly, employer challenges the administrative law judge's decision to award an hourly rate of $195.00, arguing that the administrative law judge awarded a lodestar fee of $45.00 per hour in excess of counsel's normal rate, thus permitting claimant's counsel to obtain compensation for the risk of loss in black lung litigation.[4] Employer's Brief at 31. The award of an attorney fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Jones v. Badger Coal Co*., 21 BLR 1-102, 1-108 (1998)(*en banc*).

Employer contends that the administrative law judge's awarding of $195.00 per hour is $45.00 in excess of counsel's market based rate of between $90.00 and $150.00 per hour and that there is no basis for the enhanced rate. Employer argues that the hourly rate should be reduced to $150.00, the maximum hourly rate that "counsel charges paying clients." Employer's Brief at 31. This contention lacks merit.

[4] The parties do not challenge the administrative law judge's disallowance of 47 hours of legal services as not necessary and excessive as well as 5.8 hours of legal services for work performed before the district director or his disallowance of $965.76 of claimed expenses for photocopying and postage. We therefore affirm these findings as unchallenged on appeal. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

Contrary to employer's contention, the administrative law judge provided a rational basis for his decision to award claimant's counsel an hourly rate of $195.00, based on counsel's expertise in Black Lung law, and the complexity of the issues and evidence in this case.[5] Decision and Order at 20. The administrative law judge reasonably found that claimant's counsel submitted sufficient evidence to justify an hourly rate of $195.00, based on the criteria set forth at Section 725.366(b), even though this rate exceeds what claimant's counsel charges for non-Black Lung matters. Decision and Order at 20; 20 C.F.R. §725.366(b); *see Zeigler Coal Co. v. Director, OWCP* [*Hawker*], 326 F.3d 894, 902 n.9, --- BLR --- (7th Cir. 2003). We reject employer's assertion that the administrative law judge's ruling was arbitrary and an abuse of discretion, as employer does not provide a specific basis for its assertion that this fee represents a lodestar fee compensating for risk of loss. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989); *see generally Goodloe v. Peabody Coal Co*., 19 BLR 1-91 (1995). Because employer has not shown an abuse of discretion in the administrative law judge's award of the $195.00 hourly rate, we need not address employer's counter offer of an hourly rate of $150.00.[6] *See generally Broyles v. Director, OWCP*, 974 F.2d 508, 17 BLR 2-1 (4th Cir. 1992); *Pritt v. Director, OWCP*, 9 BLR 1-159 (1986).

[5] The administrative law judge specifically noted the complexity of the issues and medical evidence involved in this case, as well as counsel's demonstrated expertise in this field, noting his involvement in panel discussions on federal black lung benefits, lecturing on the topic and also that counsel has published works in this field. Decision and Order at 20.

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

Accordingly, the administrative law judge's Decision and Order on Remand – Awarding Benefits and Awarding Attorney Fees is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

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