

BRB No. 10-0623 BLA

DIANA CUNNINGHAM)
(Widow of JAMES CUNNINGHAM))
)
 Claimant-Respondent)
)
 v.)
)
 MIDWEST COAL COMPANY) DATE ISSUED: 07/28/2011
)
 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 of Donald W. Mosser,
Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Richard H. Risse (White & Risse, LLP), Arnold, Missouri, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals
Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (2006-BLA-05500) of Administrative Law Judge Donald W. Mosser, rendered on the miner's subsequent claim filed on October 29, 2001, 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). This case is before the Board for the second time. In his initial Decision and Order, issued on March 26, 2008, the administrative law judge credited the miner with "at least" twenty-three years of coal mine employment and adjudicated the claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge found that the newly submitted evidence established that the miner was totally disabled by a respiratory or pulmonary impairment pursuant to

20 C.F.R. §718.204(b)(2)(i), (iv), and that claimant, therefore, established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d). The administrative law judge further found, however, that the evidence was insufficient to establish the existence of either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or that the miner was totally disabled by pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal,¹ the Board affirmed, as unchallenged, the administrative law judge's findings that the miner worked at least twenty-three years in coal mine employment, and that the newly submitted evidence established total disability and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b)(2), 725.309. *D.C. [Cunningham] v. Midwest Coal Co.*, BRB No. 08-0565 BLA, slip op at 2 n.4 (Mar. 10, 2009) (unpub.). The Board held that the administrative law judge committed harmless error in designating Dr. Cohen's computerized tomography (CT) scan report as rebuttal evidence, rather than as claimant's affirmative evidence. However, the Board also held that administrative law judge erred by failing to properly consider, pursuant to 20 C.F.R. §718.107(b), whether the parties showed that CT scans are medically acceptable and relevant to establishing the presence or absence of pneumoconiosis. *Id.* at 4.

With respect to the issues of the existence of legal pneumoconiosis and total disability, the Board agreed with claimant that the administrative law judge erred in finding that Dr. Cohen failed to explain the basis for his opinion, that the miner's disabling chronic obstructive pulmonary disease (COPD), was due, in part, to coal dust exposure. *Id.* at 5. The Board further held that the administrative law judge erred in failing to consider whether the opinions of Drs. Renn and Castle, that coal mine dust cannot cause severe emphysema as seen in this case, in the absence of clinical pneumoconiosis, are contrary to the prevailing medical science, as found by the Department of Labor (DOL) in the preamble to the regulations. *Id.* Thus, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c), and remanded the case for further consideration. *Id.* at 7. The Board specifically instructed the administrative law judge on remand to consider all relevant evidence of record, including the evidence developed in conjunction with the miner's prior claim, in determining whether claimant established entitlement to benefits. *Id.*

¹ Claimant is the widow of the deceased miner, James Cunningham, who died on March 12, 2005, while his subsequent claim was pending. Director's Exhibit 30. Claimant did not file a survivor's claim, but she is pursuing the miner's subsequent claim on his behalf.

In his Decision and Order on Remand, dated June 30, 2010, the administrative law judge reconsidered the evidence and accorded less weight to the opinions of Drs. Renn and Castle, because he found that these doctors relied on a lack of evidence of clinical pneumoconiosis in eliminating coal mine dust exposure as a contributor to the miner's disabling emphysema/COPD. Decision and Order on Remand at 6-7. The administrative law judge also accorded less weight to the opinions of Drs. Renn and Castle on the ground that they expressed views that were inconsistent with the definition of legal pneumoconiosis and the science credited by DOL in the preamble to the revised regulations. *Id.* at 7. Conversely, the administrative law judge found that Dr. Cohen's opinion was reasoned and documented and sufficient to satisfy claimant's burden to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Employer appeals, arguing in its brief and reply brief, that the administrative law judge did not properly weigh the CT scan and medical opinion evidence, in finding the existence of legal pneumoconiosis established at 20 C.F.R. §718.202(a)(4) and disability causation established at 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a response brief in this appeal.

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.² 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must prove that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that the miner was totally disabled and that his disability was due to pneumoconiosis. *See* 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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Employer contends that the administrative law judge erred in finding that the CT scan evidence was in equipoise as to the existence of clinical pneumoconiosis, and

² As the miner's last coal mine employment was in Indiana, we will apply the law of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

maintains that this evidence supports a finding that the miner did not have a chronic dust disease of the lungs. Employer asserts that the administrative law judge failed to satisfy his duty to resolve the conflict in the CT scan evidence, and that he gave impermissible reasons for crediting and discrediting the medical opinions of Drs. Cohen, Renn and Castle, relevant to the issues of the existence of legal pneumoconiosis and disability causation. Employer's arguments are without merit.

Contrary to employer's assertion, the administrative law judge properly explained, in accordance with the Administrative Procedure Act,³ that he considered the two conflicting readings by Drs. Wiot and Cohen, of the CT scan dated October 22, 2004,⁴ to be equally probative as to the existence of clinical pneumoconiosis, based on his determination that both physicians were highly qualified in interpreting CT scans, but reached differing conclusions as to whether there was any evidence for pneumoconiosis. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); Decision and Order on Remand at 4. We affirm the administrative law judge's rational finding that "the CT scan interpretations of record are not, by themselves, sufficient to establish the existence or non-existence of clinical or legal pneumoconiosis." Decision and Order on Remand at 4; *See Freeman United Coal Mining Co. v. Cooper*, 965 F.2d 443, 16 BLR 2-74 (7th Cir. 1992); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

We also reject employer's contention that the administrative law judge erred in his consideration of the opinions of Drs. Renn and Castle, that the miner's COPD was due solely to smoking. The administrative law judge observed that both physicians "consistently seem to rely on the lack of evidence of clinical pneumoconiosis in rejecting coal dust exposure as a significant cause of the miner's [COPD]." Decision and Order on Remand at 6-7. The administrative law judge considered statements by Drs. Renn and Castle, expressing their belief that a diagnosis of coal mine dust-related emphysema is not possible without radiographic evidence of coal workers' pneumoconiosis, to be

³ The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 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).

⁴ Dr. Wiot reviewed a CT scan of the miner's chest, dated October 22, 2004, and opined that it showed no evidence of coal workers' pneumoconiosis. Employer's Exhibit 4. Dr. Cohen interpreted this same CT scan and found opacities consistent with pneumoconiosis, along with diffuse centrilobular emphysema. Claimant's Exhibit 4.

inconsistent with both the definition of legal pneumoconiosis⁵ and the medical science cited by DOL in the preamble to the revised regulations. *Id.* at 7. The administrative law judge explained that Dr. Renn’s opinion was contrary to the regulations as he specifically testified that coal dust exposure does not result in emphysema or COPD. Decision and Order on Remand at 7, *citing* Employer’s Exhibit 12 at 74-75. The administrative law judge similarly found that Dr. Castle’s opinion was contrary to the regulations as he indicated that “he would attribute the miner’s [COPD] to coal mining versus cigarette smoking only if he had diagnosed coal workers’ pneumoconiosis.”⁶ Decision and Order on Remand at 7, *citing* Employer’s Exhibit 13, pp. 39, 42, 43.

We affirm the administrative law judge’s credibility determinations as they are proper and supported by substantial evidence. As noted by the administrative law judge, there is no requirement that a finding of legal pneumoconiosis be accompanied by radiographic evidence of clinical pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2). Moreover, the administrative law judge permissibly evaluated the opinions of Drs. Renn and Castle in conjunction with the DOL’s discussion of prevailing medical science in the preamble to the revised regulations. The preamble sets forth how the DOL has chosen to resolve questions of scientific fact. *See Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). A determination of whether a medical opinion is supported by accepted scientific evidence, as determined by the DOL, is a valid criterion in deciding whether to credit the opinion. *See generally Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7, 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001). The DOL, in the preamble to the revised regulations, recognizes that coal mine dust exposure can be associated with significant deficits in lung function in the absence of clinical pneumoconiosis. *See* 65 Fed. Reg. 79941 (Dec. 20, 2000). Because the administrative law judge determined correctly that Drs. Renn and Castle reached medical conclusions that were predicated on views of the evidence that are at odds with the science credited by DOL, we affirm his decision to accord the opinions of Drs. Renn and Castle less weight as to the etiology of the miner’s severe emphysema/COPD. *See Shores*, 358 F.3d at 490, 23 BLR at 2-26; *Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-281 n.7.

⁵ Legal pneumoconiosis includes “any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.” 20 C.F.R. §718.201(a)(2).

⁶ Dr. Castle testified that bullous emphysema of the severity seen in this case is not attributable to coal dust exposure “in the absence of more severe manifestations radiographically or otherwise . . . to have a negative X-ray and this degree of objective findings of pulmonary emphysema is very unlikely.” Employer’s Exhibit 12 at 14.

We also reject employer's assertion that the administrative law judge erred in relying on Dr. Cohen's opinion because it is legally insufficient to support claimant's burden to establish the existence of legal pneumoconiosis. As we noted in our prior decision, Dr. Cohen reviewed the results of two clinical examinations, objective tests and treatment records and based his opinion, that both smoking and coal dust exposure significantly contributed to the miner's obstructive impairment, on current scientific knowledge and the miner's work and medical histories. *Cunningham*, BRB No. 08-0565 BLA, slip op. at 5. Contrary to employer's assertion, the fact that Dr. Cohen was unable to distinguish between the effects of smoking and coal dust exposure on the miner's disabling COPD does not render his opinion legally insufficient at 20 C.F.R. §718.202(a)(4). The DOL and the United States Courts of Appeals for the Seventh Circuit have indicated that a physician's statement, that he cannot distinguish between the effects of smoking and coal dust exposure, does not, by itself, render unreasoned a physician's identification of coal dust exposure as a contributing cause of a miner's pulmonary impairment. *See* 65 Fed. Reg. 79,946 (Dec. 20, 2000); *Summers*, 272 F.3d at 482, 22 BLR at 2-280; *see also Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 372 (4th Cir. 2006); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-122 (6th Cir. 2000); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2004).

Furthermore, because the administrative law judge specifically found that Dr. Cohen set forth the rationale for his findings, based on his opinion on the objective evidence of record, and explained why he concluded that the miner's disabling COPD was due to both smoking and coal dust exposure, we affirm the administrative law judge's determination that Dr. Cohen's diagnosis of legal pneumoconiosis is reasoned and documented and deserving of credit. Therefore, we affirm the administrative law judge's reliance on Dr. Cohen's opinion to find that claimant satisfied her burden to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Shores*, 358 F.3d at 490, 23 BLR at 2-26; *Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-281 n.7; *Clark*, 12 BLR at 1-155.

Employer further asserts that the administrative law judge erred in finding that claimant established disability causation at 20 C.F.R. §718.204(c). We disagree. Contrary to employer's assertion, the administrative law judge rationally discounted the medical opinions of Drs. Renn and Castle, on the issue of disability causation, because neither physician diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding that the miner had legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484, 24 BLR 2-33, 2-37 (7th Cir. 2007); *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001); Decision and Order on Remand at 8-9. The administrative law judge properly relied on Dr. Cohen's "well reasoned opinion" that "found the miner's COPD and resulting pulmonary impairment were significantly caused by his coal dust exposure." Decision and Order on Remand at 9; Claimant's Exhibit 4. We therefore affirm the administrative law judge's

finding that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), as it is supported by substantial evidence. *See Zeigler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332, 335, 22 BLR 2-581, 2-589 (7th Cir. 2002); Decision and Order on Remand at 9. Thus, we affirm the award of benefits. *See Trent*, 11 BLR at 1-27.

As an additional matter, claimant's counsel has filed a complete, itemized statement requesting a fee for services rendered while the case was pending in the prior appeal, BRB No. 08-0565 BLA. Specifically, counsel seeks a fee of \$2,827.00 for 12.85 hours of legal services at an hourly rate of \$220.00. Employer has submitted an objection to claimant's counsel's fee request, asserting that the requested hourly rate of \$220.00 is excessive and unreasonable.

Claimant is entitled to an attorney's fee payable by employer for successfully prosecuting her claim. *See* 33 U.S.C. §928; *Beasley v. Sahara Coal Co.*, 16 BLR 1-6 (1991); *Director, OWCP v. Baca*, 927 F.2d 1122, 15 BLR 2-42 (10th Cir.1991); *Yates v. Harman Mining Co.*, 12 BLR 1-175 (1989), *aff'd on recon.*, 13 BLR 1-56 (1989) (*en banc*). After reviewing counsel's fee petition, the nature of the work performed, and employer's objections to the hourly rate, we reject employer's assertion that the requested hourly rate of \$220.00 is excessive. Contrary to employer's assertion, counsel has requested a reasonable hourly rate and has provided an adequate explanation for her billing rate, as is required by 20 C.F.R. §725.366. Consequently, we approve compensation for 12.85 hours of services rendered by counsel in support of the miner's appeal to the Board in BRB No. 08-0565 BLA, at a rate of \$220.00 per hour, for a total fee of \$2,827.00, payable directly to counsel by employer. *See* 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed. Claimant's counsel is awarded a fee of \$2,827.00 for work performed before the Board in BRB No. 08-0565 BLA, payable directly to counsel by employer.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge