BRB No. 92-2189

CARL R. SUNDQUIST	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
E.J. BARTELLS, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
SAIF CORPORATION	)	
	)	
Employer/Carrier- Respondents	)	DECISION and ORDER

Appeal of the Decision on Remand and Supplemental Decision and Order - Awarding Attorney Fees of Vivian Schreter Murray, Administrative Law Judge, United States Department of Labor.

Jeffrey S. Mutnick (Pozzi, Wilson, Atchison, O'Leary & Conboy), Portland, Oregon, for claimant.

Norman Cole (SAIF Corporation), Salem, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision on Remand and Supplemental Decision and Order - Awarding Attorney Fees (84-LHC-1449) of Administrative Law Judge Vivian Schreter Murray awarding benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

This case is before the Board for the second time. To recapitulate, claimant was employed as an asbestos worker for several employers for approximately 35 years, and was exposed to asbestos during most of this period. Claimant's last employment was with Owens Corning Fiberglass, but claimant denied that any injurious exposure to asbestos occurred during that employment. Prior to working for Owens Corning, claimant worked for Columbia I & S and for E.J.

Bartells, Inc. Claimant became aware that he suffered from work-related asbestosis on November 4, 1982.

In her initial Decision and Order, the administrative law judge found that claimant, after being laid off from Owens Corning in March 1981, voluntarily retired from the work force in May 1981, and determined that claimant had sustained a compensable 15 percent permanent impairment stemming from work-related restrictive pulmonary disease. The administrative law judge next found that E.J. Bartells was the employer responsible for paying claimant's benefits and she awarded E.J. Bartells relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f). In her Order on Reconsideration and in a subsequent Order, the administrative law judge altered her prior determinations regarding the compensation rate to be paid claimant and the date of onset of benefits.

Claimant appealed this decision to the Board. *Sundquist v. E.J. Bartells, Inc.*, BRB No. 86-1117 (June 13, 1991) (unpublished). The Board vacated the administrative law judge's finding of a 15 percent permanent impairment, holding that it was error for the administrative law judge to base claimant's award on only the percentage of claimant's impairment related to asbestos exposure, rather than his total lung impairment. *See Sundquist*, slip op. at 3-4. The Board therefore remanded the case for the administrative law judge to apply the "aggravation rule" and for a specific finding regarding the percentage of compensable overall impairment suffered by claimant.

On remand, the administrative law judge initially issued a Pre-Decisional Order in which, after stating that the most recently revised American Medical Association *Guides to the Evaluation of Permanent Impairment* (3d ed. rev. 1988) (reissued 1990) (AMA *Guides*), must be utilized to determine the extent of claimant's pulmonary impairment, she reopened the record and ordered the parties to agree on a single physician to administer pulmonary function tests to claimant and to opine on the extent of claimant's impairment under the most recent AMA *Guides*. The parties subsequently agreed to an examination of claimant by Dr. Patterson who, after conducting his examination, submitted several reports which ultimately classified claimant's impairment as Class III. Claimant's motion to depose Dr. Patterson for the purpose of determining claimant's actual percentage of impairment was denied by the administrative law judge.

In her Decision on Remand, the administrative law judge evaluated the medical evidence, averaged the pulmonary test results obtained by Dr. Patterson, and found that claimant has a pulmonary impairment of 30 percent. In her Supplemental Decision and Order, claimant's attorney was awarded a fee of $1,600 for services rendered at the administrative law judge level.

On appeal, claimant contends that the administrative law judge erred by reopening the record on remand for claimant's examination by Dr. Patterson rather than rendering an impairment rating based on the existing evidence of record. Alternatively, claimant challenges the administrative law judge's finding of a 30 percent whole man impairment; specifically, claimant argues there is no medical evidence from which the administrative law judge could rationally derive a pulmonary impairment rating of 30 percent, and that the administrative law judge erred in denying claimant's

request to depose Dr. Patterson, who claimant alleges would have testified as to his opinion of claimant's exact percentage of pulmonary impairment. Lastly, claimant appeals the attorney's fee awarded by the administrative law judge. Employer responds, urging affirmance.

Initially, we reject claimant's contention the administrative law judge erred by reopening the record on remand to allow for the admission of evidence regarding claimant's current pulmonary condition. It is well-established that an administrative law judge has considerable discretion in rendering determinations pertaining to the admissibility of evidence. *See, e.g., Wayland v. Moore Dry Dock*, 21 BRBS 177, 180-181 (1988). In her initial Decision and Order, the administrative law judge relied on a May 1985 pulmonary function study to determine the extent of claimant's impairment. On remand from the Board, the administrative law judge found in her Pre-Decisional Order that the 1985 study by Dr. Reich utilized the second edition to the AMA *Guides*, rather than the more recent third edition. She reasoned that, as a matter of judicial economy, since claimant could seek modification if his pulmonary condition had worsened since the 1985 study, *see* 33 U.S.C. §922, claimant's current pulmonary function should be evaluated under the revised third edition of the AMA *Guides*. As the instant case had been remanded to the administrative law judge for a determination of the issue of claimant's overall compensable impairment, we hold that the administrative law judge acted within her discretion in reopening the record for a current pulmonary function study before determining the extent of claimant's pulmonary disability on remand. *See Wayland*, 21 BRBS at 180-181; *see also* 20 C.F.R. §§702.338, 702.339.

Claimant next contends that the administrative law judge substituted her judgment for that of a physician by averaging the results of Dr. Patterson's pulmonary function study, rather than allowing Dr. Patterson to testify as to the exact percentage of claimant's pulmonary impairment. In support of this allegation of error, claimant cites to his denied motion to depose Dr. Patterson, wherein claimant's counsel stated that the purpose of the deposition would be to ask Dr. Patterson to identify the precise percentage of claimant's impairment within the Class III range of 30 to 45 percent he identified in his reports.

In her Decision on Remand, the administrative law judge initially resolved conflicting evidence of claimant's height. Prior pulmonary testing of claimant from 1970 to 1985 recorded a height of 169 centimeters (cm.). Dr. Patterson's testing recorded a height of 165 cm. on November 14, 1991. The administrative law judge therefore issued a Notice and Order on January 8, 1992, directing Dr. Patterson to ascertain claimant's height and make any necessary adjustment to claimant's respiratory classification under the AMA *Guides*. Dr. Patterson reported a height of between 165 and 166 cm. if claimant "stood comfortably," 167 cm. if he was "erect; and 168 cm. if he "stretched." He attributed the discrepancy with the previously recorded height of 169 cm. in May 1985 to aging. The administrative law judge accepted 167 cm. as claimant's height, finding that reading to be consistent with the instruction in the AMA *Guides* that the patient "stand upright."

The administrative law judge next reviewed claimant's FVC, FEV 1, FEV 1:FVC, and DCO values from Dr. Patterson's pulmonary function study. The pulmonary function study conducted by Dr. Patterson resulted in three recorded values being classified as Class II and one recorded value as

Class III. Although Dr. Patterson opined on two occasions that he would categorize claimant's respiratory impairment as Class III, *i.e.,* 30 to 45 percent, *see* JXS 1, 4, the administrative law judge found that the AMA *Guides* are not instructive for determining the class of claimant's impairment.

The administrative law judge next calculated the extent of claimant's pulmonary impairment by averaging the percent of impairment from claimant's pulmonary function readings that are within Class II pursuant to the AMA *Guides*: FVC-14 percent, FEV 1: FVC-19 percent, DCO-14 percent averaged to 15.65 percent, which she rounded-up to 16 percent. She then averaged this Class II average of 16 percent with the sole Class III reading of 43 percent for FEV 1 to derive a whole man impairment of 29.5 percent, which she rounded-up to 30 percent, which represents the lowest percentage impairment rating within Class III of the AMA *Guides*. Pursuant to this averaging formula, the administrative law judge found claimant to be entitled to compensation for a 30 percent impairment.

When an employee voluntarily retires and his occupational disease becomes manifest subsequent to his retirement, his recovery is limited to an award for permanent partial disability based upon the extent of his medical impairment as measured pursuant to the AMA *Guides*. *See* 33 U.S.C. §§902(10), 908(c)(23), 910(d)(1) and (2) (1988). The administrative law judge must rely on medical evidence in determining the extent of the impairment; however, the level of a claimant's disability is a factual determination which is appropriately determined by the administrative law judge based on the medical evidence of record. *Larrabee v. Bath Iron Works Corp.*, 25 BRBS 185, 187-188 (1991).

We hold that the administrative law judge erred in both calculating claimant's impairment pursuant to an averaging formula and in denying claimant's motion to depose Dr. Patterson. Although the administrative law judge is entitled to weigh the medical evidence and draw her own inferences from it, *see Phillips v. Newport News Shipbuilding and Dry Dock Co.,* 22 BRBS 94 (1988), the administrative law judge's decision to average the four pulmonary function readings of record cannot be affirmed, since that calculation is neither supported by the testimony of record nor the AMA *Guides*. Thus, the administrative law judge's calculation is unsupported by substantial evidence. Moreover, Section 702.339 of the regulations indicates that an administrative law judge should conduct an evidentiary inquiry "in such a manner as to best ascertain the rights of the parties." 20 C.F.R. §702.339; *see generally Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 40, 45 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. June 15, 1993). In the instant case claimant, in his motion to depose Dr. Patterson, proffered that he would obtain Dr. Patterson's opinion as to the exact percentage of claimant's respiratory impairment within the 30 to 45 percent Class III range he identified in his reports. The administrative law judge's decision to deny claimant's request to depose Dr. Patterson therefore foreclosed admittance into the record of probative evidence directly addressing the issue of the extent to claimant's impairment. Accordingly, we vacate the administrative law judge's finding of a 30 percent impairment, and remand the case for the administrative law judge to reopen the record for the deposition testimony of Dr. Patterson and reconsideration of the extent of claimant's overall impairment based on the medical evidence of record.

Claimant additionally challenges the attorney's fee awarded by the administrative law judge. After the issuance of the administrative law judge's Decision and Order on Remand, claimant submitted an attorney's fee petition to the administrative law judge for services rendered on claimant's behalf from January 6, 1986, to March 25, 1992. The administrative law judge reduced the time period to the dates the case was before the Office of Administrative Law Judges, *i.e.*, June 27, 1991, to March 23, 1992. During this period, claimant's counsel sought an attorney's fee of $2,143.75, representing 12.25 hours at $175 per hour. After considering employer's objections to the fee petition, the administrative law judge disallowed two hours requested in the fee petition. Moreover, notwithstanding the absence of objection by employer, the administrative law judge found excessive the remaining compensable hours requested, as well as the requested hourly rate, and reduced the fee award to $1,600.

We agree with claimant that the administrative law judge erred by failing to specify the number of hours she reduced from the fee petition or the hourly rate by which claimant's counsel was awarded a fee of $1600. Attorney's fees must be awarded in accordance with Section 28 of the Act, 33 U.S.C. §928, and the applicable regulation, 20 C.F.R. §702.132. In the instant case, the administrative law judge's failure to set forth the specific hours which she reduced, or the hourly rate upon which she based claimant's award, makes it impossible for the Board to apply its standard of review. *See generally Ballesteros v. Willamette Western Corp.*, 20 BRBS 184 (1988). Accordingly, we vacate the administrative law judge's fee award and remand the award to the administrative law judge; on remand, the administrative law judge must make appropriate findings and set forth the specific hours and hourly rate awarded to counsel. *See* 5 U.S.C. §557(c)(3)(A).

Claimant's counsel has submitted a fee petition for work performed before the Board regarding his initial appeal, BRB No. 86-1117, requesting a fee of $2,341.25, representing 8.75 hours of attorney services rendered at a rate of $175 per hour, and 18 hours of services performed by a law clerk at a rate of $45 per hour. Employer objects to the request, arguing that the number of hours expended and the hourly rate for attorney time are excessive.

Because claimant's initial appeal resulted in a greater award of compensation on remand than the administrative law judge awarded in her initial Decision and Order, counsel is entitled to a fee reasonably commensurate with the necessary work performed before the Board. *See generally Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992). In this regard, we agree with employer's objection that time expended challenging the administrative law judge's responsible employer determination was unnecessary, as claimant has no cognizable interest in the administrative law judge's resolution of this issue. *See, e.g., Shaw v. Todd Pacific Shipyards Corp.*, 23 BRBS 96, 100 (1989). Claimant's twenty-one page Petition for Review devoted approximately 4 pages, or 20 percent, to the responsible employer issue, and claimant's fee petition states that the law clerk expended 18 hours to prepare the Petition for Review. We therefore disallow 3.5 of the 18 hours requested by counsel for work performed by a law clerk. After a review of the remainder of counsel's fee petition and employer's objections thereto, we find the hours requested by counsel, and the hourly rates sought reasonably commensurate with the necessary work done. *See* 20 C.F.R. §802.203. We therefore

award counsel a fee of $2,183.75, representing 8.75 hours of attorney services at an hourly rate of $175, and 14.5 hours for law clerk services at an hourly rate of $45, payable by employer.

Accordingly, the administrative law judge's Decision and Order on Remand is vacated and the case remanded for the administrative law judge to reopen the record for the submission of Dr. Patterson's deposition testimony and reconsideration of the extent of claimant's impairment consistent with this opinion. The administrative law judge's Supplemental Decision and Order - Awarding Attorney Fees is vacated and remanded for further consideration consistent with this opinion. Claimant's counsel is awarded a fee of $2,183.75 for work performed before the Board in BRB No. 86-1117, to be paid directly to counsel by employer.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge