U.S. Department of Labor

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

BRB Nos. 20-0433 BLA and
21-0087 BLA

MARSHALL A. TEASTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MINGO LOGAN COAL COMPANY	)	DATE ISSUED: 01/24/2022
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Petitioner	)	
	)	
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 in a Subsequent Claim of Lystra A. Harris, Administrative Law Judge, United States Department of Labor, and the Proposed Order Supplemental Award Fee for Legal Services of Rozella Brooks, 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 and its Carrier.

Ann Marie Scarpino (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Lystra A. Harris's Decision and Order Awarding Benefits in a Subsequent Claim (2018-BLA-06232) filed on February 4, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).[1] Employer also appeals the Proposed Order Supplemental Award Fee for Legal Services (Supplemental Award) of Claims Examiner Rozella Brooks (the district director) on an attorney fee petition filed pursuant to the provisions of the Act.

The ALJ found Claimant established at least twenty-seven years of underground coal mine employment. She determined Claimant also established complicated pneumoconiosis arising out of his coal mine employment and thus found he invoked the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3). 20 C.F.R. §§718.203(b), 718.304. She therefore found Claimant established a change in an applicable condition of entitlement, 20 C.F.R. §725.309(c),[2] and awarded benefits. The district director subsequently awarded Claimant's counsel attorney fees in the amount of $5,837.50 and $80.00 in expenses.

[1] Claimant filed a prior claim for benefits on October 28, 2013, and the district director denied it on May 23, 2014, for failure to establish any element of entitlement. Decision and Order at 2; Director's Exhibit 1.

[2] When a miner files a claim for benefits more than one year after the denial of a previous claim becomes final, the ALJ must also deny the subsequent claim unless he finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Because Claimant did not establish any element of entitlement in his prior claim, he had to submit evidence establishing at least one element to obtain review of the merits of his current claim. *Id*.

On appeal, Employer argues the ALJ lacked authority to hear and decide the case because she was not appointed in a manner consistent with the Appointments Clause of the Constitution, Art. II § 2, cl. 2.[3] It further asserts the removal provisions applicable to the ALJ rendered her appointment unconstitutional. On the merits, Employer asserts the ALJ erred in finding Claimant established complicated pneumoconiosis.[4] Additionally, it challenges the district director's attorney fee award as excessive. Claimant responds in support of the ALJ's award of benefits and asserts Employer's objections to the district director's fee award is premature because the ALJ has not ruled on his petition. 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.

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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

Appointments Clause

[3] 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.

[4] We affirm, as unchallenged, the ALJ's finding that Claimant established twenty-seven years of underground coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3-5; Hearing Transcript at 9, 19.

[5] Because Claimant performed his most recent coal mine employment in West Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 3; Director's Exhibit 4; Hearing Transcript at 19.

Employer urges the Board to vacate the award and remand the case to be heard by a constitutionally appointed ALJ pursuant to *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018).[6] Employer's Brief at 12-19; Employer's Reply Brief at 2. It acknowledges the Secretary of Labor (Secretary) ratified the prior appointment of all sitting Department of Labor (DOL) ALJs on December 21, 2017,[7] but maintains the ratification was insufficient to cure the constitutional defect in the ALJ's prior appointment. Employer's Brief at 12-19; Employer's Reply Brief at 2-3.

The Director argues the ALJ had the authority to decide this case because the Secretary's ratification brought her appointment into compliance. Director's Brief at 3-5. He also maintains Employer failed to rebut the presumption of regularity that applies to the actions of public officers like the Secretary. *Id.* at 13. We agree with the Director's positions.

An appointment by the Secretary need only be "evidenced by an open, unequivocal act." *Marbury v. Madison*, 5 U.S. 137, 157 (1803). Ratification "can remedy a defect" arising from the appointment of an official when an agency head "has the power to conduct an independent evaluation of the merits [of the appointment] and does so." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) (internal quotations omitted); *see also McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338 (6th Cir. 2017). It is permissible so long as the agency head: 1) had at the time of ratification the authority to

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[6] *Lucia* involved a challenge to the appointment of an ALJ at the Securities and Exchange Commission (SEC). 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. Commissioner*, 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.

[7] The Secretary of Labor (Secretary) issued a letter to the ALJ on December 21, 2017, stating:

> In my capacity as head of the Department of Labor, and after due consideration, I hereby ratify the Department's prior appointment of you as an [ALJ]. This letter is intended to address any claim that administrative proceedings pending before, or presided over by, [ALJs] of the U.S. Department of Labor violate the Appointments Clause of the U.S. Constitution. This action is effective immediately.

Secretary's December 21, 2017 Letter to ALJ Harris.

take the action to be ratified; 2) had full knowledge of the decision to be ratified; and 3) made a detached and considered affirmation of the earlier decision. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016). Under the "presumption of regularity," courts presume public officers have properly discharged their official duties, with "the burden shifting to the attacker to show the contrary." *Advanced Disposal*, 820 F.3d at 603, *citing Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001).

Congress 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. Thus, at the time he ratified the ALJ's appointment, the Secretary had the authority to take the action to be ratified. *Wilkes-Barre*, 857 F.3d at 372; *Advanced Disposal*, 820 F.3d at 603.

Under the presumption of regularity, we therefore presume the Secretary had full knowledge of the decision to be ratified and made a detached and considered affirmation. *Advanced Disposal*, 820 F.3d at 603. Moreover, the Secretary did not generally ratify the appointment of all ALJs in a single letter. Rather, he specifically identified Judge Harris and gave "due consideration" to her appointment. Secretary's December 21, 2017 Letter to ALJ Harris. The Secretary further acted in his "capacity as head of the Department of Labor" when ratifying the appointment of Judge Harris "as an [ALJ]." *Id*.

Employer does not assert the Secretary had no "knowledge of all the material facts" or did not make a "detached and considered judgement" when he ratified Judge Harris' appointment. Employer therefore has not overcome the presumption of regularity. *Advanced Disposal*, 820 F.3d at 603-04 (lack of detail in express ratification insufficient to overcome the presumption of regularity); *see also Butler*, 244 F.3d at 1340. The Secretary thus properly ratified the ALJ's appointment. *See Edmond v. United States*, 520 U.S. 651, 654-66 (1997) (appointment valid where the Secretary of Transportation issued a memorandum "adopting" assignments "as judicial appointments of [his] own"); *Advanced Disposal*, 820 F.3d at 604-05 (National Labor Relations Board's retroactive ratification of the appointment of a Regional Director with statement it "confirm[ed], adopt[ed], and ratif[ied] nunc pro tunc" all its earlier actions was proper). Consequently, we reject Employer's argument that this case should be remanded for a new hearing before a different ALJ.

Removal Provisions

Employer also challenges the constitutionality of the removal protections afforded DOL ALJs. Employer's Brief at 12-18; Employer's Reply Brief at 3-5. Employer generally argues the removal provisions in the Administrative Procedure Act (APA), 5 U.S.C. §7521, are unconstitutional, citing Justice Breyer's separate opinion and the

Solicitor General's argument in *Lucia*. *Id.* 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), and the United States Court of Appeals for the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), *vacated,* 594 U.S. , 141 S. Ct. 1970 (2021). *Id.*

Employer's arguments are without merit, as the only circuit court to squarely address this precise issue has upheld the statute's constitutionality. *Decker Coal Co. v. Pehringer*, F.4th , No. 20-71449, 2021 WL 3612787 at *10-11 (9th Cir. Aug. 16, 2021) (5 U.S.C. §7521 is constitutional as applied to DOL ALJs).

Further, 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, 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*. U.S. 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, where the CFPB was an "independent agency led by a single Director and vested with significant executive power."[8] 140 S. Ct. at 2201. It did not address ALJs.

Finally, in *Arthrex*, the Supreme Court vacated the Federal Circuit's judgment. 141 S. Ct. 1970. The Court explained "the *unreviewable authority* wielded by Administrative Patent Judges during inter partes review is incompatible with their appointment by the Secretary to *an inferior office*." *Id.* (emphasis added). In contrast, DOL ALJs' decisions are subject to further executive agency review by this Board.

Although Employer generally summarizes these cases, it has not explained how or why these legal authorities should apply to ALJs or otherwise undermine the ALJ's ability to hear and decide this case. Congressional enactments are presumed to be constitutional

[8] In addition to his "vast rulemaking [and] enforcement" authorities, the Director of the CFPB 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).

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 [C]ongressional 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). Here, 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) (a reviewing court should not "consider far-reaching constitutional contentions presented in [an off-hand] manner"). Thus, Employer has not established that the removal provisions at 5 U.S.C. §7521 are unconstitutional either facially or as applied. *Pehringer*, F.4th , No. 20-71449, 2021 WL 3612787 at *10-11.

Complicated Pneumoconiosis

Section 411(c)(3) of the Act provides an irrebuttable presumption 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 large 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 (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. 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); *E. Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255-56 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc).

The ALJ found the x-ray evidence established Category A complicated pneumoconiosis, the computed tomography (CT) scans were in equipoise, and the medical opinions did not support a finding of complicated pneumoconiosis. 20 C.F.R. §718.304(a)-(c).[9] Weighing all of the categories together, she found the other evidence did not diminish

[9] The ALJ found there is no biopsy evidence in the record. Decision and Order at 8 n.6; *see* 20 C.F.R. §718.304(b). Although Employer acknowledges the parties did not submit biopsy evidence, it alleges "there is reference to biopsy evidence diagnosing sarcoidosis." Employer's Brief at 26; *see also* Employer's Reply Brief at 9.

the positive x-rays' probative force. Decision and Order at 34. We reject Employer's contentions that the ALJ erred.

X-rays – 20 C.F.R. §718.304(a)

The ALJ considered ten interpretations of five x-rays. Decision and Order 12. All the interpreting physicians are dually-qualified Board-certified radiologists and B readers with the exception of Dr. Zaldivar, who is a Board-certified pulmonologist only.[10] *Id.* Each physician identified simple pneumoconiosis.[11] *Id.*

Drs. DePonte, Crum, and Kendall read the May 19, 2016 x-ray as negative for complicated pneumoconiosis. Director's Exhibits 11 at 16, 29; Employer's Exhibit 15. Drs. Crum and Zaldivar read the February 17, 2017 x-ray as negative for complicated pneumoconiosis. Director's Exhibits 53, 62. Dr. Crum read two x-rays dated September 18, 2018, and September 19, 2018, as positive for complicated pneumoconiosis and no other physicians interpreted these films. Claimant's Exhibits 1, 2.

Dr. Crum also read a May 15, 2019 x-ray as positive for complicated pneumoconiosis while Dr. Zaldivar read it as negative.[12] Claimant's Exhibit 6; Employer's Exhibits 16, 26. The ALJ credited Dr. Crum's positive reading based on his dual qualifications. *Id*. at 13. Noting pneumoconiosis is a progressive disease and the three most recent x-rays are positive, the ALJ found the x-ray evidence established complicated pneumoconiosis. 20 C.F.R. §718.304(a); Decision and Order at 13.

[10] Dr. Zaldivar was a B reader until January 31, 2018, when his certification lapsed. Decision and Order at 12; Director's Exhibit 62

[11] Employer challenges the ALJ's conclusion that Claimant established "simple pneumoconiosis" because the International Labour Organization (ILO) classification form for x-rays only asks the interpreting physician to identify changes consistent with "pneumoconiosis." Employer's Brief at 20 n.12. We disagree. Although the terms do not appear in the text of the Act, pneumoconiosis is commonly described as either "simple" or "complicated" to indicate the severity of the disease. Simple pneumoconiosis is generally regarded as a milder form of the disease, while complicated pneumoconiosis is considered to be more advanced and severe. *Usery v. Turner Elkhorn Mining Co*., 428 U.S. 1, 7 (1976). The ILO classification form recognizes both forms of the disease based on identification of either small or large opacities. *See also* 20 C.F.R. §718.202(a)(1).

[12] Dr. Zaldivar interpreted this x-ray on May 19, 2019, and November 7, 2019. Employer's Exhibits 16, 26.

Employer contends Dr. Crum's x-ray readings are equivocal because he suggested the radiological findings could be confirmed by a CT scan.[13] Employer's argument is meritless since Dr. Crum specifically read a subsequent CT scan as positive for complicated pneumoconiosis, thereby confirming his own x-ray readings. In addition, contrary to Employer's contention, the ALJ permissibly accorded more weight to Dr. Crum's positive reading of the May 15, 2019 x-ray based on his *radiological* qualifications. *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; *see also Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59 (6th Cir. 1995). We therefore affirm, as supported by substantial evidence, the ALJ's finding that Claimant established complicated pneumoconiosis based on the x-ray evidence. 20 C.F.R. §718.304(a); *see Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528 (4th Cir. 1998).

Other Medical Evidence – 20 C.F.R. §718.304(c)

CT Scans

The parties submitted readings of Claimant's December 4, 2018 CT scan. Decision and Order at 14-16. Dr. Crum noted round pulmonary nodules consistent with simple pneumoconiosis in all lung zones that "would correspond to R, Q, T and U nodules" on an ILO form, along with "areas of emphysema which is also associated with dust exposure" and "hilar and mediastinal adenopathy which appears partially calcified and is also a very common finding seen with pneumoconiosis." Claimant's Exhibit 5. He identified "numerous areas of bilateral coalescence" and "areas of likely large opacit[ies]" in the right lung, including "a linear nodular large opacity measuring 2.2 [centimeters] in greatest dimension." *Id*. He also noted "likely large opacit[ies]" in the right lung base measuring 3.1, 1.5, 1.4 and 1.2 centimeters. *Id*. Dr. Crum indicated the "location of these large opacities and their linear nodular appearance would make them very difficult to evaluate and see on chest x-rays." *Id*. He concluded that the large opacities are "most consistent with complicated pneumoconiosis/progressive massive fibrosis category B." *Id*. In

[13] On the ILO form for the September 18, 2018 x-ray Dr. Crum noted "[illegible] A opacities developing in mid lungs which could be confirmed with CT scan [illegible]" and on the ILO form for the September 19, 2018 x-ray he noted, "[illegible] A opacities again noted which could be confirmed with CAT scan. . . .[illegible] extensive nodularity [illegible]," Decision and Order at 10-11, Claimant's Exhibits 1, 2. However, Dr. Crum did not make any comments regarding CT scan confirmation on the ILO form for his reading of the May 15, 2019 x-ray, having already identified complicated pneumoconiosis on a December 4, 2018 CT scan, as discussed infra. Claimant's Exhibits 5, 6.

contrast, Dr. Tarver noted findings of simple pneumoconiosis and identified "multiple small 2mm nodules scattered throughout both lungs," but stated "[t]here are no large opacities or masses." Employer's Exhibit 17. Because Drs. Crum and Tarver are both dually qualified radiologists, the ALJ gave "equal probative weight" to their interpretations and found the CT scan evidence "inconclusive."[14] *Id.* As Employer does not challenge this finding, it is affirmed.[15] *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Treatment Records

The ALJ noted the parties submitted voluminous hospitalization and treatment records, which she found neither support nor refute that Claimant has complicated pneumoconiosis. Decision and Order at 29-32; Director's Exhibits 26, 31, 33; Employer's Exhibits 1, 18, 19, 20, 21, 22, 23. The ALJ observed:

> Several records, even those including radiographic interpretations, contain no mention of pneumoconiosis. That, however, does not equate to a medical determination rejecting the presence of pneumoconiosis. Additionally, the records which discuss sarcoidosis do not establish that Claimant's pulmonary impairment, his symptoms, or the abnormalities identified on his x-rays and CT scans are the result of that disease (and not of pneumoconiosis.) This is because it is not clear if the physicians

[14] We reject Employer's assertion that because only Dr. Tarver addressed the requirements of 20 C.F.R. §718.107, Claimant did not meet its burden of establishing Dr. Crum's CT scan is medically acceptable and relevant. Employer's Brief at 4; Employer's Reply Brief at 6. The ALJ permissibly found Dr. Tarver's opinion was sufficient to satisfy the requirements of Section 718.107(b) for all of the CT scans of record. *See Webber v. Peabody Coal Co.*, 23 BLR 1-123, 135-136 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151 (1989) (en banc); Decision and Order at 15-16. Moreover, Employer does not explain why the ALJ's alleged error makes a difference since the ALJ found the CT scan evidence inconclusive.

[15] Employer asserts the ALJ erred in finding Dr. Tarver's June 21, 2016 interpretation of an earlier June 18, 2009 CT scan is not in the record. Employer's Brief at 24 n.13; Employer's Reply Brief at 6; *see* Decision and Order at 14 n.12. We consider the ALJ's error, if any, harmless as the ALJ observed correctly that the June 18, 2009 CT scan predates the denial of Claimant's prior claim and therefore she could not consider it in the current claim. Decision and Order at 14 n.12, *citing Cline v. Westmoreland Coal Co.*, 21 BLR 1-69, 1-74 (1997); *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

> who created those records considered pneumoconiosis as a possible diagnosis and, if so, on what basis such a diagnosis was rejected.

Decision and Order at 33. Because the ALJ acted within her discretion in weighing Claimant's treatment records, we reject Employer's assertion that they prove Claimant does not have complicated pneumoconiosis. *See Hicks*, 138 F.3d at 528; *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984) (ALJ has discretion to determine the weight to accord an x-ray that is silent on the existence of pneumoconiosis).

Medical Opinions

Dr. Green is the only physician to diagnose complicated pneumoconiosis. The ALJ gave no weight to Dr. Green's opinion because she found it was based solely on Dr. Crum's x-ray readings and not on "means other than" those described in 20 C.F.R. §§718.304(a), (b). Decision and Order at 28, *quoting* 20 C.F.R. §718.304(c); *see* Claimant's Exhibit 2.

The ALJ also noted that while Employer's experts did not diagnose complicated pneumoconiosis, she found their opinions entitled to weight.[16] Decision and Order at 28. Contrary to Employer's contention, having affirmed the ALJ's finding that the CT scan evidence is inconclusive, we see no error in her determination that Dr. Zaldivar's and Dr. Rosenberg's opinions are less persuasive because they relied on Dr. Traver's negative CT scan reading to exclude a diagnosis of complicated pneumoconiosis. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); Decision and Order at 28. Therefore, we affirm both the ALJ's determination that Claimant is unable to establish complicated pneumoconiosis based on the medical opinion evidence, and also that the opinions of Drs. Zaldivar and Rosenberg did not establish the absence of the disease. 20 C.F.R. §718.304(c).

[16] Dr. Zaldivar observed the x-rays and CT scans showed pulmonary nodules consistent with pneumoconiosis and sarcoidosis. Director's Exhibit 62; Employer's Exhibit 25 at 119. He initially stated he could not determine the cause of the nodules without a biopsy. He later concluded Claimant does not have complicated pneumoconiosis based on Dr. Tarver's reading. Director's Exhibits 62, 65 at 15; Employer's Exhibit 25 at 116-120. Dr. Rosenberg opined Claimant has simple pneumoconiosis and sarcoidosis. Director's Exhibit 66; Employer's Exhibit 2, 24 at 19. He also opined that Dr. Tarver's CT scan showed no evidence of complicated pneumoconiosis. Employer's Exhibit 24 at 19-20, 23-27, 36.

Weighing the Evidence as a Whole

Considering all of the categories of evidence together, the ALJ gave greatest weight to the more recent x-rays and found Claimant established complicated pneumoconiosis. Decision and Order at 33-34. Although Employer generally disagrees with this finding, there is no basis to remand this case. Contrary to Employer's contention, the ALJ did not take "the path of least resistance" in crediting the positive x-ray evidence but rather weighed all evidence as she was required to do and permissibly found Claimant established complicated pneumoconiosis. Employer's Brief at 23-25; s*ee Cox*, 602 F.3d at 283; *Scarbro*, 220 F.3d at 255-56; *Melnick*, 16 BLR at 1-33-34. Employer's arguments 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).

Therefore, we affirm the ALJ's finding that Claimant established complicated pneumoconiosis, thereby invoking the irrebuttable presumption, and establishing a change in an applicable condition of entitlement.[17] Decision and Order at 34; 20 C.F.R. §§718.304, 725.309(c); *Cox*, 602 F.3d at 283; *Melnick*, 16 BLR at 1-33-34. We further affirm, as unchallenged, the ALJ's conclusion that Claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §718.203(b); *see Skrack*, 6 BLR at 1-711; Decision and Order at 34-35. Thus, we affirm the award of benefits.

District Director's Supplemental Attorney Fee Award for Legal Services

Claimant's counsel (Counsel) submitted an itemized fee petition, requesting a fee for legal services performed before the district director between January 26, 2016, and August 9, 2018. Counsel requested attorney fees in the amount of $8,237.50, representing $4,200 for 12.00 hours of legal services performed by attorney Joseph E. Wolfe at an hourly rate of $350.00, $675 for 2.25 hours of legal services performed by attorney Andrew Delph, Jr., at an hourly rate of $300.00, $2,000 for 10.0 hours of legal services performed by attorney Brad A. Austin at an hourly rate of $200.00; $937.50 for 6.25 hours of legal services performed by attorney Victoria S. Herman at an hourly rate of $150.00, $225 for 1.50 hours of legal services performed by attorney Rachel Wolfe at an hourly rate of

[17] Because we have affirmed the ALJ's conclusion the Claimant established complicated pneumoconiosis, we need not address Employer's arguments regarding the preamble to the revised regulations or its assertion that the ALJ erred in calculating the length of Claimant's smoking history. Employer's Brief at 3, 23. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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$150.00, and $200 for 2.00 hours of work performed by legal assistants at an hourly rate of $100.00. Counsel also requested $80.00 in expenses. 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 disallowed 4.50 hours for Mr. Wolfe's requested legal services and 2.25 hours for Mr. Austin's requested legal services for entries that were clerical in nature. The district director therefore awarded $5,837.50 in attorney fees and $80.00 in expenses.

Employer argues that Mr. Wolfe's requested hourly rate of $350.00 is unsupported and should be reduced. Employer's Brief at 28; Employer's Reply Brief at 15. It also states it "would not oppose" an hourly rate of $150 for Mr. Austin and Ms. Wolfe, and an hourly rate of $100 for the legal assistants. It further objects to certain quarter-hour entries for work Mr. Wolfe and Mr. Austin performed and asserts they should be disallowed or reduced because they are clerical in nature or involve review of routine documents. Claimant responds, asserting that because the ALJ has not ruled on its fee petition, it is premature to appeal the district director's award to this Board.[18] Claimant's Brief at 21. Employer filed a reply brief reiterating its arguments.

The amount of an attorney's fee award 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. *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 that 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 attorney's fees to award under a fee-shifting statute, the United States 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. *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The lodestar method is the

[18] Counsel contends Employer's arguments regarding his fee petition are premature; however, he refers to his work before the ALJ, where he has requested $11,650.00 in legal fees and $3,883.08 in expenses. Employer's Brief at 27 n.16; Employer's Reply Brief at 14 n.7. This appeal concerns only the district director's fee award. There is no attorney fee award by the ALJ before us.

appropriate starting point for calculating fee awards under the Act. *Bentley*, 522 F.3d at 663.

Hourly Rate

An attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). The prevailing market rate is "the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *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."[19] *Blum*, 465 U.S. at 896 n.11; *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 617 (6th Cir. 2007).

Employer contends Counsel did not show that Mr. Wolfe's requested hourly rate of $350.00 is in line with the prevailing market rate of similarly experienced black lung counsel in Virginia who work for fee-paying clients before the DOL. Employer's Brief at 29; Employer's Reply Brief at 14-16. It states Mr. Wolfe's hourly rate "should be reduced to no more than $275 per hour." *Id*. It also generally asserts it "would not oppose" an hourly rate of $150.00 for Mr. Austin and Ms. Wolfe or $100 an hour for the legal assistants. *Id*.

Employer raised similar objections to Mr. Wolfe's requested hourly rate before the district director. Employer's Opposition to Fee Petition Before District Director at 1-3. After considering Employer's arguments, Counsel's fee petition, and "the complexity of the issues, the qualifications of the representative, and the level at which the claim was decided[,]" the district director reduced Attorney Wolfe's requested hourly rate from $350.00 to $300.00. Supplemental Award at 2. She explained that this is a "routine case which did not call for special ability and effort" and that "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*. However, Employer fails to explain why the district director's award of a $300.00 hourly rate to Mr. Wolfe is arbitrary, capricious, or an abuse of discretion under

[19] In support of his fee petition, Counsel provided a list of qualifications for each attorney and legal assistant, rates from the National Law Journal's 2014 Survey of Law Firm Economics, and seventy black lung cases in which the district director awarded attorney fees to his firm. Fee Petition at 1-12, 24-25.

the specifics facts of this case. *See Bentley*, 522 F.3d at 661; *Jones*, 21 BLR at 1-108. We therefore affirm it. *See Skrack*, 6 BLR at 1-711.

We also reject Employer contention that $150.00 is a more reasonable hourly rate for both Mr. Austin and Ms. Wolfe. Employer specifically stated before the district director that "[n]o objection is noted for Mr. Austin's $200/hour charge." Employer's Opposition to Fee Petition Before District Director at 8. In addition, Claimant only requested an hourly rate of $150 for Ms. Wolfe's services and an hourly rate of $100 for the legal assistants, consistent with what it argues is reasonable to us. Fee Petition at 1. We therefore affirm the district director's determination as to the appropriate hourly rates for Mr. Austin, Ms. Herman, Ms. Wolfe, and the legal assistants.

Allowable Hours

We reject Employer's contention that Claimant's counsel improperly billed in quarter-hour increments. 20 C.F.R. §802.203(d)(3); Employer's Brief at 29; Employer's Reply Brief at 17. We also reject Employer's contention the district director failed to address its objections to certain legal services that Mr. Wolfe billed for as being not compensable because they were clerical in nature. The district director disallowed twenty-seven of the thirty entries objected-to.[20] Supplemental Award at 2. Each of the three remaining entries were found to be compensable legal work.[21] *Lanning v. Director,*

[20] The Director disallowed twenty-seven of thirty entries that Employer challenged as clerical. The disallowed activities were performed on the following dates; April 15, 2016, April 27, 2016, May 6, 2016, May 16, 2016, May 23, 2016, June 6, 2016, June 29, 2016, July 8, 2016, December 8, 2016, December 14, 2016, December 20, 2016, December 23, 2016, January 9, 2017, January 21, 2017, February 10, 2017, February 21, 2017, March 21, 2017, March 26, 2017, March 29, 2017, April 8, 2017, June 2, 2017, January 11, 2018, January 25, 2018, May 7, 2018, May 30, 2018, July 2, 2018, August 9, 2018. Supplemental Award at 2.

[21] We see no error in the district director's determination that legal services Mr. Wolfe performed on July 23, 2016, February 3, 2017, and April 3, 2017, are compensable. Supplemental Award at 2; Employer's Brief at 32-33. The July 23, 2016 entry was for "Review, dated 7/19/16, Letter from the RO noting objection to new regulation and medical information for disclosure only- from Scott White-WR and RO- Mingo Logan Coal Co. (JEW)." Employer's Opposition to Fee Award at 6. The February 3, 2017 entry was for "Letter submitting Evidence to the DOL - Dr. Crum's curriculum vitae and interpretation of the CXR, dated 5/19/16; copy to all parties. (JEW)." *Id.* Finally, the April 3, 2017 entry

OWCP, 7 BLR 1-314, 1-316-17 (1984); *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980). Employer does not explain why the district director's allowance of the remaining three entries as compensable legal services was arbitrary, capricious, or an abuse of discretion. *See Bentley*, 522 F.3d at 661; *Jones*, 21 BLR at 1-108.

As Employer raises no other challenges, we affirm the district director's award of $5,837.50 in attorney fees and $80.00 in expenses. *Skrack*, 6 BLR at 1-711.

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits in a Subsequent Claim and the district director's Proposed Order Supplemental Award Fee for Legal Services.

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

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was for "Review, dated 3/27/17, Order to Show Cause Abandonment of Claim/Denial-from the DOL; also Letter forwarding the Show Cause to client. (JEW)." *Id.* at 7.