BRB No. 92-1738 BLA

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| ESTATE OF J. T. GOODLOE, LARRY GOODLOE, PERSONAL REPRESENTATIVE | ) | |
| Claimant-Respondent | ) | |
| v. | ) | |
| PEABODY COAL COMPANY | ) | |
| Employer-Petitioner | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | DATE ISSUED: |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order on Remand of Lawrence E. Gray, Administrative Law Judge, United States Department of Labor.

Jack N. VanStone (VanStone & Associates), Evansville, Indiana, for claimant.

W. C. Blanton (Popham, Haik, Schnobrich & Kaufman), Minneapolis, Minnesota, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (82-BLA-1434) of Administrative Law Judge Lawrence E. Gray awarding benefits 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). Employer has also filed a supplemental petition for review, appealing the administrative law judge's

Supplemental Decision and Order Approving Attorney's Fee and Order on Motion for Reconsideration of [the] Supplemental Decision and Order Approving Attorney's Fee for work performed while the case was before the Office of Administrative Law Judges. This case is before the Board for the second time. In the Initial Decision and Order, the

administrative law judge credited the miner[1] with "no less than 33 years of qualifying coal mine employment," Initial Decision and Order at 2, and adjudicated the claim pursuant to the regulations set forth at 20 C.F.R. Part 727. The administrative law judge found that the evidence was sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(3). Initial Decision and Order at 4. The administrative law judge also found, however, that the evidence was sufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(2)-(4). Initial Decision and Order at 5-7. Accordingly, benefits were denied.

In response to an appeal by claimant and a cross-appeal by employer, the Board rejected employer's Section 727.203(a)(3) contention. The Board, however, vacated the administrative law judge's finding that rebuttal of the interim presumption was established pursuant to Section 727.203(b)(2)-(4) and remanded the case with instructions for the administrative law judge to reconsider the relevant medical evidence under these subsections and, if necessary, to consider the claim pursuant to 20 C.F.R. Part 718 and under the interim criteria contained at 20 C.F.R. §410.490. *Goodloe v. Peabody Coal Co.*, BRB Nos. 87-3817 BLA/A (Aug. 31, 1989)(unpub.).

In his Decision and Order on Remand, which is the subject of the present appeal, the administrative law judge found that the relevant evidence of record was insufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(2)-(4). Decision and Order on Remand at 2-4. Accordingly, benefits were awarded and employer filed the present appeal.

On appeal, employer does not challenge the administrative law judge's finding that the evidence of record is insufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(2), *see* Employer's Brief at 6 n.4, 24-25; *see also* Employer's Reply Brief at 12, but contends that the administrative law judge erred in finding that the evidence of record was insufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3)-(4). Claimant responds to employer's appeal, stating that employer's contentions are without merit and urging affirmance of the administrative law judge's Decision and

[1] The miner, J. T. Goodloe, died on April 14, 1989. Claimant is Larry Goodloe, who is pursuing the miner's claim as the Personal Representative of the miner's estate. Decision and Order on Remand at 1 n.1.

Order on Remand awarding benefits. In employer's Reply Brief, employer reiterates its contentions on appeal and urges the Board to reverse the administrative law judge's Decision and Order on Remand awarding benefits or, in the alternative, to vacate the award and remand the claim for reconsideration of the evidence pursuant to Section 727.203(b)(3)-(4).

With respect to the attorney's fee, claimant's counsel filed an Application For Approval of a Representative's Fee for work performed both before the Office of Administrative Law Judges and the Benefits Review Board, asking for an hourly rate of $200 plus reimbursement of expenses. Employer filed objections with the appropriate tribunal concerning the hourly rate. On July 22, 1992, the Board issued an order, holding that the hourly rate requested by claimant for work performed before the Board, $200, was excessive, and, consequently, the Board reduced the hourly rate to $150 plus reimbursement of expenses.[2] *Goodloe v. Peabody Coal Co.*, BRB Nos. 87-3817 BLA and 92-1738 BLA (Order dated July 22, 1992)(unpub.).

On December 16, 1992, Administrative Law Judge Lawrence E. Gray issued a Supplemental Decision and Order Approving Attorney's Fee, finding that claimant's counsel is entitled to the hourly rate at the time of filing the fee petition and not, as employer contends, from the time at which the services were rendered. Administrative Law Judge Gray concluded that claimant's counsel is entitled to an hourly rate of $200 for 28.25 hours plus reimbursement of $139.96 in expenses for a total of $5,789.96. Employer subsequently filed a Motion for Reconsideration with the Office of Administrative Law Judges, asking Administrative Law Judge Gray to reconsider his attorney's fee finding. Employer based his contention on the fact that the Board reduced the hourly rate from $200 to $150 because it considered the $200 hourly rate to be excessive. On January 29, 1993, Administrative Law Judge Gray issued an Order on Motion for Reconsideration of [the] Supplemental Decision and Order Approving Attorney's Fee, rejecting employer's contention, and, accordingly, the administrative law judge reaffirmed his approval of the $200 hourly rate as set forth in his

[2] The Board's order also stated that "[i]nasmuch as final decision in this case is still pending, this Order is neither enforceable nor payable until such time as an award of benefits to claimant becomes final, and that award reflects a successful prosecution of the claim." Order dated July 22, 1992.

Supplemental Decision and Order Approving Attorney's Fee and employer filed the present appeal.

On appeal, employer contends that the administrative law judge erred in stating that claimant's counsel is entitled to the hourly rate at the time his application was filed and argues that claimant's counsel is entitled only to a fee representing the prevailing hourly rate at the time the services were performed. Further, employer contends that the administrative law judge erred in awarding claimant's counsel an hourly rate of $200 since it is not claimant's counsel's customary billing rate pursuant to 20 C.F.R. §725.366 and that the hourly rate of $200 is not reasonable. Finally, employer urges the Board to reverse the administrative law judge's Supplemental Decision and Order Approving Attorney's Fee and Order on Motion for Reconsideration of [the] Supplemental Decision and Order Approving Attorney's Fee to the extent the award was based on an excessive hourly rate. Claimant's counsel responds, urging affirmance of the fee award. In employer's Reply Brief, employer reiterates its contentions on appeal and further contends that the fee award provisions at 20 C.F.R. §725.366 do not provide for enhancement of fees based either on the contingent nature of fee awards in black lung claims or on delay in the receipt of such fees. Reply Brief at 1-6. In response to employer's Reply Brief, claimant's counsel submitted a Personal Statement, stating, *inter alia*, that the hourly rate of $200 is conservative and reasonable under the circumstances and that a lesser hourly rate would be unreasonable. In response to claimant's counsel's Personal Statement, employer stated that the general circumstances described and arguments advanced by claimant's counsel have been duly considered by the appropriate tribunals. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, did not file a brief in this appeal.[3]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as

[3] Inasmuch as the administrative law judge's finding of "no less than 33 years of qualifying coal mine employment" and his findings pursuant to Sections 727.203(a)(1)-(2) and 727.203(b)(1) have never been challenged on appeal, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Further, we note that the 28.25 hours requested by claimant's counsel as well as his request for reimbursement of $139.96 in expenses have not been challenged on appeal. *See Skrack*, *supra*.

incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

With respect to the administrative law judge's rebuttal finding, employer contends that the administrative law judge erred in finding that the relevant evidence of record was insufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3). Specifically, employer contends that the administrative law judge erred in not finding that the medical opinion of Dr. Stewart was sufficient to establish rebuttal of the interim presumption at Section 727.203(b)(3), that he erred in holding employer to a higher burden of proof in establishing rebuttal and erred in his failure to discuss the deposition opinion of Dr. Howard.[4] Employer's Brief at 11-20. In finding Dr. Stewart's opinion insufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3), the administrative law judge stated that:

> [u]nder "diagnoses," Dr. Stewart only listed "mild coronary artery disease" and indicated that this condition was not related to dust exposure in the miner's coal mine employment. However, in the portion of the report that asks for an assessment of the severity of any chronic respiratory or pulmonary disease, Dr. Stewart responded, "very mild impairment but not enough to qualify for Black Lung according to standards set down by law." In his deposition, Dr. Stewart confirmed that he found the miner to have a very mild pulmonary impairment but added "but certainly not more than you would expect in a heavy smoker." Thus, from Dr. Stewart's report[,] it could be argued that the miner's mild pulmonary impairment was the type associated with Black Lung, but not severe enough to qualify him for benefits. However, from Dr. Stewart's testimony on deposition[,] it could be argued that he related the miner's mild pulmonary impairment to his cigarette smoking history. In neither Dr. Stewart's report nor his deposition does he specifically identify the etiology of the miner's pulmonary

[4] Employer also contends that "[a]fter considering and evaluating all of the relevant medical evidence, the ALJ properly originally found that the interim presumptions were rebutted on the basis that [the miner] was not totally disabled from a pulmonary or respiratory standpoint," and that the Board "did not reverse or vacate that legal conclusion," and, therefore, the Board must hold, as a matter of law, that rebuttal has been established. Employer's Brief at 11. Contrary to employer's contention, the Board vacated the administrative law judge's finding that rebuttal of the interim presumption was established pursuant to Section 727.203(b)(2)-(4). *Goodloe*, slip op. at 2-3. We therefore reject employer's contention as it is without merit.

> impairment. Accordingly, I find that Dr. Stewart did not affirmatively "rule out" any causal relationship between the miner's mild pulmonary impairment and his coal mine employment. Moreover, I find the fact that Dr. Stewart failed to invalidate unequivocally the more recent 1984 blood gas studies leads to the conclusion that he did not unequivocally "rule out" the possibility that the claimant's pulmonary impairment may have worsened subsequent to his 1979 report.

Decision and Order on Remand at 3; Director's Exhibit 16; Employer's Exhibit 6. Pursuant to Section 727.203(b)(3), the United States Court of Appeals for the Seventh Circuit, in whose jurisdiction this case arises, requires the party opposing entitlement to "rule out" coal workers' pneumoconiosis as a contributing cause of total disability by a preponderance of the evidence. *See Freeman United Coal Mining Co. v. Director, OWCP [Forsythe]*, 20 F.3d 289, 18 BLR 2-189 (7th Cir. 1994); *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 18 BLR 2-42 (7th Cir. 1993); *Keeling v. Peabody Coal Co.*, 984 F.2d 857, 17 BLR 2-38 (7th Cir. 1993); *Amax Coal Co. v. Beasley*, 957 F.2d 324, 327, 16 BLR 2-45, 2-48 (7th Cir. 1992); *Freeman United Coal Mining Co. v. Benefits Review Board [Wolfe]*, 912 F.2d 164, 14 BLR 2-53 (7th Cir. 1990); *Wetherill v. Director, OWCP*, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987). Thus, employer is required to prove that the miner's total disability did not arise in whole or in part out of his coal mine employment, 20 C.F.R. §727.203(b)(3). *Wolfe, supra*; *see Borgeson v. Kaiser Steel Corp.*, 12 BLR 1-169 (1989)(*en banc*); *see also Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994).

In the instant case, the administrative law judge, within a proper exercise of his discretion, concluded that Dr. Stewart's opinion did not affirmatively "rule out" a causal relationship between the miner's pulmonary impairment and his coal mine employment by ruling out pneumoconiosis as a cause of the miner's disability, *see Forsythe*, *supra*; *Battram*, *supra*; *Keeling*, *supra*; *Beasley*, *supra*; *Wolfe*, *supra*. The administrative law judge, in his role as trier of fact, *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985), properly evaluated the competing statements made in Dr. Stewart's report and in his deposition concerning the role of pneumoconiosis and the miner's smoking history to conclude that neither "Dr. Stewart's report nor his deposition...specifically identify the etiology of the miner's pulmonary impairment." Decision and Order on Remand at 3. The administrative law judge, therefore, properly concluded that Dr. Stewart's opinion as to the role of pneumoconiosis in the miner's impairment, *see Forsythe*, *supra*; *Battram*, *supra*; *Keeling*, *supra*; *Beasley*, *supra*; *Wolfe*, *supra*, is unclear, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Worrell v. Consolidation Coal Co.*, 8 BLR 1-158, 1-161-2

(1985); *see also Duke v. Director, OWCP*, 6 BLR 1-673 (1983). We therefore reject employer's contention that the administrative law judge erred in not finding that the medical opinion of Dr. Stewart was sufficient to establish rebuttal of the interim presumption at Section 727.203(b)(3) and its contention that the administrative law judge erred in holding employer to a higher burden of proof than the "preponderance of the evidence" standard in establishing rebuttal pursuant to Section 727.203(b)(3).

Further, employer contends that the administrative law judge erred in his failure to discuss the deposition opinion of Dr. Howard under Section 727.203(b)(3). Employer's Brief at 18-20. A review of Dr. Howard's deposition opinion, however, indicates that the opinion is insufficient, as a matter of law, to establish rebuttal of the interim presumption at Section 727.203(b)(3). In his deposition, Dr. Howard states that the miner "may have simple coal workers' pneumoconiosis," Employer's Exhibit 7, Deposition at 22, that the miner had emphysema due to smoking, Employer's Exhibit 7, Deposition at 15, and that the dramatic drop in the O2 level of the 1984 blood gas study was very unlikely due to coal dust exposure, Employer's Exhibit 7, Deposition at 12, 14. Dr. Howard, however, fails to affirmatively "rule out" a causal relationship between the miner's pulmonary impairment and his coal mine employment,[5] *see Forsythe*, *supra*; *Battram*, *supra*; *Keeling*, *supra*; *Beasley*, *supra*; *Wolfe*, *supra*. Consequently, although the administrative law judge did not discuss the deposition opinion of Dr. Howard in his analysis of the evidence under Section 727.203(b)(3), we hold that, as a matter of law, Dr. Howard's deposition opinion is insufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3), and further hold that any error with respect to the administrative law judge's failure to address this deposition opinion at Section 727.203(b)(3) is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Consequently, we affirm the administrative law judge's finding that the relevant evidence of record is insufficient to establish rebuttal of the interim presumption at Section 727.203(b)(3).

Further, employer contends that the administrative law judge erred in finding that the relevant evidence of record was insufficient to establish rebuttal of

[5] In his deposition, Dr. Howard states that he believes that chronic obstructive pulmonary disease is not an indication of pneumoconiosis, Employer's Exhibit 7, Deposition at 18-19, 26-27. This opinion is inconsistent with the definition of pneumoconiosis under the Act, which encompasses chronic obstructive pulmonary disease if it arises from coal mine employment, *see* 20 C.F.R. §727.202; *see also* 30 U.S.C. §902(b).

the interim presumption pursuant to Section 727.203(b)(4). Employer's Brief at 21-24. Rebuttal of the interim presumption pursuant to Section 727.203(b)(4) allows the party opposing entitlement to rebut the interim presumption by establishing that the miner does not have pneumoconiosis. To rebut the interim presumption pursuant to Section 727.203(b)(4), the evidence must establish both the absence of clinical pneumoconiosis and the absence of statutory pneumoconiosis as defined in the Act and regulations, *i.e.*, the absence of any chronic respiratory or pulmonary impairment arising out of coal mine employment. 20 C.F.R. §§727.203(b)(4), 727.202. In finding that the relevant medical evidence of record was insufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(4), the administrative law judge stated that:

> [o]n appeal, the miner argued to the Board that I failed to consider on rebuttal that Dr. Stewart acknowledged in his deposition that he could not say that the radiologist's x-ray interpretation of early pneumoconiosis was incorrect. In considering that statement now, I acknowledge that it interjects an equivocal element regarding Dr. Stewart's conclusion as to the existence of pneumoconiosis. Moreover, I find that the fact that Dr. Stewart did not specifically identify the etiology of the miner's mild pulmonary impairment raises the possibility that it may come within the regulatory definition of pneumoconiosis as set forth at [Section] 727.202.

Decision and Order on Remand at 3-4. The administrative law judge properly found Dr. Stewart's overall opinion to be equivocal, and, therefore, insufficient to establish rebuttal at Section 727.203(b)(4), because Dr. Stewart states in his medical opinion that the miner had a "very mild impairment but not enough to qualify for Black Lung according to standards set down by law," Director's Exhibit 16, and, in his deposition, Dr. Stewart stated that he could not say that a radiologist's x-ray interpretation of early pneumoconiosis is incorrect, Employer's Exhibit 6, Deposition at 20, *see Justice*, *supra*; *Worrell*, *supra*; *Parsons v. Director, OWCP*, 6 BLR 1-272 (1983). Further, Dr. Stewart's opinion is insufficient to establish rebuttal at Section 727.203(b)(4) since his opinion fails to provide a reasoned medical opinion that establishes both the absence of clinical pneumoconiosis and the absence of statutory pneumoconiosis as required under the Act, 20 C.F.R. §§727.203(b)(4), 727.202. *See Freeman United Coal Mining Co. v. Director, OWCP [Sylvia Shelton]*, 957 F.2d 302, 16 BLR 2-40 (7th Cir. 1992); *Dockins v. McWane Coal Co.*, 9 BLR 1-57, 1-58-9 (1986); *see also Pavesi v. Director, OWCP*, 758 F.2d 956, 7 BLR 2-184 (3d Cir. 1985). Furthermore, inasmuch as the issues involved under these subsections are essentially identical in a case such as this, in which employer has failed to rule out the existence of a chronic respiratory disease and seeks to rule out the role of coal mine

employment in claimant's respiratory disease, *Keeling v. Peabody Coal Co.*, 984 F.2d 857, 862-4, 17 BLR 2-38, 2-45-7 (7th Cir. 1993), a finding of rebuttal at subsection (b)(4) would not be possible since such a finding would be tantamount to finding that the miner's respiratory disease was caused by coal mine employment and at the same time finding that it was not caused by coal mine employment, *Chastain v. Freeman United Coal Co.*, 919 F.2d 485, 14 BLR 2-130 (7th Cir. 1990), *pet. for reh'g den'd*, 927 F.2d 969 (7th Cir. 1991).[6] Finally, contrary to employer's contention that the administrative law judge required proof, beyond any doubt, that the miner did not have both medical and statutory pneumoconiosis, Employer's Brief at 23, the administrative law judge did not hold employer to a more stringent burden of proof than the applicable "preponderance of the evidence" standard. *See* Decision and Order on Remand at 3-4. We therefore affirm the administrative law judge's finding that the relevant medical evidence of record is insufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(4). Consequently, we affirm the administrative law judge's Decision and Order Awarding Benefits on Remand.

[6] The administrative law judge thus properly made his findings at subsection (b)(3) and (b)(4) based on the same statements in the medical evidence. *See Keeling*, *supra*; *Chastain*, *supra*.

With respect to the administrative law judge's attorney's fee award, employer contends that the administrative law judge erred in finding that claimant's counsel is entitled to the hourly rate at the time of the filing of the fee petition and contends that claimant's counsel is entitled only to a fee representing the prevailing hourly rate at the time the services were performed.[7] Further, employer contends that claimant's counsel is not entitled to an enhancement of attorney fees for delay or for contingency. In his Supplemental Decision and Order Approving Attorney's Fee, the administrative law judge found that claimant's counsel is entitled to the rate at the time of the filing of the fee petition and not, as employer contends, the time at which the services were rendered. Supplemental Decision and Order Approving Attorney's Fee at 1. In response to employer's appeal, claimant's counsel states that "[a] reasonable fee in this case would be $150.00 an hour basic fee, plus 30% for delay in payment ($195.00 an hour), plus 30% for contingency ($253.50 an hour)," and, therefore, "an award of $200.00 an hour by the ALJ should be affirmed." Response Brief at 4.

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[7] Claimant's counsel filed an Application For Approval of a Representative's Fee for work performed before the Office of Administrative Law Judges in 1992. The amount of work performed by claimant's counsel before the Office of Administrative Law Judges is as follows:

1992: 0.5 hours
1991: 4.2 hours
1989: 6.1 hours
1987: 0.4 hours
1986: .25 hours
1985: 4.1 hours
1984: 12.7 hours

The award of attorney's fees pursuant to Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928, as incorporated into the Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.367(a), is discretionary and will be sustained on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980). *Marcum* requires a two-tier analysis: the adjudication official must first determine whether the service was necessary to the proper conduct of the case, and, if so, whether the time expended performing the service was excessive or unreasonable. *Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316 (1984).

Although the administrative law judge stated that the "most recent court decisions are contrary to Employer's view" that basing the fee award on the current hourly rate is improper, the administrative law judge has failed to cite authority for this proposition. Moreover, the Board and the Office of Administrative Law Judges have previously held that the prevailing hourly rate should be based on the customary rate in effect at the time the services were rendered. *See Hobbs v. Stan Flowers Co., Inc.*, 18 BRBS 65, 67 (1986), *aff'd*, *Hobbs v. Director, OWCP*, 820 F.2d 1528 (9th Cir. 1987); *Phillips v. California Stevedore & Ballast Co.*, 14 BRBS 498, 503 (1981); *see also Profitt v. Director, OWCP*, 16 BLR 3-75, 3-76 (1991).

Further, with respect to employer's contention that claimant's counsel is not entitled to an enhancement of an attorney's fee for either the contingent nature of the fee award or for delay in receipt of such award, in *City of Burlington v. Dague*, 112 S.Ct 2638 (1992), the United States Supreme Court held that enhancement of an award of attorney's fees on the basis of contingency is not permitted under various fee-shifting statutes.[8] In *Missouri v. Jenkins,* 109 S.Ct 2463 (1989), however, the United States Supreme Court held that an adjustment for delay in payment[9] is an appropriate factor in determining what constitutes a reasonable

[8] In *Dague,* 112 S.Ct. at 2641, the Supreme Court stated that its case law construing what is a "reasonable fee" applies uniformly to all fee-shifting statutes granting a reasonable fee to a prevailing party.

[9] It should be noted that an attorney's fee award does not become effective, and is thus not enforceable, until there is a successful prosecution of the claim, *see Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-17 (1993); *Beasley v. Sahara Coal Co.*, 16 BLR 1-6 (1991); *Markovich v. Bethlehem Mines Corp.*, 11 BLR 1-105, 1-106 (1987), *aff'd*, *BethEnergy Mines Corp. v. Director, OWCP [Markovich]*, 854 F.2d 632, 638 (3d Cir. 1988), and all appeals are exhausted, *see Fairley v.*

attorney's fee, *see* 20 C.F.R. §725.366(b);[10] Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928; *see also Hobbs v. Stan Flowers Co*, 18 BRBS 65 (1986), *aff'd*, 820 F.2d 1528, 1530 (9th Cir. 1987)("when the delay is extreme, reliance on historical rates-which logically might be said to contemplate normally expected delay-may render unreasonable an otherwise reasonable attorney's fee by cutting too deeply into the attorney's ultimate award"); *U.S. Department of Labor v. Triplett*, 110 S.Ct 1428, 13 BLR 2-364 (1990); *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203, 208-9 (1991); *Bennett v. Director, OWCP*, 17 BLR 1-72, 1-73-4 (1992). The Board has held, in *Bennett*, that the appropriate time to request an enhancement of attorney fees due to delay is at the time the fee petition is filed. *Bennett*, 17 BLR at 1-74; *see Bullock v. Ingalls Shipbuilding, Inc.*, 27 BRBS 90, 94 (1993)(*en banc*), *aff'd*, *Ingalls Shipbuilding, Inc. v. Director, OWCP [Biggs]*, No. 94-40066 (5th Cir. Jan. 12, 1995); *see also Ingalls Shipbuilding, Inc. v. Director, OWCP [Fairley]*, 898 F.2d 1088, 1096 (5th Cir. 1990). In the instant case, claimant's counsel failed to raise the enhancement for delay factor until claimant's counsel filed his Response with the Board to Peabody's Petition for Review of an Award of Attorney Fees dated July 28, 1993, and thus failed to timely raise the enhancement for delay issue. *See, e.g.*, *Mitchell v. United States Steel Corp.*, 7 BLR 1-68, 1-70 (1984); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982); *Taylor v. 3D Coal Corp.*, 3 BLR 1-350, 1-355 (1981). It is also noted that the administrative law judge did not refer to enhancement for delay as a factor in the fee award, *see* Supplemental Decision and Order Approving Attorney's Fee, or in responding to employer's Motion for Reconsideration, *see* Order on Motion for Reconsideration of [the] Supplemental Decision and Order Approving Attorney's Fee. Thus, claimant's counsel is precluded from now raising the enhancement for delay

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*Ingalls Shipbuilding, Inc.*, 22 BRBS 184 (1989)(*en banc* decision with Brown, J., concurring), *aff'd*, 898 F.2d 1088 (5th Cir. 1990); *Williams v. Halter Marine Service, Inc.*, 19 BRBS 248, 253 (1987).

[10] Section 725.366(b) states that:

> (b) Any fee approved under paragraph (a) of this section shall be reasonably commensurate with the necessary work done and shall 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 fee requested....

20 C.F.R. §725.366(b).

issue under *Bennett*. *See Hobbs*, *supra*; *Phillips*, *supra*; *see also Profitt*, *supra*. To the extent that *Fisher v. Todd Shipyards Corp.*, 21 BRBS 323, 327-8 (1988) and *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49, 55 (1988), in which the Board stated that

"[a]ugmentation of the hourly rate to reflect delay in payment constitutes an abuse of discretion under the Act because factors such as risk of loss and delay of payment occur generally in Longshore cases and are considered to be incorporated into the normal hourly rate charged by counsel," *Blake*, 21 BRBS at 55; *Fisher*, 21 BRBS at 328, and which was issued prior to the United States Supreme Court's decision in *Jenkins,* are inconsistent with this opinion, those decisions are overruled.

Nevertheless, we vacate the administrative law judge's Supplemental Decision and Order Approving Attorney's Fee and Order on Motion for Reconsideration of [the] Supplemental Decision and Order Approving Attorney's Fee and remand the case to the Office of Administrative Law Judges with instructions for the administrative law judge to determine claimant's counsel's customary billing rate at the time the services were rendered.[11] *See* 20 C.F.R. §725.366.

Accordingly, the Decision and Order on Remand of the administrative law judge awarding benefits is affirmed. The Supplemental Decision and Order Approving Attorney's Fee and Order on Motion for Reconsideration of [the] Supplemental Decision and Order Approving Attorney's Fee is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[11] Further, we note our agreement with employer that contingent fee agreements are invalid in black lung cases under the Act. 20 C.F.R. §725.365; *see also Triplett*, *supra*. The Board has routinely held that the regulatory prohibition against contingent fee agreements does not violate the nature and purpose of the Act. *See Wells v. Director, OWCP*, 9 BLR 1-63 (1986); *see generally Dague*, *supra*.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge