BRB No. 97-1393 BLA

PEARL M. JONES (Widow of NORMAN JONES) Claimant-Respondent v. BADGER COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER *EN BANC*

Appeal of the Decision and Order - Awarding Benefits and the Supplemental Decision and Order Granting Attorney Fees of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Robert F. Cohen Jr. (Cohen, Abate & Cohen, L.C.), Fairmont, West Virginia, for claimant.

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

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

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

PER CURIAM:

Employer appeals the Decision and Order awarding benefits and the Supplemental Decision and Order Granting Attorney Fees (95-BLA-0050) of Administrative Law Judge Gerald M. Tierney on a survivor's 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). The administrative law judge found that the weight of the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and death due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded.

Subsequent to the issuance of the administrative law judge's Decision and Order, claimant's counsel submitted a fee petition to the administrative law judge, requesting $20,960.26 for 88 hours of services at $230 per hour, and $720.26 in expenses. Thereafter, employer filed objections and claimant replied to employer's objections. In a Supplemental Decision and Order Granting Attorney Fees, the administrative law judge reduced the hourly rate to $200, and disallowed $146.88 in expenses. Accordingly, the administrative law judge awarded claimant's counsel a fee of $18,173.38, representing 88 hours of services at $200 per hour, plus $573.38 in expenses.

On appeal, employer challenges the administrative law judge's weighing of the evidence at Sections 718.202 and 718.205(c). Claimant responds, urging affirmance of the award of benefits, and argues that because all of the criteria for invoking the doctrine of collateral estoppel were met, the administrative law judge should have granted claimant's motion to estop employer from relitigating the issue of the existence of occupational pneumoconiosis, which was previously established in the living miner's claim. Employer replies, arguing that the doctrine of collateral estoppel is inapplicable and that claimant waived the issue by failing to file a cross-appeal herein. The Director, Office of Workers' Compensation Programs (the Director), submitted a limited response, urging the Board to reject employer's arguments regarding the proper methodology for weighing evidence at Section 718.202, but declining to address the merits of this case. The Director additionally agrees with claimant's argument that claimant was not required to file a cross-appeal to preserve the issue of collateral estoppel, and asserts that the administrative law judge should have addressed claimant's motion and determined whether the doctrine of collateral estoppel was applicable under the facts of this case. Pursuant to the Board's Order dated May 6, 1998, oral argument was held in this case on June 18, 1998, in Charleston, West Virginia.

Employer also challenges the number of hours and the hourly rate approved by the administrative law judge. Claimant responds, urging affirmance of the administrative law judge's fee award.

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

Turning first to the procedural issue, we reject employer's argument that the issue of collateral estoppel was waived by claimant's failure to file a cross-appeal pursuant to 20 C.F.R. §802.201(a)(2). Claimant preserved the issue through the arguments in her response brief, which, under the applicable regulation, are limited to those which respond to arguments raised in petitioner's brief and to those in support of the decision below. *See* 20 C.F.R. §802.212(b). Inasmuch as claimant was satisfied with the result of the administrative law judge's decision, she was not required to file a cross-appeal in order to make arguments which were not in support of his reasoning but which supported the result reached by the administrative law judge, *i.e.*, an award of benefits based on findings of the existence of pneumoconiosis arising out of coal mine employment and death due to pneumoconiosis. *See Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994); *Garcia v. Director, OWCP*, 869 F.2d 1413, 12 BLR 2-231 (10th Cir. 1989); *Dalle Tezze v. Director, OWCP*, 814 F.2d 129, 10 BLR 2-62 (3d Cir. 1987). Claimant initially filed a Motion for Summary Decision before the administrative law judge raising the applicability of the doctrine of collateral estoppel. The administrative law judge, however, failed to determine whether, under the facts of this case, employer was precluded from relitigating the issue of the existence of occupational pneumoconiosis by applying the criteria enunciated by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Sedlack v. Braswell Services Group*, 134 F.3d 219 (4th Cir. 1998); *Sandberg v. Virginia Bankshares, Inc.*, 979 F.2d 332 (4th Cir. 1992). The administrative law judge's failure to determine whether the doctrine of collateral estoppel was applicable is moot, however, if his finding of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(4), 718.203(b), based on his independent review of the evidence of record in the survivor's claim, may be affirmed.

Turning to the merits of the claim, employer contends that the administrative law judge erred in separately evaluating the x-ray evidence at Section 718.202(a)(1) and the medical opinions at Section 718.202(a)(4) in determining whether claimant established the existence of pneumoconiosis. Employer argues that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all relevant evidence must be weighed together to determine whether claimant suffers from the disease.[1] The Director correctly

[1] In support of its position, employer cites to *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), a case arising in a different appellate circuit which consequently is not controlling. In *Williams,* the court adopted the Director's position that although 20 C.F.R. §718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be

notes, however, that the Act and its implementing regulations recognize both "clinical" and "legal" pneumoconiosis. 30 U.S.C. §902(b); 20 C.F.R. §718.201; *see Barber v. Director, OWCP*, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995); *Doris Coal Co. v. Director, OWCP [Stiltner]*, 938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991). Legal pneumoconiosis, as defined in 20 C.F.R. §718.201, is a broader category which is not dependent upon a determination of clinical pneumoconiosis, and the absence of clinical pneumoconiosis does not necessarily influence a physician's diagnosis of legal pneumoconiosis. *See generally Taylor v. Director, OWCP*, 9 BLR 1-22 (1986). In the present case, the administrative law judge reasonably found that although the evidence of record was insufficient to establish clinical pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(2), the weight of the medical opinions established legal pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order at 2-4. We therefore find no error in the administrative law judge's method of weighing the evidence pursuant to Section 718.202(a)(1)-(4).

Employer next challenges the administrative law judge's evaluation and weighing of the medical opinions at Section 718.202(a)(4). Specifically, employer argues that the

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weighed together to determine whether the miner suffers from the disease. The Director correctly notes, however, that the *Williams* court did not distinguish between legal pneumoconiosis and clinical pneumoconiosis, as that issue was not relevant to the facts of that case, whereas in the present case, the administrative law judge found that claimant failed to establish clinical pneumoconiosis but successfully established legal pneumoconiosis.

administrative law judge erred in mechanically crediting the opinions of the miner's treating physicians; in relying on poorly documented or conclusory opinions; and in selectively analyzing the evidence. Employer asserts that the administrative law judge summarily discounted the opinions of Drs. Fino, Zaldivar, Morgan and Renn that the miner's pulmonary condition was due to smoking and not dust exposure in coal mine employment, and improperly shifted the burden of proof by finding that those opinions did not "displace" the opinions of the treating physicians, Drs. Arnett and Nefflen, that the miner had pneumoconiosis.[2] Employer's arguments are without merit.

[2] We reject employer's argument that Dr. Nefflen offered inconsistent and conflicting diagnoses. The administrative law judge accurately determined that Dr. Nefflen's treatment notes included diagnoses of chronic obstructive pulmonary disease and asthmatic or acute bronchitis, diagnoses which fall within the regulatory definition of pneumoconiosis if they arise out of coal mine employment. 20 C.F.R. §718.201. The miner's death certificate, signed by Dr. Nefflen, listed the immediate cause of death as sepsis due to pneumonia due to chronic obstructive pulmonary disease; and Dr. Nefflen's letter of March 2, 1994 indicated that the miner's underlying pulmonary problem was pneumoconiosis. Decision and Order at 4; Director's Exhibits 6-9; Claimant's Exhibits 3, 4, 9.

In evaluating the medical opinions at Section 718.202(a)(4), the administrative law judge acknowledged the pulmonary expertise of Drs. Fino, Zaldivar, Morgan and Renn, but determined that Drs. Fino, Zaldivar and Morgan never examined the miner, and Dr. Renn examined him only once in 1984, whereas Dr. Arnett treated the miner between 1979 and his death in 1993,[3] and Dr. Nefflen treated the miner during multiple hospitalizations. The administrative law judge acted within his discretion as trier-of-fact in finding that the opinions of the miner's treating physicians, Drs. Arnett and Nefflen, were entitled to greater weight because those physicians had the most complete picture of the miner's health, particularly Dr. Arnett,[4] a Board-certified pulmonary expert whose conclusions were based on his personal observation, testing and treatment of the miner over a period of more than ten years.[5] Decision and Order at 3-4; *see Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-

[3] Employer argues that its experts had access to the same medical data base as did Dr. Arnett in assessing the miner's condition, and notes that because Dr. Arnett did not have admitting privileges, he did not treat the miner during his multiple hospitalizations. The administrative law judge, however, determined that while Dr. Nefflen treated the miner when he was hospitalized, Dr. Arnett's deposition testimony established that he remained aware of the miner's condition through frequent visits to the miner and informal consultation in the miner's treatment. Decision and Order at 4; Employer's Exhibit 11 at 8, 33.

[4] We reject employer's assertion that the basis for Dr. Arnett's diagnosis of pneumoconiosis is not clear, and was possibly based solely on his positive x-ray interpretations. Dr. Arnett's deposition testimony indicates that his diagnosis was based on the totality of the miner's medical, smoking and employment histories, symptoms, and his findings on examination and testing of the miner over a period of more than ten years. Moreover, while Dr. Arnett observed x-ray abnormalities, he noted that an overwhelming number of the miner's films were interpreted by qualified readers as negative for pneumoconiosis, and agreed that at most, any x-ray changes were minimal. Employer's Exhibit 11 at 12-16, 20-25, 28-30, 38-44, 49-54. The administrative law judge additionally determined that Dr. Arnett diagnosed asthma, which he testified was not caused by dust exposure in coal mine employment but was greatly exacerbated by it, *see* 20 C.F.R. §718.201. Decision and Order at 3, n. 4; Employer's Exhibit 11 at 28-30.

[5] The administrative law judge additionally determined that the opinions of Drs. Arnett and Nefflen were corroborated by the physicians of the West Virginia Occupational Pneumoconiosis Board, and Drs. Franz, Kovoor, Corder and Kaufmann, who either diagnosed pneumoconiosis or noted the miner's history of pneumoconiosis. Decision and Order at 4, n. 5; Director's Exhibits 3, 19; Claimant's Exhibits 1-2, 5-8.

299 (4th Cir. 1994); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985). Contrary to employer's arguments, the fact that Dr. Arnett achieved some improvement in the miner's respiratory function with prescribed medications does not mandate a conclusion that the miner did not suffer from pneumoconiosis, an irreversible condition, *see generally Badger Coal Co. v. Director, OWCP [Kittle]*, 83 F.3d 414, 20 BLR 2-265 (4th Cir. 1996); and Dr. Arnett was not required to specifically apportion the effects of the miner's smoking and his dust exposure in coal mine employment upon the miner's condition.[6] *See generally Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48 (1990). The administrative law judge's findings and inferences pursuant to Section 718.202(a)(4) are supported by substantial evidence, and therefore are affirmed.[7]

Similarly, we reject employer's challenge to the administrative law judge's weighing of the evidence at Section 718.205(c). The administrative law judge permissibly accorded little weight to the opinions of Drs. Fino, Zaldivar, Morgan and Renn that pneumoconiosis played no role in the miner's death, as they failed to diagnose pneumoconiosis, *see Grigg, supra*; and reasonably relied on the opinions of the miner's treating physicians, Drs. Arnett

[6] We also reject employer's argument that Dr. Renn's opinion was entitled to greater weight because he cited to 22 articles in support of his conclusions, whereas Dr. Arnett was supplied with medical literature by claimant's counsel and did not perform his own in-depth literature search. The method of obtaining medical literature in support of a physician's opinion and the quantity of such literature does not necessarily impact upon the validity of a physician's conclusions.

[7] The administrative law judge's findings that the miner was entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b), and that the evidence of record was insufficient to establish rebuttal of that presumption, are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and Nefflen, corroborated by the opinions of Dr. Gaziano and the physicians of the West Virginia Occupational Pneumoconiosis Board, that the miner's death was due to pneumoconiosis. Decision and Order at 4-5. The administrative law judge's findings pursuant to Section 718.205(c) are supported by substantial evidence, in accordance with applicable law, *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993), and are affirmed. Consequently, we affirm the administrative law judge's award of benefits.

Lastly, employer challenges the administrative law judge's award of attorney fees as excessive. The award of an attorney fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

Employer contends that the administrative law judge erred in failing to apply the appropriate standard and in failing to separately address each of employer's objections to the hours requested by claimant's counsel, which either challenged the reasonableness and necessity of the work performed on various dates, or the adequacy of counsel's description of the extent and character of the work done pursuant to 20 C.F.R. §725.366(a).[8] Employer also maintains that the hourly rate of $200 approved by the administrative law judge was excessive, and that the administrative law judge did not address employer's argument that a reduced hourly rate of $175 is more consistent with counsel's customary rate in other areas of law and the rate charged by the general legal community. Employer's arguments are without merit.

[8] Claimant notes that counsel's response to employer's objections to the fee petition provided a detailed explanation to the administrative law judge of the precise nature of the services provided and why counsel believed the time spent providing such services was reasonable and necessary. Employer did not acknowledge counsel's explanation either before the administrative law judge or in its brief on appeal to the Board.

The review of a fee petition requires the administrative law judge to decide whether, at the time counsel performed the service, counsel could reasonably regard it as necessary to establish entitlement and whether the amount of time expended was excessive or unreasonable. *See Lanning v. Director, OWCP*, 7 BLR 1-314 (1984); *Robel v. Director, OWCP*, 7 BLR 1-358 (1984); *Marcum, supra*. In finding that the hours claimed by counsel were not excessive, the administrative law judge summarized employer's seven specific challenges to the time spent, and acted within his discretion in finding that all of the hours requested by counsel for reviewing the file, traveling, organizing exhibits and preparing briefs were necessary and reasonable.[9] Supplemental Decision and Order at 1-2; *see* 20 C.F.R. §725.366; *Lenig v. Director, OWCP*, 9 BLR 1-147 (1986); *Ball v. Director, OWCP*, 7 BLR 1-617 (1984); *Lanning, supra.* We therefore reject employer's challenge to the number of hours claimed for services rendered.

We also reject employer's argument that the hourly rate and total fee awarded by the administrative law judge was excessive. The administrative law judge denied counsel's request of a $30 per hour fee enhancement for delay as premature,[10] and after consideration of the factors contained at 20 C.F.R. §725.366(b), awarded counsel his customary hourly rate of $200 for black lung cases. Supplemental Decision and Order at 3-4. Employer's assertion

[9] Although employer objected to the entries of April 5-7, 1995, and July 16-18, 1996, on the ground that they lacked the specificity required by the regulation, the administrative law judge did not abuse his discretion by awarding a fee for these entries. 20 C.F.R. §725.366(a).

[10] The administrative law judge invited counsel to file for reconsideration of the attorney fee award on the basis of delay within thirty days of an award which reflected a successful prosecution of the claim, at which time the administrative law judge could properly consider the appropriateness of enhancement of the fee for delay in accordance with *Bennett v. Director, OWCP*, 17 BLR 1-72 (1992). Supplemental Decision and Order at 2-4.

that an hourly rate of $175 would be appropriate and more consistent with the rate obtained by the general legal community in this area of law is insufficient to meet employer's burden of proving that the rate awarded was excessive or that the administrative law judge abused his discretion in this regard. *See generally Broyles v. Director, OWCP*, 974 F.2d 508, 17 BLR 2-2-1 (4th Cir. 1992); *Pritt v. Director, OWCP*, 9 BLR 1-159 (1986).

Accordingly, the administrative law judge's Decision and Order awarding benefits and his Supplemental Decision and Order Granting Attorney Fees are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

Deskbook Section: Part V.A.9 - Issues on Appeal

Inasmuch as claimant was satisfied with the result of the administrative law judge's decision, she was not required to file a cross-appeal pursuant to 20 C.F.R. §802.201(a)(2), but could make arguments in her response brief pursuant to 20 C.F.R. §802.212(b) which were not in support of the administrative law judge's reasoning but which supported the result he reached.

Deskbook Section: Part VII.B.5 - Section 718.202(a)(4): Medical Reports

Under the facts of this case, in determining whether the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), the administrative law judge did not err in failing to weigh evidence relevant to a determination of "clinical" pneumoconiosis together with evidence relevant to a determination of "legal" pneumoconiosis. Legal pneumoconiosis, as defined in 20 C.F.R. §718.201, is a broader category which is not dependent upon a determination of clinical pneumoconiosis, and the absence of clinical pneumoconiosis does not necessarily influence a physician's diagnosis of legal pneumoconiosis.