

BRB No. 99-0434 BLA/S
Case No. 95-BLA-0834

WILLIAM E. HAWKER)	
)	
Claimant-Respondent)	
)	
v.)	
)	
ZEIGLER COAL COMPANY)	DATE ISSUED: 08/23/2000
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER on RECONSIDERATION

Appeal of the Decision and Order - Awarding Benefits and Supplemental Decision and Order Granting Attorney Fees of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Rick Rauch (McNamar, Fearnow & McSharar, P.C.), Indianapolis, Indiana, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Dorothy L. Page (Judith E. Kramer, Acting Solicitor of Labor; 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, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer has filed a timely Motion for Reconsideration requesting the Board to reconsider its Decision and Order of August 23, 2000, in the captioned case which arises

under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).¹ In that decision, the Board affirmed the administrative law judge's finding that the evidence was sufficient to establish the existence of complicated pneumoconiosis, thereby enabling claimant to establish entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304 (2000). The Board, therefore, affirmed the administrative law judge's award of benefits. The Board further affirmed the administrative law judge's award of attorney fees in his Supplemental Decision and Order Granting Attorney Fees, dated June 28, 1999. Employer presently argues that the Board erred in affirming the administrative law judge's finding that the evidence was sufficient to establish the existence of complicated pneumoconiosis under Section 718.304 (2000). Employer also challenges the Board's affirmance of the administrative law judge's award of attorney fees. Claimant has filed a letter urging the Board to summarily deny employer's Motion for Reconsideration.² The Director, Office of Workers' Compensation Programs (the Director), has not filed a response to employer's Motion for Reconsideration.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule in an Order issued on February 21, 2001, to which claimant, employer and the Director have responded. All parties agree that the regulations at issue in the lawsuit do not affect the outcome of this case. Based upon the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this motion for reconsideration.

Employer contends that the administrative law judge made numerous errors in finding

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² On September 6, 2000, claimant filed a "Motion to Publish an Unpublished Decision and Order," requesting that the Board publish its Decision and Order, dated August 23, 2000. Claimant's motion is denied.

that claimant was entitled to the irrebuttable presumption at Section 718.304 (2000). We disagree. First, there is no merit to employer's contention that it was irrational and improper for the Board to affirm the administrative law judge's finding that the x-ray evidence of record was sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(a)(2000). Employer refers to the numerous x-ray readings of record which are negative for complicated pneumoconiosis, and argues, as it did in its appeal, that the weight of this evidence clearly outweighs the lesser number of x-ray readings of record which are positive for complicated pneumoconiosis. In advancing this argument, employer ignores that an administrative law judge may credit the x-ray interpretations of readers who are dually-qualified as Board-certified radiologists and B readers over interpretations of physicians who lack these dual qualifications. As the Board held in its Decision and Order in this case, substantial evidence supports the administrative law judge's finding that the majority of the x-ray readings *from dually-qualified radiologists* of films taken since the December 26, 1990 film, which was the first film interpreted as showing the presence of large opacities, size B, is positive for large opacities.³ See *Hawker, supra*, slip op. at 3-4; Decision and Order at 16. Including the December 26, 1990 reading from Dr. Fisher, there are six positive readings for complicated pneumoconiosis from dually-qualified radiologists, two negative readings from similarly-qualified physicians, and one interpretation from Dr. Sargent that a film (the December 26, 1990 film) was unreadable. Director's Exhibits 16, 27, 29; Claimant's Exhibits 7, 13, 21, 22; Employer's Exhibits 2, 3. Our review of the record on reconsideration reveals that this characterization of the x-ray evidence of record which the Board provided in its Decision and Order was accurate. Moreover, contrary to employer's contention, the administrative law judge was not required to consider the interpretations of each film independently, and then compare the number of films supporting a finding of complicated pneumoconiosis against the number of films weighing against such a diagnosis. See *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Adkins v. Director, OWCP*, 958 F.3d 49, 16 BLR 2-61 (4th Cir. 1992).

Employer also contends, citing *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999), that the Board erred in failing to vacate the administrative law judge's finding that the existence of complicated pneumoconiosis was established under Section

³The administrative law judge properly found that the earliest identification of a large opacity came from Dr. Fisher's reading of the December 26, 1990 film, which indicated the presence of large opacities, size B. Decision and Order at 16; Director's Exhibit 27. Contrary to employer's contention, it is rational for an administrative law judge to credit later evidence on the basis of its recency where the evidence is positive for pneumoconiosis, since pneumoconiosis is a progressive disease. See *Adkins v. Director, OWCP*, 958 F.3d 49, 16 BLR 2-61 (4th Cir. 1992); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

718.304 (2000) on the ground that the administrative law judge failed to consider all of the evidence which shed light on the x-ray evidence of record. Employer argues that the Board erred in affirming an award of benefits which was clearly based upon the administrative law judge's preference for the x-ray evidence over anything else in the record. This contention lacks merit. In *Gray*, the United States Court of Appeals for the Sixth Circuit held that conflicting, unlike evidence, and not just x-ray evidence, must be taken into account before a finding may be made that the irrebuttable presumption at Section 718.304 is established. *Gray* does not mandate, as employer suggests it does, that other, unlike evidence indicating that a miner does not have complicated pneumoconiosis must be credited over x-ray evidence which is positive for the disease. We reaffirm our holding in our Decision and Order that the administrative law judge properly considered all of the conflicting relevant evidence under Section 718.304, and properly found it sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304 (2000). See *Gray, supra*; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). Employer's suggestion to the contrary amounts to an improper request to reweigh the evidence. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Employer further requests reconsideration of the Board's affirmance of the administrative law judge's Supplemental Decision and Order Granting Attorney Fees. Employer challenges the Board's affirmance of the administrative law judge's award of attorney fees for time claimant's counsel spent in defense of his fee petition, and the Board's affirmance of the administrative law judge's allowance of claimant's expenses for non-testifying witnesses. The Board has already addressed these arguments and, therefore, these issues will not be reconsidered by the Board.⁴ *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); see *Hawker, supra*, slip op. at 6-7.

Finally, we note that claimant's counsel has filed a complete, itemized statement requesting a fee for services performed in his initial appeal pursuant to 20 C.F.R. §802.203. Claimant's counsel requests a fee of \$3,442.73, representing .50 hours of legal services at an hourly rate of \$190.00, .25 hours of legal services at an hourly rate of \$175.00, 20.30 hours of legal services at an hourly rate of \$140.00, 1.70 hours of legal services at an hourly rate of \$145.00, and 1.40 hours of legal services at an hourly rate of \$100.00, plus expenses of \$75.48.⁵

⁴ We note that, subsequent to the Board's Decision and Order in the captioned case, the United States Court of Appeals for the Fourth Circuit held in *Kerns v. Consolidation Coal Co.*, 247 F.3d 133 (4th Cir. 2001)(Order), that the costs involved in pursuing a petition for attorney fees are themselves compensable, a holding with which the Board's holding on that issue was consistent.

⁵ The application indicates that Randall R. Fearnow, Paul (Rick) Rauch and Marianna Gerritzen performed work in this case before the Board during the periods from July 26,

Claimant's counsel has also filed a complete, itemized statement pursuant to Section 802.203, requesting a fee for services performed before the Board in defense of the administrative law judge's award of attorney fees in the Supplemental Decision and Order Granting Attorney Fees, dated June 28, 1999. Claimant's counsel requests a fee for \$5,906.47, representing .25 hours of legal services at an hourly rate of \$175.00, .25 hours of legal services at an hourly rate of \$140.00, 40.10 hours of legal services at an hourly rate of \$140.00, and 1.20 hours of legal services at an hourly rate of \$100.00, plus \$92.47 in expenses.⁶

Claimant's fee petitions include a complete, itemized statement of the extent and character of the necessary work done before the Board, and indicate the professional status and customary hourly billing rate for the attorneys who performed the work, as required pursuant to 20 C.F.R. §802.203 (2000). 20 C.F.R. §802.203(c), (d); *Workman v. Director, OWCP*, 6 BLR 1-1281 (1984). Claimant's counsel's work performed before the Board in defense of the award of attorney fees at the administrative law judge level is compensable. *See Kerns v. Consolidation Coal Co.*, 247 F.3d 133 (4th Cir. 2001)(Order); *Workman, supra*. We hold the requested attorney fees and hourly rates for services rendered, and the expenses incurred for counsel's work performed before the Board are reasonable. Accordingly, contingent upon claimant's ultimate success in the prosecution of the instant claim, claimant's counsel is entitled to a total fee of \$9,349.20 for legal services rendered, and expenses incurred, to be paid directly to claimant's counsel by employer. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203; *see Clark v. Director, OWCP*, 9 BLR 1-211 (1986).

1999 to August 30, 2000 and July 27, 1999 to December 1, 1999. The application indicates that Mr. Fearnow's hourly billing rate is \$190 per hour, up from \$175 per hour, effective June 1, 2000; that Mr. Rauch's hourly billing rate is \$145 per hour, up from \$140 per hour, effective on February 1, 2000; and that Ms. Gerritzen's billing rate is \$100 per hour.

⁶ We note that employer has filed a motion for an enlargement of time in which to file objections to claimant's fee petition. Employer's motion is denied.

Accordingly, the relief requested by employer is denied, and the Board's original Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge