BRB No. 99-0555 BLA

ARCHIE YOUNG	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JIM WALTER RESOURCES, INCORPORATED	)	DATE ISSUED:
	)	
Employer-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 and the Decision and Order Denying Reconsideration of Attorney Fee Award of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Michael E. Bevers (Nakamura, Quinn & Walls LLP), Birmingham, Alabama, for claimant.

Laura A. Woodruff (Maynard, Cooper & Gale), Birmingham, Alabama, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Decision and Order Denying Reconsideration of Attorney Fee Award (98-BLA-0338) of Administrative Law Judge Gerald M. Tierney 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).[1] The administrative law judge found that the instant claim constituted a duplicate claim and found that claimant established a coal mine employment history of thirty-four years based on the agreement of the parties. Decision and Order at 2. The administrative law judge concluded that, while claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), the presence of the disease was established pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 11-14. The administrative law judge further concluded that claimant was entitled the presumption, found at 20 C.F.R. §718.203(b), that his pneumoconiosis arose out of coal mine employment, and that employer failed to rebut the presumption. Decision and Order at 14. The administrative law judge proceeded to find that claimant established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c), and established that pneumoconiosis was a substantial contributing factor to the disability pursuant to 20 C.F.R. §718.204(b). Decision and Order at 16. Accordingly, benefits were awarded. Subsequently, in a separate Decision and Order, the administrative law judge granted claimant's counsel a fee of $7,816.60 based on a fee

[1] Claimant previously filed four claims, all of which were denied by the district director on the basis of claimant failing to establish any of the elements of entitlement. Director's Exhibit 19-22. The instant claim was filed on January 16, 1997, more than one year after the most recent denial. Director's Exhibits 1, 22. This claim was initially denied by the district director on the basis of claimant having failed to establish total disability due to pneumoconiosis arising out of coal mine employment. Accordingly, the district director found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Claimant requested a hearing, Director's Exhibit 18, and subsequent to the hearing the administrative law judge issued the Decision and Order Awarding Benefits, a Supplemental Decision and Order Granting Attorney Fees and a Decision and Order Denying Reconsideration of Attorney Fee Award. Employer now appeals.

petition submitted by counsel. After the fee was awarded, employer sought reconsideration of the award. The administrative law judge issued a decision denying this request.

On appeal, employer contends that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis established pursuant to Section 718.202(a)(4), and further erred in finding the presence of a totally disabling respiratory impairment due to pneumoconiosis pursuant to Section 718.204(c), (b). Employer further contends that the administrative law judge's award of attorney fees was arbitrary, capricious and an abuse of discretion. Claimant responds and urges affirmance of the award of benefits and the award of attorney fees. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in this appeal.[2]

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

[2] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination, as well as the findings that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(3) and failed to demonstrate total disability pursuant to Section 718.204(c)(1)-(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We further affirm, as unchallenged the administrative law judge's determination that claimant established entitlement to the presumption at Section 718.203(b) and that the presumption was not rebutted. *See Skrack*, *supra*.

disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer asserts that the administrative law judge erred in finding the existence of pneumoconiosis pursuant to Section 718.202(a)(4) inasmuch as the opinion of Dr. Patton, whose opinion was relied upon by the administrative law judge in finding that claimant established the presence of the disease, was based primarily on claimant's coal mine employment history and unsupported by any medical evidence.

In finding that claimant established the presence of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge accorded dispositive weight to the opinions of Dr. Patton, claimant's treating physician, who concluded that claimant suffered from a chronic pulmonary disease arising out of long-term coal mine exposure, Director's Exhibit 16; Claimant's Exhibit 1. The administrative law judge permissibly concluded that Dr. Patton's opinion constituted a statutory diagnosis of pneumoconiosis, *see* 20 C.F.R. §§718.201, 718.202(a)(4), and, in a permissible exercise of his discretion, concluded that the opinion was entitled to great weight and was supportive of a finding of pneumoconiosis at Section 718.202(a)(4), based on the physician's status as claimant's treating physician. *See Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). The administrative law judge further concluded that the opinions of Drs. Goldstein, Russakoff and Branscomb, Director's Exhibits 12, 20; Employer's Exhibits 2, 3, 5, all of whom concluded that claimant did not suffer from pneumoconiosis, were entitled to little weight, compared to the opinion of Dr. Patton, inasmuch as they lacked the familiarity and first-hand knowledge that Dr. Patton had of

claimant's condition. Specifically, the administrative law judge found that Dr. Goldstein failed to consider claimant's coal mine employment history and failed to explain his medical conclusions. The administrative law judge further concluded that Dr. Russakoff examined claimant only one time, in 1987, and that the physician therefore did not have first-hand knowledge of claimant's current condition. Finally, the administrative law judge concluded that Dr. Branscomb, expressing concern that he did not have enough information, regarding claimant's condition, failed to explain the bases of his conclusions.

An administrative law judge may accord less weight to the opinions of physicians who fail to explain their conclusions. *See York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985); *White v. Director, OWCP*, 6 BLR 1-368, 1-371 (1983). Moreover, an administrative law judge may accord less weight to dated opinions as such opinions may fail to present a complete picture of the miner's current health. *See generally Stark v. Director, OWCP*, 9 BLR 1-36 (1989). Accordingly, we affirm the administrative law judge's weighing of the evidence and his determination that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4).[3]

[3] Inasmuch as claimant has established the existence of pneumoconiosis, claimant has established a material change in conditions pursuant to Section 725.309 under any of the standards enunciated by the various United States Courts of Appeals. *See Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(en banc rehearing), *modifying*, 94 F.3d 369 (7th Cir. 1996), *and affirming* 19 BLR 1-45 (1995); *Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 21 BLR 2-50 (8th Cir. 1997); *Wyoming Fuel Co. v. Director, OWCP* [*Brandolino*], 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996); *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(en banc), *cert. denied*, 117

S.Ct. 763 (1997); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *Sahara Coal Co. v. Director, OWCP* [*McNew*], 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991).

Employer further asserts that the administrative law judge erred in finding that claimant established total disability pursuant to Section 718.204(c), specifically, arguing that the administrative law judge erred in relying exclusively on Dr. Patton's opinion without addressing the underlying documentation of the physician's opinion. Employer also asserts that the administrative law judge erroneously ignored the contrary objective test results and contrary opinions of Drs. Goldstein, Russakoff and Branscomb.

In finding that claimant demonstrated the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c), the administrative law judge initially concluded that claimant was unable to demonstrate the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(1)-(3) as there was no pulmonary function study or blood gas study evidence supportive of the presence of a totally disabling respiratory impairment, and there was no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 14. The administrative law judge went on to conclude, however, that the presence of a totally disabling respiratory impairment was demonstrated at Section 718.204(c)(4) by the opinion of Dr. Patton, who found that claimant was unable to carry fifty pounds or more because of a moderately severe respiratory impairment. The administrative law judge, in a permissible exercise of his discretion, concluded that such an opinion was sufficient to demonstrate the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(4). *See Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 1986) *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*).

Contrary to employer's assertion, the administrative law judge addressed the entirety of relevant evidence at Section 718.204(c), and in a permissible exercise of his discretion, accorded greatest weight to the opinion of Dr. Patton as he was claimant's treating physician and had first-hand knowledge of claimant's physical condition. *See Onderko, supra*. Further, in relying on the opinion of Dr. Patton in support of a finding of total disability, the administrative law judge found the doctor's opinion sufficiently documented and reasoned by inference. *See Pulliam v. Drummond Coal Co.*, 7 BLR 1-846 (1985); *Adamson v. Director, OWCP*, 7 BLR 1-229 (1984). Consequently, we reject employer's assertion that Dr. Patton's opinion is not well-documented or reasoned. Accordingly, we affirm the administrative law judge's finding of total disability at Section 718.204(c) as the administrative law judge addressed the entirety of relevant evidence and permissibly concluded that Dr. Patton's opinion was the most credible medical evidence of record. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).

Employer further contends that the administrative law judge erred in concluding that claimant carried his burden of establishing that his totally disabling respiratory impairment was due to pneumoconiosis pursuant to Section 718.204(b). Specifically, employer asserts that the administrative law judge erred in relying on Dr. Patton's report as support for such a determination inasmuch as the physician's opinion diagnosing pneumoconiosis was unreliable and the opinions of Drs. Russakoff, Goldstein and Branscomb were entitled to greater weight.

The United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this claim arises, has held that, in order to carry his burden at Section 718.204(b), a claimant must establish that pneumoconiosis is a substantial, contributing factor in the cause of the miner's total disability. *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990). In the instant case, the administrative law judge determined that claimant carried his burden at Section 718.204(b) as he permissibly concluded that Dr. Patton's acknowledgment that claimant's pulmonary impairment was secondary to his occupational exposure was sufficient to demonstrate that claimant's pneumoconiosis was a substantial, contributing factor to his totally disabling respiratory impairment.[4] *See Lollar*. In rejecting the opinions of Drs. Goldstein, Russakoff and Branscomb at Section 718.204(b), the administrative law judge found their opinions lacking in credibility as they failed to diagnosis the existence of pneumoconiosis. *See Stark v. Director, OWCP*, 9 BLR 1-36 (1989). Accordingly, we affirm the administrative law judge's determination that claimant established that pneumoconiosis was a substantially contributing cause of his total disability pursuant to Section 718.204(b), *see Lollar*, *supra*, and, we affirm the administrative law judge's determination that claimant has established to benefits.

[4] Employer's assertion that Dr. Patton's opinion is impermissibly equivocal is summarily rejected. The resolution of inconsistencies and equivocation in a physician's opinion is a matter of consideration for an administrative law judge, since the administrative law judge addressed the equivocation of Dr. Patton's report, we conclude that the administrative law judge properly resolved the issue of its credibility. *See generally Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984).

Further, contrary to employer's assertion, the administrative law judge has sufficiently addressed the relevant evidence and given the bases for his weighing and crediting of the evidence. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a).

Finally, employer contends that the administrative law judge has erred in awarding claimant's counsel attorney fees in the amount of $7816.60 as such an award is arbitrary, capricious and an abuse of discretion. Employer contends that the administrative law judge erred in failing to credit evidence it submitted which demonstrates that the amount of time claimant's counsel spent on the instant claim was unreasonable.

The standard of review for the Board in analyzing an appellant's arguments on appeal of an attorney fee is whether the determination is arbitrary, capricious or an abuse of discretion, *see Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), *citing Marcum v. Director*, 2 BLR 1-894 (1980); *see generally Murphy v. Director, OWCP*, 21 BLR 1-116 (1999). The adjudicating officer must discuss and apply the regulatory criteria at 20 C.F.R. §725.366 in determining the award due, if any. *See Lenig v. Director, OWCP*, 9 BLR 1-147 (1986).

We reject employer's contention and hold that employer has failed to demonstrate that the administrative law judge's award of the attorney fees was arbitrary, capricious or an abuse of discretion. Subsequent to the January 25, 1999 award of benefits, claimant's counsel, on February 8, 1999, submitted his petition for an attorney fee. No objections to this petition were raised by employer. In a Supplemental Decision and Order issued on March 2,

1999, the administrative law judge awarded claimant's counsel the $7,816.60 fee requested as it was deemed reasonable.[5] Subsequently, employer sought reconsideration of the attorney fee award contending that the amount of time counsel claimed as preparation for the case was unreasonable inasmuch as counsel had, in the past, litigated similar cases and, did not therefore have to engage in the amount of work claimed in the instant petition. In denying employer's request, we conclude that the administrative law judge acted in a reasonable matter, *i.e.*, in a manner soundly within his discretion, in concluding that he had already addressed the issue of time spent by claimant's counsel on the instant case and that such time was necessary and not excessive. As we conclude that the administrative law judge's finding does not constitute an arbitrary or capricious act or a clear violation of his discretion, employer has failed to carry his burden and we reject his assertions in this regard.[6]

Accordingly, we affirm both the administrative law judge's Decision and Order Awarding Benefits and the Decision and Order Denying Reconsideration of Attorney Fee Award.

SO ORDERED.

JAMES F. BROWN

[5] The fee was based on a total of .5 hours work at $200.00 per hour, 48 hours of work at $160.00 per hour, .5 hours of "CLA" work at $65.00 per hour and reasonable expenses of $4.10.

[6] In so doing, we need not address whether employer's initial failure to respond to the fee petition precluded a challenge in the future. *See Abbott*, *supra*.

Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge