BRB No. 00-0662 BLA

ROBERT L. KIRK	)	
	)	
Claimant-	)	
Respondent	)	
	)	DATE ISSUED:
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION AND ORDER
Party-in-Interest		

Appeal of the Decision and Order - Award of Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

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

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

Rita A. Roppolo (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 appeals the Decision and Order - Award of Benefits (94-BLA-1689) of Administrative Law Judge Gerald M. Tierney with respect to 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). Claimant initially filed an application for benefits on October 21, 1979. Director's Exhibit 22. This claim was denied by the district director on August 19, 1980. *Id*. Claimant took no further action until filing a claim on September 19, 1986. Director's Exhibit 1. In a Decision and Order issued on October 2, 1997, the administrative law judge credited claimant with at least thirty-four years of coal mine employment and determined that inasmuch as the newly submitted evidence was sufficient to establish the existence of pneumoconiosis, claimant demonstrated a material change in conditions. The administrative law judge also found that the evidence of record as a whole supported a finding of total disability and total disability due to pneumoconiosis. Accordingly, benefits were awarded. The administrative law judge subsequently granted claimant's counsel's petition for attorney fees in its entirety.

Employer filed an appeal with the Board which, in a Decision and Order issued on April 28, 1999, affirmed the administrative law judge's finding that the x-ray evidence of record was sufficient to establish the existence of pneumoconiosis without reaching the administrative law judge's determination that the medical opinions of record were also sufficient to establish pneumoconiosis. The Board affirmed, as unchallenged on appeal, the administrative law judge's finding that claimant is suffering from a totally disabling pulmonary impairment. *Kirk v. Consolidation Coal Co.*, BRB No. 98-0229 BLA (Apr. 28, 1999)(unpub.). The Board further held, however, that the administrative law judge did not adequately address whether the medical opinions of Drs. Rasmussen and Abrahams are sufficiently reasoned with respect to their identification of pneumoconiosis as a significant contributing cause of claimant's disabling impairment. *Id*. Thus, the Board vacated the administrative law judge's finding with respect to the issue of causation and remanded the case to the administrative law judge for reconsideration. The Board also instructed the administrative law judge to reconsider his decision to discredit the opinions of Drs. Fino and Renn on the ground that neither of these physicians diagnosed pneumoconiosis. *Id*. Finally, the Board instructed the administrative law judge to address employer's specific objections to claimant's counsel's attorney fee petition. *Id.*

On remand, the administrative law judge determined that the opinions of Drs. Rasmussen and Abrahams are reasoned and entitled to greater weight than the opinions of Drs. Renn and Fino. The administrative law judge consequently reaffirmed his award of benefits. The administrative law judge also addressed employer's objections to the fee

petition and determined that the number of hours that counsel expended on various activities was reasonable and awarded the amount requested in full. In the present appeal, employer argues that the administrative law judge did not properly weigh the medical opinions of Drs. Rasmussen and Abrahams and did not comply with the Board's remand instructions concerning the reports of Drs. Fino and Renn. Employer also asserts that the administrative law judge's findings regarding counsel's attorney fee petition are in error. Claimant has responded and urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in response to the merits of employer's appeal.

The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969. 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). By Order dated February 9, 2001, United States District Court Judge Emmet G. Sullivan enjoined the implementation of forty-seven of these regulatory provisions and stayed all claims pending on appeal before the Board, except for those in which the Board, after briefing by the parties, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Director has filed a brief, asserting that the present case is not affected by the amended regulations. Claimant concurs with the Director. Employer contends that the present case must be stayed on the grounds that the retroactive application of the amended regulations pertaining to the opinions of treating physicians, the definition of pneumoconiosis and total disability, and the standard of proof in survivors' claims is contrary to law and that the challenged regulations cannot be implemented prior to the resolution of the case currently before the United States District Court.

Upon review of the parties' briefs and the issues raised in employer's appeal, we hold that this case can proceed as, with one exception, it is not necessary to apply the regulations to which employer refers in order to address its appeal. The exception concerns the amended definition of pneumoconiosis, which applies in all pending cases, and explicitly recognizes that an obstructive impairment arising out of coal mine employment can constitute pneumoconiosis. 65 Fed. Reg. 80,048 (to be codified at 20 C.F.R. §718.201(a)(2)). Employer has conceded, however, that this regulation does not affect the outcome of this case, inasmuch as it is consistent with the pre-existing case law of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises. We will, therefore, address the merits of employer's appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

Turning first to the administrative law judge's consideration of the medical opinions of record, we hereby vacate the administrative law judge's findings with respect to the opinions of Drs. Rasmussen, Abrahams, Renn, and Fino. As employer alleges, the administrative law judge did not identify and resolve conflicts in the opinions of Drs. Rasmussen and Abrahams which are relevant to whether the conclusions they expressed are reasoned. Both Drs. Rasmussen and Abrahams stated that claimant's totally disabling obstructive lung disease was caused by both coal mine dust exposure and cigarette smoking, but acknowledged that the extent to which each contributed could not be quantified. Claimant's Exhibits 1, 16. Dr. Rasmussen, in particular, explicitly indicated that it was possible that the entirety of claimant's impairment resulted from smoking. Claimant's Exhibit 29 at 118. The administrative law judge also did not address Dr. Renn's critique of the studies that Dr. Rasmussen relied upon in attributing a portion of claimant's total disability to dust exposure or Dr. Rasmussen's concession that the studies contained some flaws and that, in some respects, claimant did not display the traits indicative of a coal dust induced obstructive impairment. Claimant's Exhibit 29 at 95-108; Employer's Exhibit 21 at 31.

In addition, contrary to the administrative law judge's determination, Dr. Renn did not exclude the possibility that pneumoconiosis, whether clinical or legal, can cause an obstructive defect. He indicated that the degree of obstruction caused by coal dust exposure is usually less than that experienced by claimant. Employer's Exhibit 21 at 24, 69. Dr. Fino also did not state that coal dust exposure causes no obstructive impairment. Employer's Exhibits 5, 16 at 20-22. As discussed above, these statements are not inconsistent with either the newly promulgated definition of pneumoconiosis or the case law of the United States Court of Appeals for the Fourth Circuit. 65 Fed. Reg. 80,048 (2000)(to be codified at 20 C.F.R. §718.201(a)(2)); *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000); *Hobbs v. Clinchfield Coal Co. [Hobbs II]*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995). Finally, the administrative law judge did not reconsider the opinions of Drs. Renn and Fino in light of the decision of the United States Court of Appeals for the Fourth Circuit in *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), as instructed by the Board.[1]

[1]In *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), and other cases, the United States Court of Appeals for the Fourth Circuit recognized that a physician's report is probative of the issue of causation, even if the physician determines, in contrast to the administrative law judge's finding, that the miner did not have

pneumoconiosis, provided that the physician did not *actually premise* his opinion upon a conclusion that pneumoconiosis was absent. If the physician acknowledges the miner's respiratory or pulmonary impairment, but nevertheless concludes that an ailment other than pneumoconiosis caused the disability, the Fourth Circuit has held that such an opinion is not premised upon the flawed assumption and is probative evidence regarding the source of a miner's totally disabling impairment. *See Ballard*, *supra*; *see also Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); *Hobbs v. Clinchfield Coal Co. [Hobbs II]*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995).

Accordingly, we vacate the administrative law judge's findings with respect to the opinions of Drs. Renn, Fino, Rasmussen, and Abrahams as they pertain to the issue of total disability causation and remand the case to the administrative law judge for reconsideration of these opinions in accordance with applicable law. In assessing the relative probative weight of the medical opinions of record on remand, the administrative law judge cannot mechanically credit, to the exclusion of all other evidence, the opinion of Dr. Abrahams based upon his status as claimant's treating physician.[2] Rather, the administrative law judge must address the qualifications of the respective physicians, the explanation of their conclusions, whether the documentation underlying their medical judgments actually relates to the conclusions rendered, and the sophistication and bases of the physicians' diagnoses. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *see also U.S. Steel Mining Co., Inc. v. Director, OWCP [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

Employer is also correct in asserting that in light of the fact that remand is necessary in order to permit the administrative law judge to reconsider his weighing of the medical opinions of record, remand is also required for reconsideration of the administrative law judge's finding that the medical opinions of record are sufficient to establish the existence of pneumoconiosis. In his initial Decision and Order, the administrative law judge determined that both the x-ray evidence and the medical opinions of record supported a finding of pneumoconiosis. The Board affirmed the administrative law judge's finding that the existence of pneumoconiosis was established based solely on the x-ray evidence. Thereafter, the United States Court of Appeals for the Fourth Circuit held that the administrative law judge must weigh all evidence relevant to the existence of pneumoconiosis together. *See Compton*, *supra*. Because the administrative law judge essentially weighed the medical opinion evidence regarding the existence of pneumoconiosis in the same manner as he weighed the evidence regarding the source of claimant's totally disabling impairment, we must vacate the administrative

[2]The amended regulations contain a provision which provides that the opinion of a treating physician may be accorded special consideration under certain circumstances. 65 Fed. Reg. 80,047 (2000)(to be codified at 20 C.F.R. §718.104(d)). This provision does not apply to evidence, such as that in the present case, developed prior to January 19, 2001. 65 Fed. Reg. 80,046 (2000)(to be codified at 20 C.F.R. §718.101(b)).

law judge's finding that the existence of pneumoconiosis was established and remand this case for him to reweigh the medical opinion evidence and weigh together the x-ray and medical opinion evidence in accordance with *Compton*.

With respect to the administrative law judge's consideration of claimant's counsel's attorney fee petition, employer challenged several entries pertaining to counsel's review of the file, preparation for the depositions of Drs. Rasmussen and Renn, discussions with claimant and his wife, research, preparation of evidence for submission, and the drafting of the post-hearing brief. The administrative law judge considered each objection and found that the time expended was compensable, effectively reaffirming the award of attorney fees in the amount of $20,400 for 104 hours billed at an hourly rate of $200. Decision and Order on Remand at 3-5. On appeal, employer argues that the administrative law judge did not engage in a meaningful analysis of whether the hours claimed were reasonable and necessary to the prosecution of the claim, but rather mechanically accepted counsel's explanation of the contested charges.

An administrative law judge's determination with respect to an attorney fee request will be affirmed unless it is arbitrary, capricious, or represents an abuse of discretion. *See Abbott v. Director, OWCP*, 13 BLR 1-15 (1989). When addressing an attorney fee petition, the administrative law judge must determine whether, at the time the attorney performed the service, the attorney 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); *Spencer v. Director, OWCP*, 6 BLR 1-971 (1984). In the present case, the administrative law judge considered counsel's explanations of the challenged entries in light of the nature of the relevant issues and rationally determined that the services rendered with respect to the file reviews, research, evidentiary development, client conferences, and deposition preparation were reasonable and necessary to establish entitlement. *See Abbott*, *supra*; *Lanning*, *supra*. Regarding the drafting of the post-hearing brief, however, the administrative law judge did not perform the requisite analysis. Although he found that taking thirty hours to produce a ninety-three page document was not excessive, the administrative law judge did not render a finding as to the core issue of whether counsel reasonably found it necessary to prepare a brief of this length in order to establish entitlement in the present case. *See Lanning*, *supra*; *see also Kovaly v. Director, OWCP*, 7 BLR 1-383 (1984). We vacate this portion of the administrative law judge's findings regarding the attorney fee petition. The administrative law judge must reconsider this item on remand.

Accordingly, the administrative law judge's Decision and Order on Remand - Award of Benefits is affirmed in part, vacated in part, and remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge