BRB Nos. 11-0474 BLA
and 11-0830 BLA

ELMER PAYNE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HARMAN MINING CORPORATION	)	DATE ISSUED: 04/27/2012
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Supplemental Decision and Order Awarding Attorneys' Fees of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe, Williams, Rutherford & Reynolds), Norton, Virginia, for claimant.

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

Richard A. Seid (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Supplemental Decision and Order Awarding Attorneys' Fees (10-BLA-5217) of Administrative Law Judge Linda S. Chapman (the administrative law judge) rendered on a subsequent claim[1] filed pursuant to the provisions of Title IV of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge credited claimant with 28 years of coal mine employment, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the new evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of

[1] Claimant filed his first claim on January 17, 1989. Director's Exhibit 1. On May 28, 1991, Administrative Law Judge Giles J. McCarthy issued a Decision and Order denying benefits because claimant failed to establish the existence of pneumoconiosis and total respiratory disability. *Id*. Judge McCarthy's denial of benefits was affirmed by the Board, *Payne v. Harman Mining Co.*, BRB No. 91-1614 BLA (Nov. 20, 1992)(unpub.), and the United States Court of Appeals for the Fourth Circuit, *Payne v. Director, OWCP*, No. 92-2579 (4th Cir. July 6, 1993). Claimant filed correspondence on October 6, 1993 and November 2, 1993, which a claims examiner construed as a request for modification. Director's Exhibit 1. On February 4, 1994, a claims examiner denied claimant's request for modification pursuant to 20 C.F.R. §725.310 (2000). *Id*. Claimant also filed a request for modification on February 14, 1994. *Id*. On October 3, 1995, Administrative Law Judge Jeffrey Tureck issued a Decision and Order denying benefits on modification pursuant to 20 C.F.R. §725.310 (2000). *Id*. The denial became final because claimant did not pursue this claim any further. Claimant filed his second claim (a duplicate claim) on January 16, 1998. *Id*. It was denied by a claims examiner on January 20, 1999 because claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id*. Claimant filed a request for modification on January 6, 2000. *Id*. On June 24, 2002, Judge Tureck issued a Decision and Order denying benefits on modification pursuant to 20 C.F.R. §725.310 (2000). *Id*. Claimant filed a request for modification on May 21, 2003. *Id*. On August 18, 2003, the district director denied claimant's request for modification pursuant to 20 C.F.R. §725.310. *Id*. Claimant also filed a request for modification on August 4, 2004. *Id*. On October 19, 2004, a claims examiner denied claimant's request for modification pursuant to 20 C.F.R. §725.310. *Id*. Because claimant did not pursue this claim any further, the denial became final. Claimant filed his third claim (a subsequent claim) on July 17, 2006. Claimant's Exhibit 2. It was finally denied by a claims examiner on January 25, 2007 because claimant failed to establish any element of entitlement. *Id*. Claimant filed this claim (a subsequent claim) on August 14, 2008. Director's Exhibit 4.

entitlement pursuant to 20 C.F.R. §725.309. On the merits, the administrative law judge determined that claimant invoked the rebuttable presumption that his total disability was due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

In a subsequent Supplemental Decision and Order Awarding Attorneys' Fees, the administrative law judge considered claimant's counsel's petition for attorney's fees. The administrative law judge awarded claimant's counsel a fee of $15,336.25 for legal services performed while the case was before the Office of Administrative Law Judges.

On appeal, employer challenges the administrative law judge's finding that it failed to establish rebuttal of the Section 411(c)(4) presumption by showing the absence of pneumoconiosis and disability causation. Both claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the administrative law judge's award of benefits.[2] Further, employer challenges the administrative law judge's award of attorney's fees. Employer contends that the administrative law judge erred in finding that the hourly rate was reasonable. Employer also contends that the administrative law judge erred in considering the amount of time that claimant's counsel billed for specific services. Neither claimant's counsel, nor the Director, has filed a brief in response to employer's appeal of the award of attorney's fees.

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.[3] 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

[2] Employer has filed a brief in reply to claimant's response brief, reiterating its prior contentions.

[3] The Board will apply the law of the Fourth Circuit, as claimant was last employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 1, 2, 5.

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled due to pneumoconiosis, if 15 or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

Initially, we will address employer's contention that the administrative law judge applied an incorrect standard of proof on rebuttal of the presumption at Section 411 (c)(4) of the Act, 30 U.S.C. §921(c)(4). Specifically, employer argues that the administrative law judge erred in requiring it to prove rebuttal beyond any reasonable doubt.

After finding that the x-ray evidence did not establish the existence of clinical pneumoconiosis, the administrative law judge stated that "[c]linical and legal pneumoconiosis are distinct concepts, and the [e]mployer must address both conditions in order to rebut the presumption of total disability due to pneumoconiosis." Decision and Order at 20. The administrative law judge found that the opinions of Drs. Agarwal, DeFore, Fino, and Hippensteel did not assist employer in meeting its burden on rebuttal. In addition, although she noted that Dr. Rosenberg opined that claimant's totally disabling obstructive impairment was due solely to cigarette smoking, the administrative law judge stated that "Dr. Rosenberg has failed to explain why [claimant] could not have developed clinically significant obstructive lung disease as a result of his coal dust exposure, in addition to his smoking history." *Id*. The administrative law judge therefore found that employer failed to meet its burden to establish the absence of legal pneumoconiosis or total disability due to pneumoconiosis.

Contrary to employer's assertion that the administrative law judge erred in requiring it to prove rebuttal beyond any reasonable doubt, the administrative law judge properly found that employer must establish that claimant's pneumoconiosis did not contribute to his total respiratory disability. *See* 30 U.S.C. §921(c)(4); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, BLR (6th Cir. 2011). The administrative law judge specifically stated that, "[i]n order to meet this burden, the [e]mployer must affirmatively *rule out* a causal relationship between [claimant's] disabling respiratory impairment and his coal mine employment." Decision and Order at 21. The administrative law judge reasonably determined that "[s]ince none of the recent medical evidence, which is the evidence most indicative of [claimant's] present pulmonary condition, sufficiently rules out a causal relationship between [claimant's] disabling respiratory impairment and his coal mine employment, I find that the [e]mployer has not sustained its burden to rebut the presumption that [claimant's] totally disabling respiratory impairment is caused by pneumoconiosis." *Id*. at 23; *see* 30 U.S.C.

§921(c)(4); *Morrison*, 644 F.3d at 480, BLR at . Consequently, we reject employer's assertion that the administrative law judge applied an incorrect standard of proof on rebuttal.

Next, we address employer's contention that the administrative law judge erred in discrediting Dr. Rosenberg's opinion because the doctor's explanation of the role that the FEV1/FVC ratio had in determining disease and disability causation was contrary to the preamble to the amended regulations. Specifically, employer asserts that, contrary to the administrative law judge's finding, "[the preamble] says nothing about whether coal dust results in decreased FEV1/FVC ratios." Employer's Brief at 13. Contrary to employer's assertion, the administrative law judge permissibly found that Dr. Rosenberg's opinion was inconsistent with the preamble to the amended regulations, based on the doctor's explanation of the role that the FEV1/FVC ratio had in determining disease and disability causation.[4] *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3rd Cir. 2011); 65 Fed. Reg. 79,940-1, 79,943 (Dec. 20, 2000). Thus, we reject employer's assertion that that the administrative law judge erred in discrediting Dr. Rosenberg's opinion on this ground.

Employer further asserts that the administrative law judge erred in discrediting Dr. Rosenberg's opinion because the doctor's testimony regarding claimant's emphysema was inconsistent with the preamble to the amended regulations. Contrary to employer's

[4] In a report dated November 15, 2010, Dr. Rosenberg stated: "Thus, while I agree with [the Department of Labor (DOL)] that [chronic obstructive pulmonary disease (COPD)] may be detected by a decrease in the FEV1 and FEV1/FVC ratio, this does not generally apply to patients with legal CWP. Among the latter, based on epidemiological studies accepted by [the DOL], the obstruction is characterized by a preservation of the FEV1/FVC ratio. In fact, what has been outlined is that the preservation of the FEV1/FVC ratio is the 'norm' in patients with coal mine induced obstructive lung disease. The opposite is true with respect to smoking-related COPD where the ratio is decreased. Thus, patterns of airflow obstruction help determine the etiology of a given miner's airway obstruction." Employer's Exhibit 1.

Dr. Rosenberg further stated: "Specific to [claimant], one can appreciate that while his FEV1 is decreased, his FEV1/FVC ratio is markedly reduced down to 42% (normal 70% or higher). This pattern of obstruction, as noted above, is not characteristic of obstruction related to past coal mine dust exposure. Rather, it is classic for the presence of [a] smoking-related form of COPD." *Id.*

assertion, the administrative law judge permissibly found that Dr. Rosenberg's opinion was inconsistent with the preamble to the amended regulations, based on the doctor's testimony regarding claimant's emphysema.[5] *Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Obush*, 24 BLR at 1-125-26; 65 Fed. Reg. 79,923, 79,938-39, 79,941-42 (Dec. 20, 2000). Thus, we reject employer's assertion that that the administrative law judge erred in discrediting Dr. Rosenberg's opinion on this ground.

Employer additionally argues that the administrative law judge erred in discrediting Dr. Rosenberg's opinion because the doctor failed to explain why claimant's post-bronchodilator improvement indicated that his chronic obstructive pulmonary disease (COPD) was caused solely by cigarette smoking, even though his test results did not improve to normal. Contrary to employer's assertion, the administrative law judge permissibly found that Dr. Rosenberg did not adequately explain why claimant's partial post-bronchodilator improvement indicated that his COPD was solely related to cigarette smoking.[6] *Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Thus, we reject employer's assertion that that the administrative law judge erred in discrediting Dr. Rosenberg's opinion on this ground.

Employer raises no additional challenge to the administrative law judge's weighing of the evidence. We, therefore, affirm the administrative law judge's findings that employer failed to establish that claimant does not have legal pneumoconiosis or that claimant's total disability is not due to pneumoconiosis and, thus, that it failed to establish rebuttal of the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).

Furthermore, because the administrative law judge properly found that employer failed to establish rebuttal of the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), by establishing either that claimant does not have clinical pneumoconiosis and legal pneumoconiosis, or that claimant's total disability was not due to pneumoconiosis, we affirm the administrative law judge's award of benefits.

---

[5] Dr. Rosenberg stated that "one should appreciate that [claimant's] diffusing capacity is significantly reduced, which is supportive of a diffuse form of emphysema, and one related to smoking history and not coal dust exposure." Employer's Exhibit 1.

[6] Dr. Rosenberg stated that "[claimant] had a marked bronchodilator response, which again is consistent with smoking as opposed to a coal mine dust related form of obstruction." Employer's Exhibit 1.

Finally, we address employer's contention that the administrative law judge erred in awarding attorney's fees.[7] Claimant's counsel submitted a fee petition to the administrative law judge, requesting a fee of $10,227.50 for a total of 70.25 hours of legal services performed by Joseph E. Wolfe, Ryan C. Gilligan, W. Andrew Delph, full time legal assistants, and part time legal assistants, while the case was before the Office of Administrative Law Judges from October 3, 2009 to March 26, 2011.[8] In her Decision and Order, the administrative law judge stated, "I find that the appropriate hourly rate for Mr. Wolfe is $300, $200 for Mr. Delph's time, $175 for Mr. Gilligan's time, and $100 for full time [legal assistants' time], and $60 for part time legal assistants' time."[9] Supplemental Decision and Order at 4. Further, the administrative law judge indicated that she disallowed entries totaling 19 hours because they were clerical in nature.[10] The administrative law judge therefore stated that "the total time is reduced to 70.5 hours, and the fee is reduced to $15,336.25." *Id*. at 7.

The amount of an attorney's fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980); *see also Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (*en banc*).

Employer contends that the administrative law judge erred in finding that the hourly rates were reasonable. Specifically, employer asserts that claimant's counsel failed to produce specific evidence of the prevailing market rates for legal services. Employer maintains that the administrative law judge erred in relying on past fee awards

---

[7] The Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)), provides that when a claimant wins a contested case, the employer, his insurer, or the Black Lung Disability Trust Fund shall pay a "reasonable attorney's fee" to claimant's counsel. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928(a).

[8] The following hourly rates were billed in the fee petition: $300.00 for Joseph E. Wolfe; $225.00 for Ryan C. Gilligan; $200.00 for W. Andrew Delph; $100.00 for full time legal assistants; and $60.00 for part time legal assistants.

[9] With the exception of the hourly rate requested for Mr. Gilligan, the administrative law judge awarded each of the hourly rates requested in the fee petition.

[10] In considering the entries in the fee petition, Administrative Law Judge Linda S. Chapman (the administrative law judge) stated, "I have subtracted .5 hours for Mr. Wolfe, 17.5 hours for full time legal assistants, and 1 hour for part time legal assistants." Supplemental Decision and Order at 7.

and the Altman & Weil's *Survey of Law Firm Economics* to establish the prevailing market rates.

In determining the appropriate fee award, the administrative law judge is required to apply the regulatory criteria found at 20 C.F.R. §725.366(b), which provides that the fee award must 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); *see Pritt v. Director, OWCP*, 9 BLR 1-159 (1986); *see also Velasquez v. Director, OWCP*, 844 F.2d 738, 11 BLR 2-134 (10th Cir. 1988). Failure to discuss and apply the regulatory criteria requires remand. *Lenig v. Director, OWCP*, 9 BLR 1-147 (1986); *Allen v. Director, OWCP*, 7 BLR 1-330 (1984).

In this case, the administrative law judge performed the requisite analysis set forth in Section 725.366(b), considered employer's objections and the evidence provided by both parties as to the prevailing market rates for black lung attorneys, and adequately explained her determination that hourly rates of $300.00 for Mr. Wolfe, $200.00 for Mr. Delph, $175.00 for Mr. Gilligan, $100.00 for full time legal assistants, and $60.00 for part time legal assistants were reasonable under the facts of this case. Within a proper exercise of her discretion, the administrative law judge relied on the following considerations: the nature of the issues involved in this case; the qualifications of the attorneys; Mr. Wolfe's expertise developed in thirty-two years of specialized practice in this area of law; the superior work products of Mr. Wolfe, Mr. Belcher and Mr. Gilligan; Altman & Weil's *Survey of Law Firm Economics*, reporting a range of hourly rates for attorneys in various regions, based on years of practice and experience; the nature of the services rendered; evidence of fees counsel received in the past, based on a list of 21 cases in which the requested rates were awarded as reasonable; and the ultimate benefit to claimant. *See B & G Mining, Inc., v. Director, OWCP* [*Bentley*], 522 F.3d 657, 665-666, 24 BLR 2-106, 2-124 (6th Cir. 2008) (holding that the adjudicator might need to consider one or more specific factors, including experience and complexity of the case, to determine where the particular attorney's representation lies along the spectrum of the market for legal services). Thus, contrary to employer's assertion, the administrative law judge permissibly concluded that the Altman & Weil's *Survey of Law Firm Economics*, considered in conjunction with the other factors, including evidence of fees counsel received in the past, was appropriately included within the range of sources from which to ascertain a reasonable rate. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 289, 24 BLR 2-269, 2-291 (4th Cir. 2010); *Maggard v. International Coal Group, Knott County, LLC*, 24 BLR 1-172 (2010) (Order); *Bowman v. Bowman Coal Co.*, 24 BLR 1-165, 1-170 n.8 (2010) (Order); *Parks v. Eastern Assoc. Coal Corp.*, 24 BLR 1-177, 1-181 n.5 (2010) (Order). Further, because the administrative law judge, within a proper exercise of her discretion, determined that counsel provided sufficient evidence supporting her approval

of the hourly rates of $300.00 for Mr. Wolfe, $200.00 for Mr. Delph, $175.00 for Mr. Gilligan, $100.00 for full time legal assistants, and $60.00 for part time legal assistants, as reasonable for work performed before the Office of Administrative Law Judges, *see generally Broyles v. Director, OWCP*, 824 F.2d 327, 10 BLR 2-194 (4th Cir. 1987), *aff'd sub nom. Pittston Coal Group v. Sebben*, 488 U.S. 105, 12 BLR 2-89 (l988), we reject employer's assertion that claimant's counsel failed to produce specific evidence of the prevailing market rates for legal services.

Because it is not arbitrary, capricious, or an abuse of discretion, we affirm the administrative law judge's approval of the hourly rates for Mr. Wolfe, his co-counsel, and his legal assistants in this case.

Employer also objects to the administrative law judge's calculation of allowable hours. Specifically, employer argues that "[the administrative law judge] appeared to have incorporated reductions for clerical charges from a different case." Employer's Brief on Fees at 3. Employer asserts that the fact that five charges referenced by the administrative law judge corresponded with charges from the fee petition is just a coincidence.

We hold that employer's assertion has merit. As discussed *supra*, claimant's counsel requested a fee of $10,227.50 for 70.25 hours of legal services before the Office of Administrative Law Judges from October 3, 2009 to March 26, 2011. In considering the fee petition, however, the administrative law judge disallowed entries from May 5, 2008 to February 17, 2011 that clearly were not a part of the fee petition. Supplemental Decision and Order at 4-6. Further, despite claimant's counsel's request for a fee of $10,227.50 for 70.25 hours of legal services, the administrative law judge awarded claimant's counsel a fee of $15,336.25 for 70.5 hours of legal services. *Id*. at 7. We, therefore, agree with employer that the administrative law judge erroneously relied on entries for work that were different from the entries for work listed in claimant's counsel's fee petition for this case. *Lanning v. Director, OWCP*, 7 BLR 1-314 (1984). Consequently, we vacate the administrative law judge's award of attorney's fees in the amount of $15,336.25 for 70.5 hours of legal services and remand the case to the administrative law judge for consideration of the entries for work that are listed in claimant's counsel's fee petition.[11]

[11] Employer requests that the case be remanded for reassignment to a different administrative law judge. Because employer has not demonstrated any bias or prejudice on the part of the administrative law judge, employer's request is denied. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed, and her Supplemental Decision and Order Awarding Attorneys' Fees is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge