BRB No. 12-0356 BLA

JANET HUMPHRIES (Widow of and o/b/o JAMES C. HUMPHRIES)	)	
Claimant-Respondent	)	
v.	)	
UNITED STATES STEEL MINING COMPANY	)	DATE ISSUED: 04/23/2013
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 on Remand of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joan B. Singleton, Bessemer, Alabama, for claimant.

Kary B. Wolfe and Timothy M. Davis (Jones, Walker, Waechter, Poitevent, Carrère & Denègre LLP), Birmingham, Alabama, for employer.

Rita Roppolo (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 on Remand (2005-BLA-5068 and 2005-BLA-5069) of Administrative Law Judge Daniel F. Solomon awarding benefits on a

miner's duplicate claim[1] and denying benefits on a survivor's claim[2] filed pursuant to the provisions of Title IV of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case is before the Board for the third time.[3] Pursuant to the last appeal filed by claimant, the Board vacated Administrative Law Judge Edward Terhune Miller's finding that the evidence did not establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), and remanded the case for further consideration of the medical opinion evidence thereunder. The Board also held that, under the circumstances of this case, it lacked jurisdiction to consider the specific issues raised by claimant before the Board in the appeal of the denial of her survivor's claim.[4] Nevertheless, the Board remanded the case to Judge Miller for modification proceedings pursuant to 20 C.F.R. §725.310 (2000), because it construed the Brief on Remand that claimant filed with Judge Miller on February 22, 2008 as a request for modification of the survivor's claim. *Humphries v. U.S. Steel Mining Co.*, BRB Nos. 09-0729 BLA and 10-0149 BLA (Aug. 31, 2010)(unpub.). Subsequently, the Board denied employer's motion for reconsideration. *Humphries v. U.S. Steel Mining Co.*, BRB Nos. 09-0729 BLA and 10-0149 BLA (Feb. 28, 2011)(unpub. Order on Recon.).

On remand, the case was reassigned to Judge Solomon (the administrative law judge), who found that the evidence established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits in the miner's claim. Regarding the survivor's claim, the administrative law judge found that the evidence did not establish that the miner's death was due to

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[1] The miner filed claims on August 12, 1991, March 23, 1992, and December 17, 1997, which were finally denied. Director's Exhibits 26, 27. The miner filed this claim (a duplicate claim) on June 12, 2000. Director's Exhibit 1.

[2] Claimant is the widow of the miner, who died on July 22, 2003. Director's Exhibits 45, 48. She filed her survivor's claim on February 2, 2004. Director's Exhibit 52. The miner's claim and the survivor's claim were consolidated before the Office of Administrative Law Judges.

[3] The full procedural history of this case is set forth in the Board's decisions in *Humphries v. U.S. Steel Mining Co.*, BRB Nos. 06-0647 BLA and 06-0647 BLA-A (Apr. 27, 2007)(unpub.), and *Humphries v. U.S. Steel Mining Co.*, BRB Nos. 09-0729 BLA and 10-0149 BLA (Aug. 31, 2010)(unpub.).

[4] The Board determined that, "[b]ecause claimant did not seek reconsideration of the Board's decision or file an appeal with the United States Court of Appeals, the Board's decision became final as of April 27, 2007, the date it was filed with the Clerk of the Board." *Humphries*, BRB Nos. 09-0729 BLA and 10-0149 BLA, slip op. at 9.

pneumoconiosis at 20 C.F.R. §718.205(c)(1)-(5). Accordingly, the administrative law judge denied benefits in the survivor's claim.

On appeal, employer challenges the administrative law judge's finding that the evidence established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) in the miner's claim. Both claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the administrative law judge's award of benefits in the miner's claim. Employer filed a brief in reply to claimant's response brief, reiterating its prior contentions.[5]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[6] 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).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that the miner was 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).

Employer contends that the administrative law judge erred in finding that the evidence established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge considered the opinions of Drs. Shad, Sherman, and Rosenberg. Dr. Shad opined that the miner's pneumoconiosis and obstructive lung disease related to coal dust exposure contributed to his total disability. Director's Exhibit 10. Dr. Sherman opined that he could not determine the cause of the miner's pulmonary impairment from the information given to him. Director's Exhibit 17. Dr. Sherman further opined that, while he did not find the evidence presented to him convincing for determining the presence of pneumoconiosis, coal workers'

[5] Because the findings of Administrative Law Judge Daniel F. Solomon (the administrative law judge), that the evidence did not establish that the miner's death was due to pneumoconiosis and, thus, that claimant is not entitled to benefits in the survivor's claim, are not challenged on appeal, they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] The record indicates that the miner was employed in the coal mining industry in Alabama. Director's Exhibits 2, 26, 34. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

pneumoconiosis was a possible etiology of the miner's pulmonary impairment. *Id*. Lastly, Dr. Rosenberg opined that the miner's minimal degree of simple coal workers' pneumoconiosis did not cause any disabling respiratory impairment. Employer's Exhibit 1.

The administrative law judge found that Dr. Shad's opinion was reasoned and documented. The administrative law judge found that Dr. Sherman's opinion was equivocal. Further, the administrative law judge found that Dr. Rosenberg's opinion was contrary to the spirit of the Act. Moreover, the administrative law judge found Dr. Rosenberg's opinion, that the miner did not suffer from a totally disabling respiratory impairment, was contrary to his own finding. Based on his finding that Dr. Shad's opinion was entitled to dispositive weight on the issue of disability causation, the administrative law judge found that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c).

Employer asserts that the administrative law judge erred in finding that Dr. Shad's opinion is sufficient to establish disability causation. Specifically, employer argues that Dr. Shad's opinion is unreliable. Contrary to employer's assertion, the administrative law judge permissibly accorded dispositive weight to Dr. Shad's opinion because it is reasoned and documented. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). After noting that the autopsy evidence established that the miner had simple pneumoconiosis, the administrative law judge found that "[t]his new evidence adds credence to Dr. Shad's diagnosis of pneumoconiosis and his finding that the miner's total disability is due to coal dust-related obstructive lung disease." 2012 Decision and Order at 5. Further, the administrative law judge found that, [d]espite some evidence that the miner may have smoked cigarettes earlier in his lifetime…, the record establishes that the miner had a very extensive coal mine employment history of approximately 41 years, which dwarfs his possible smoking history." *Id*. Thus, the administrative law judge reasonably found that Dr. Shad's disability causation opinion was reasoned and documented. *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Lucostic*, 8 BLR at 1-47; *Fuller*, 6 BLR at 1-1294. Consequently, we reject employer's assertion that the administrative law judge erred in finding that Dr. Shad's opinion is sufficient to establish disability causation. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Employer also asserts that the administrative law judge erred in discounting Dr. Rosenberg's opinion. Contrary to employer's assertion, the administrative law judge permissibly discounted Dr. Rosenberg's opinion because it is contrary to the spirit of the Act, as he found that the doctor's statements indicate a belief that pneumoconiosis does

not cause an impairment unless blood gas studies show impairment. *Sweet v. Jeddo-Highland Coal Co.*, 7 BLR 1-659 (1985); *Whitaker v. Director, OWCP*, 6 BLR 1-983 (1984); *see generally Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1981); *Walker v. Brown Badgett, Inc.*, 8 BLR 1-220 (1985); *Cunningham v. Pittsburg & Midway Coal Co.*, 7 BLR 1-93 (1984). In addition, the administrative law judge permissibly discounted Dr. Rosenberg's opinion because it is contrary to the spirit of the Act, as he found that the doctor's opinion is based on the belief that simple pneumoconiosis is not disabling in the absence of x-ray evidence of advanced pneumoconiosis. *A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011), *aff'g J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009). Further, the administrative law judge permissibly discounted Dr. Rosenberg's opinion because the doctor's opinion that the miner did not suffer from pneumoconiosis is contrary to his finding on this issue. *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). Thus, we reject employer's assertion that the administrative law judge erred in discounting Dr. Rosenberg's opinion.

Employer further asserts that the administrative law judge erred in discounting Dr. Sherman's opinion. Contrary to employer's assertion, the administrative law judge permissibly discounted Dr. Sherman's opinion because it is equivocal. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). Thus, we reject employer's assertion that the administrative law judge erred in discounting Dr. Sherman's opinion.

Furthermore, we reject employer's assertion that the administrative law judge erred in failing to consider Dr. Hasson's disability causation opinion,[7] as employer did not specifically challenge the administrative law judge's failure to consider the doctor's opinion in the motion for reconsideration it filed before the Board on October 1, 2010.[8]

[7] Dr. Hasson opined that there was no evidence of pneumoconiosis, that the etiology of the miner's chronic obstructive pulmonary disease (COPD) was intrinsic, and that the etiology of the miner's hypertensive cardiovascular disease (HCVD) was idiopathic. Director's Exhibit 27. Dr. Hasson further opined that both the intrinsic COPD and the idiopathic HCVD contributed to the miner's mild respiratory impairment. *Id*.

[8] In his May 29, 2009 Decision and Order, Administrative Law Judge Edward Terhune Miller found that "Dr. Hasson's medical opinion is not considered probative on the issue of causation of total disability because he determined that the [m]iner had not proved the existence of [coal workers' pneumoconiosis], which has now been proved by the autopsy evidence." 2009 Decision and Order at 12. Nevertheless, based on his

Sarf v. Director, OWCP, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). We, therefore, affirm the administrative law judge's award of benefits in the miner's claim.

We now address claimant's counsel's fee petition filed in connection with services performed before the Board, pursuant to 20 C.F.R. §802.203. Claimant's counsel has filed an amended complete, itemized statement requesting a fee for services performed before the Board in BRB Nos. 06-0647 BLA and 06-0647 BLA-A, BRB Nos. 09-0729 BLA and 10-0149 BLA, and BRB No. 12-0356 BLA, pursuant to 20 C.F.R. §802.203.[9] Claimant's counsel requests a fee of $14,475.00 for 47.75 hours of legal services at an hourly rate of $300.00, plus expenses in the amount of $150.00. Employer has filed objections to the fee petition. Claimant's counsel has not replied to the objections.

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finding that the conflicting opinions of Drs. Shad and Rosenberg are similarly probative, Judge Miller found that claimant failed to establish disability causation at 20 C.F.R. §718.204(c). As discussed, *supra*, in response to claimant's appeal, the Board addressed Judge Miller's finding regarding disability causation. Although it did not address Judge Miller's weighing of Dr. Hasson's opinion, the Board vacated Judge Miller's finding at 20 C.F.R. §718.204(c), and remanded the case for further consideration of the evidence. *Humphries*, BRB Nos. 09-0729 BLA and 10-0149 BLA, slip op. at 8.

[9] On March 27, 2012, claimant's counsel filed an itemized statement requesting a fee for services performed before the Board in BRB Nos. 06-0647 BLA and 06-0647 BLA-A, as well as BRB Nos. 09-0729 BLA and 10-0149 BLA, pursuant to 20 C.F.R. §802.203. Employer filed an objection to the fee petition. By Order dated July 24, 2012, the Board agreed with employer that claimant's counsel failed to satisfy the requirements of 20 C.F.R. §725.366, as well as the Board's regulatory requirements set out at Section §802.203(d). The Board determined that "[t]he fee petition submitted by claimant's counsel is incomplete on its face, as it does not contain 'the normal billing rate for each person who performed services on behalf of claimant.' 20 C.F.R. §802.203(d)(4)." *Humphries v. U.S. Steel Mining Co.*, BRB Nos. 06-0647 BLA, 06-0647 BLA-A, and BRB Nos. 09-0729 BLA and 10-0149 BLA, slip op. at 2 (July 24, 2012)(unpub. Order). Hence, the Board denied claimant's counsel's fee petition. However, the Board instructed claimant's counsel that she may re-file a fee petition in compliance with the requirements set forth in 20 C.F.R. §802.203 within thirty (30) days from receipt of the Order.

Employer contends that claimant's counsel's amended fee petition fails to correct the deficiencies in the first fee petition.[10] Specifically, employer asserts that claimant's counsel's hourly rate is excessive and unreasonable for her jurisdiction. Employer also asserts that claimant's counsel's statement that the requested hourly rate is justified, based on an enhancement due to the length of the litigation and the contingent nature of the work, lacks foundation in this case.

An attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). The prevailing market rate is "the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004). The fee applicant has the burden to produce satisfactory evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896 n.11; *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 617 (6th Cir. 2007).

In support of her requested hourly rate, claimant's counsel submitted pages from the Survey of Law Firm Economics published by Altman & Weil, a statement that she was a member in good standing of a state bar at the time she performed the services at issue pursuant to 20 C.F.R. §802.203(d)(2), and a statement regarding her experience as an attorney.[11] *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 228, 43 BRBS 67, 71 (CRT) (4th Cir. 2009); *B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 664-65, 24 BLR 2-106, 2-122-23 (6th Cir. 2008). Furthermore, notwithstanding employer's challenge on this issue, employer has not submitted any contrary evidence to show that the hourly rate requested is unreasonable within claimant's counsel's geographic area. Moreover, although she stated that the requested hourly rate is justified based on an enhancement due to the length of the litigation and the

[10] Unlike in the first fee petition, claimant's counsel, in the amended fee petition, stated that "[a]ll the hours billed here are attributable to this lawyer who is in good standing before the federal bar and State of Alabama Bar." Amended Fee Petition at 1. Claimant's counsel further stated that "[n]o clerical hours and postage, FEDEx charges, neither in-house nor external copying costs have been billed." *Id*.

[11] In the amended fee petition, claimant's counsel notes the following: She has graduated from an accredited law school, the National Law Center at George Washington University; she has been admitted to practice before the Bar of Alabama, the United States Court of Appeals for the Eleventh Circuit, and the United States Supreme Court; and she has more than 30 years of experience as an attorney. Claimant's counsel also notes that "[her] normal billing rate is $300 per hour on civil cases." Amended Fee Petition at 1.

contingent nature of the work, there is no indication that claimant's counsel relied on contingency multipliers to enhance her fee award to compensate for a risk of loss in this case. *City of Burlington v. Dague*, 112 S.Ct. 2638 (1992); *Broyles v. Director, OWCP*, 974 F.2d 508, 17 BLR 2-1 (4th Cir. 1992); *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91 (1995). Consequently, we find that claimant's counsel's requested hourly rate of $300.00 is reasonable and we approve it. *Blum*, 465 U.S. at 896 n.11.

Employer also asserts that many of the entries claimed by claimant's counsel only contain cursory statements of tasks, without substantive details necessary to determine whether the time expended was excessive or unreasonable. Upon review of claimant's counsel's descriptions of the services rendered in the itemized entries to which employer objects, we conclude that the itemized entries sufficiently detail the tasks performed by claimant's counsel to evaluate the reasonableness of the time expended on the legal services. *Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316 (1984). Thus, we reject employer's assertion that claimant's counsel's fee petition fails to satisfy the requirements set forth at 20 C.F.R. §802.203(d). Nevertheless, because the Board may not award a fee for services performed before other tribunals, *see Abbott v. Director, OWCP*, 13 BLR 1-15 (1989); *Matthews v. Director, OWCP,* 9 BLR 1-184, 1-186 (1986), we disallow 7.75 hours of time for services performed on June 23, 2007, July 3, 2007, August 2, 2007, January 3, 2008, and February 4, 2008. We also disallow 0.25 hours of time spent by claimant's counsel sending a fax to the Director on February 4, 2010, as this work was clerical in nature. *Whitaker v. Director, OWCP*, 9 BLR 1-216 (1986); *McKee v. Director, OWCP*, 6 BLR 1-233 (1983); *Childers v. Director, OWCP*, 2 BLR 1-1198 (1980); *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980). Further, we disallow $150.00 in expenses by claimant's counsel for a filing fee in federal court. However, we allow the remaining 39.75 hours for legal services, as they are reasonably commensurate with the necessary work performed in the appeals before the Board. Consequently, we award claimant's counsel a fee of $11,925.00 for 39.75 hours of legal services performed before the Board at an hourly rate of $300.00.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits on a miner's duplicate claim and denying benefits on a survivor's claim is affirmed. Moreover, claimant's counsel's is awarded a fee of $11,925.00 for 39.75 hours of work performed before the Board in BRB Nos. 06-0647 BLA and 06-0647 BLA-A, BRB Nos. 09-0729 BLA and 10-0149 BLA, and BRB No. 12-0356 BLA, to be paid directly to claimant's counsel by employer. 33 U.S.C. §932(a); 20 C.F.R. §802.203.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge