BRB No. 98-0229 BLA

ROBERT L. KIRK, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY)		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 and Corrected Supplemental Decision and Order Granting Attorney Fees of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

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

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

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (87-BLA-3223 and 94-BLA-1689) of Administrative Law Judge Gerald M. Tierney awarding benefits 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). Employer also appeals the administrative law judge's Corrected Supplemental Decision and Order Granting

Attorney Fees (87-BLA-3223 and 94-BLA-1689).[1] The instant case involves a 1986 duplicate claim.[2] The administrative law judge initially found the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. The administrative law judge, therefore, considered claimant's 1986 claim on the merits. After crediting claimant with at least thirty-four years of coal mine employment, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). The administrative law judge also found that claimant was entitled to a presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that claimant established total disability pursuant to 20 C.F.R. §718.204(c)(4). The administrative law judge also found that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge awarded benefits. On

[1]Employer filed one appeal of the administrative law judge's Decision and Order awarding benefits and another appeal of the administrative law judge's Corrected Supplemental Decision and Order Granting Attorney Fees. By Order dated March 31, 1998, the Board consolidated these two appeals.

[2]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on October 31, 1979. Director's Exhibit 22. The district director denied benefits on August 19, 1980. *Id.* There is no indication that claimant took any further action in regard to his 1980 claim.

Claimant filed a second claim on September 19, 1986. Director's Exhibit 1.

appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Employer also contends that the administrative law judge erred in finding the evidence sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[3] Employer also contests the administrative law judge's attorney fee award. Claimant responds in support of the administrative law judge's attorney fee award.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

[3]Inasmuch as no party challenges the administrative law judge's finding that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer argues that the administrative law judge erred in finding the x-ray evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Employer initially contends that the administrative law judge erred in allowing claimant to submit two post-hearing interpretations of claimant's September 27, 1994 x-ray without providing it with an opportunity to provide further interpretations of the x-ray.[4] However, inasmuch as employer had an opportunity to object to the admission of this post-hearing evidence and failed to do so, *see* Hearing Transcript at 10-16, employer cannot raise its objection on appeal to the Board. *See generally Kauzlarich v. Director, OWCP*, 4 BLR 1-744 (1982).

[4]On August 23, 1996, claimant asked employer to provide him with x-rays taken on October 3, 1988, October 21, 1988 and September 27, 1994. Hearing Transcript at 10. While claimant received the October 3, 1988 and October 21, 1988 x-rays on September 10, 1996, claimant did not receive the September 27, 1994 x-ray until September 19, 1996. *Id*. Consequently, claimant was prevented from submitting any interpretations of the September 27, 1994 x-ray within twenty days of the scheduled October 8, 1996 hearing. Although claimant, at the hearing, submitted four interpretations of the September 27, 1994 x-ray, claimant requested an opportunity to obtain further readings of this x-ray. Claimant asserted that since it took approximately a month for employer to supply the September 27, 1994 x-ray, he should be provided an equivalent number of days after receipt of the film to obtain readings and submit them. *Id.* at 15. Noting that employer had submitted six interpretations of the September 27, 1994 x-ray and claimant had submitted only four, the administrative law judge allowed claimant the opportunity to submit two additional interpretations of the September 27, 1994 x-ray. *Id.* at 15-16.

Employer also argues that the administrative law judge erred in his consideration of the x-ray evidence. In determining whether the x-ray evidence was sufficient to establish the establish the existence of pneumoconiosis, the administrative law judge acted within his discretion by according greater weight to the interpretations of claimant's most recent x-ray taken on September 27, 1994. *See Pate v. Alabama By-Products Corp.*, 6 BLR 1-636 (1983); Decision and Order at 7; Claimant's Exhibits 21-23, 27, 28; Employer's Exhibits 11, 12, 14, 15, 17, 19. The administrative law judge also properly accorded greater weight to the interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). Among the physicians interpreting claimant's most recent x-ray, the administrative law judge found that Drs. Wiot, Spitz, Cappiello, Ahmed, Brandon and Harron were dually qualified as B readers and Board-certified radiologists. Decision and Order at 6. The administrative law judge noted that Drs. Wiot and Spitz rendered negative interpretations of claimant's September 27, 1994 x-ray while Drs. Cappiello, Ahmed, Brandon and Aycoth read this x-ray as positive for pneumoconiosis.[5] Decision and Order at 7. Because a majority of the best qualified physicians interpreted claimant's most recent x-ray as positive for pneumoconiosis,[6] the administrative law judge found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[7] Inasmuch as it is based upon substantial evidence, we

[5]Drs. Wheeler and Scott also interpreted claimant's September 27, 1994 x-ray, each finding the x-ray negative for pneumoconiosis. *See* Employer's Exhibits 14, 15. Although employer asserts that these physicians were identified as B readers and Board-certified radiologists at the hearing, *see* Transcript at 15, the record does not document either physician's status as a Board-certified radiologist. Consequently, the administrative law judge properly identified Drs. Wheeler and Scott as mere B readers. Decision and Order at 6.

[6]The administrative law judge further noted that Dr. Pathak, a B reader who holds the British equivalent of American Board-certification in Radiology, also interpreted claimant's September 27, 1994 x-ray as positive for pneumoconiosis. Decision and Order at 7 n.2; Claimant's Exhibit 24.

[7] Citing *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993), employer argues that the administrative law judge, in his evaluation of the x-ray evidence, erred in not considering party affiliation. It is initially noted that the instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. Because there is no evidence that claimant performed any coal mine employment within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, *Woodward* is not controlling.

affirm the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Employer also contends that the administrative law judge erred in finding the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Section 718.202(a), however, provides alternative methods by which a claimant may establish the existence of pneumoconiosis. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). In light of our affirmance of the administrative law judge's finding that the x-ray evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), we decline to address the administrative law judge's errors, if any, in

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Moreover, even if applicable, the administrative law judge's analysis does not violate the reasoning of *Woodward*. While *Woodward* permits an administrative law judge to consider party affiliation when evaluating x-ray evidence, an administrative law judge may not accord less weight to x-ray interpretations based upon party affiliation unless he properly determines, based upon evidence in the record, that the physicians retained by a party are biased. See *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *see also Cochran v. Consolidated Coal Co.*, 16 BLR 1-101 (1992); *Chancey v. Consolidation Coal Co.*, 7 BLR 1-240 (1984). Furthermore, although *Woodward* allows for consideration of party affiliation, the United States Court of Appeals for the Sixth Circuit has not held that party affiliation should be dispositive in determining the weight to be assigned the medical evidence of record. Consequently, the administrative law judge did not err in not considering party affiliation in the instant case.

his consideration of the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Employer also contends that the administrative law judge erred in finding that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b).[8] In finding the evidence sufficient to establish that claimant's total disability was due to pneumoconiosis, the administrative law judge credited the opinions of Drs. Rasmussen and Abrahams over the contrary opinions of Drs. Renn and Fino. Decision and Order at 14-15. Employer argues that the administrative law judge failed to address whether the opinions of Drs. Rasmussen and Abrahams are sufficiently reasoned. We agree. The administrative law judge failed to adequately address whether the opinions of Drs. Rasmussen and Abrahams are sufficiently reasoned. *See Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). We, therefore, vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b) and remand the case for further consideration.[9]

Turning to the administrative law judge's award of attorney fees, employer argues that the amount of the award is excessive. The award of an attorney's fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989).
The administrative law judge awarded claimant's counsel a total fee of $23,998.91 for 104.25 hours of legal services at an hourly rate of $200.00, 1.50 hours of legal

[8]The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that a claimant must prove by a preponderance of the evidence that his pneumoconiosis was at least a contributing cause of his totally disabling respiratory impairment. *See Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

[9]In weighing the conflicting medical opinions at 20 C.F.R. §718.204(b), the administrative law judge assigned less probative weight to the opinions of Drs. Renn and Fino on disability causation because they did not diagnose pneumoconiosis. Decision and Order at 14-15. In *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), the United States Court of Appeals for the Fourth Circuit held that a medical opinion that acknowledges a miner's respiratory or pulmonary impairment, but nonetheless concludes that an ailment other than pneumoconiosis caused the miner's total disability, is relevant because it directly rebuts the miner's evidence that pneumoconiosis contributed to his disability. On remand, the administrative law judge is instructed to reconsider the opinions of Drs. Renn and Fino in light of *Ballard*.

services at an hourly rate of $50.00, and $3,073.91 in expenses. The administrative law judge also awarded claimant $878.00 in expenses.

Employer initially argues that the administrative law judge's award of an hourly rate of $200.00 is excessive. The regulations provide that an approved fee shall 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 the fee requested." 20 C.F.R. §725.366. After finding that claimant's counsel was not entitled to an enhancement of $30.00 per hour for delay of payment, the administrative law judge awarded claimant's counsel his "basic hourly rate in black lung cases of $200.00 per hour." Corrected Supplemental Decision and Order Granting Attorney Fees at 3. The administrative law judge subsequently noted that the fee award was based upon the nature of the issues involved, the degree of skill with which claimant was represented, the amount of time and work involved, and other relevant factors. *Id.* at 4. Inasmuch as it is not arbitrary, capricious, or an abuse of discretion, we affirm the administrative law judge's finding that claimant's counsel was entitled to an hourly fee of $200.00.

Employer also contends that the administrative law judge failed to adequately address its specific objections to the time that claimant's counsel requested for various legal services. Employer filed ten specific objections to claimant's requested hours. *See* Employer's Objections to Fee Petition dated December 24, 1997. However, rather than addressing employer's objections, the administrative law judge stated:

> With respect to the objections to specific entries, reasonable latitude and discretion must be allowed to an experienced attorney in the practice of his profession. Reasonable attorneys might choose different quantitative or qualitative courses or choices of emphasis in rendering professional services in particular cases. However, second guessing such choices in small increments, absent an appearance of abuse, obvious error or inconsistency with practice in the relevant professional community, gross incompetence or lack of good faith is an exercise in futility. The time [claimant's counsel] spent reviewing the file, traveling, organizing exhibits and preparing the brief are necessary and reasonable and the Employer's objection to excessive hours is overruled.

Corrected Supplemental Decision and Order Granting Attorney Fees at 3.

The administrative law judge's cursory rejection of employer's objections[10] does not comply with the Administrative Procedure Act, specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record, 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 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Consequently, we vacate the administrative law judge's attorney fee award and remand the case to the administrative law judge with instructions to address employer's specific objections to the attorney fee petition.[11]

[10]For example, employer challenges as excessive the thirty hours that claimant's counsel spent preparing a brief. Employer also argues that claimant's counsel failed to adequately explain why he found it necessary to conduct medical research.

[11]We note that an attorney's fee award does not become effective, and is thus unenforceable, until there is a successful prosecution of the claim. *Coleman v. Ramey Coal Co*., 18 BLR 1-9, 1-17 (1995).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion. The administrative law judge's Corrected Supplemental Decision and Order Granting Attorney Fees is affirmed in part and vacated in part.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge