BRB No. 99-0434 BLA

WILLIAM E. HAWKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ZEIGLER 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 - Awarding Benefits and Supplemental Decision and Order Granting Attorney Fees of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Rick Rauch (McNamar, Fearnow & McSharar, P.C.), Indianapolis, Indiana, for claimant.

Richard A. Dean and Gregory S. Feder (Arter & Hadden LLP), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits and Supplemental Decision and Order Granting Attorney Fees (95-BLA-0834) of Administrative Law Judge Rudolf L. Jansen 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). The administrative law judge considered the instant claim, a duplicate claim filed on May 26, 1992,[1] on the merits under the applicable regulations at 20 C.F.R. Part 718.[2] After crediting

[1]Claimant filed a prior claim on June 5, 1981. Director's Exhibit 33. The claim was finally denied on September 4, 1981 by the district director, who found that claimant failed to establish the existence of pneumoconiosis and total disability. *Id.* Claimant did not take further action until filing the instant claim on May 26, 1992. Director's Exhibit 1.

claimant with thirty-eight years of coal mine employment based upon the parties' stipulation, the administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1), (a)(2) and (a)(4). The administrative law judge further found the evidence of record sufficient to establish the existence of complicated pneumoconiosis under 20 C.F.R. §718.304 and that claimant was, therefore, entitled to the irrebuttable presumption of total disability due to pneumoconiosis.[3] Accordingly, the administrative law judge awarded benefits. Subsequently, claimant's counsel filed a timely fee petition, and a supplemental request for attorney fees for time expended in defending his attorney fee petition against employer's opposition to the original fee petition. In a Supplemental Decision and Order Granting Attorney Fees, the administrative law judge awarded claimant's counsel the entire requested fee in both the original fee petition and supplemental application; *i.e.*, $26,850.70, representing $17, 865.75 in fees for legal services plus $8,984.95 in expenses.

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[2]The administrative law judge noted that he was required to consider whether the new evidence was sufficient to establish one of the elements previously adjudicated against claimant in determining whether claimant established a material change in conditions under 20 C.F.R. §725.309. Decision and Order at 3-4; *see* *Spese v. Peabody Coal Co.*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)*; Sahara Coal Co. v. Director, OWCP [McNew]*, 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991). The administrative law judge actually considered the claim on the merits, however, without independently assessing whether the new evidence established a material change in conditions. Any error the administrative law judge made in doing so was harmless, inasmuch as employer does not contend on appeal that the administrative law judge's failure to make a specific material change in conditions determination was prejudicial. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[3]The administrative law judge also found claimant entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), and that the presumption was not rebutted. Decision and Order at 18.

On appeal of the award of benefits, employer contends that the administrative law judge erred in finding claimant entitled to the irrebuttable presumption of total disability due to pneumoconiosis under Section 718.304(a)(1)-(3). Claimant responds in support of the decision awarding benefits. Employer filed a reply brief, reiterating its contentions in its Petition for Review and brief. Claimant filed a letter in response to employer's reply brief. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend to participate in this appeal. Employer also challenges the administrative law judge's award of an attorney's fee, arguing that the award was arbitrary, capricious and an abuse of discretion. Claimant responds in support of the fee award. Employer filed a reply brief. Claimant subsequently filed a motion to strike employer's argument in its reply brief that the hourly rate requested by claimant was unreasonable, contending that employer failed to raise this issue before the administrative law judge or at any prior point during the pendency of the litigation. Employer filed an opposition to claimant's motion, contending that it had raised the issue before the administrative law judge. Claimant filed a reply brief in support of his motion to strike.

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. 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).

An award of attorney fees is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious and indicative of an abuse of discretion. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989); *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

In challenging the administrative law judge's findings on the merits, employer first contends that the administrative law judge improperly found the x-ray evidence sufficient to establish the presence of complicated pneumoconiosis pursuant to Section 718.304(a). Employer argues that the administrative law judge failed to weigh all of the evidence bearing on the issue inasmuch as he did not consider Dr. Fino's rationale for his opinion that claimant's x-rays were negative for complicated pneumoconiosis. Pointing to Dr. Fino's conclusion that the changes he noted on claimant's December 1990 and July 1991 x-rays showed far too rapid of a progression for any coal mine dust condition, employer asserts that the administrative law judge should have credited Dr. Fino's negative x-ray readings over the readings of Dr. Tarver, which indicate the presence of complicated pneumoconiosis, since Dr. Tarver testified that, as a radiologist, he would advance no views on the progression of pneumoconiosis because that issue would be best addressed by a pulmonologist. Employer argues that, in failing to consider Dr. Fino's reasons for finding the x-ray evidence negative for complicated pneumoconiosis, the administrative law judge merely engaged in a head counting analysis and "provided no rationale for his decision making process between [the] conflicting [x-ray] reports." Employer's Brief at 21.

Employer's contentions lack merit. Employer's suggestion that the administrative

law judge should have accorded determinative weight to Dr. Fino's negative x-ray readings amounts to a request to reweigh the evidence. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Contrary to employer's contention, the administrative law judge permissibly found the x-ray evidence sufficient to establish the existence of complicated pneumoconiosis because the number of positive readings for complicated pneumoconiosis by dually-qualified B reader/ Board-certified radiologists outweighed the negative readings of the physicians possessing these special radiological qualifications. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 4-7, 16-17. The administrative law judge properly found that the record contains x-ray interpretations of large opacities[4] from four physicians dually-qualified as B reader/Board-certified radiologists: Drs. Cole, Fisher, Cappiello and Tarver. Decision and Order at 16; Director's Exhibits 16, 27; Claimant's Exhibits 7, 13, 21, 22. The administrative law judge properly found that the earliest identification of a large opacity came from Dr. Fisher's reading of the December 26, 1990 film, which indicated the presence of large opacities, size B. Decision and Order at 16; Director's Exhibit 27. Substantial evidence supports the administrative law judge's finding that the majority of the subsequent x-ray readings from dually-qualified radiologists was positive for large opacities. Decision and Order at 16. Including the December 26, 1990 reading from Dr. Fisher, there are six positive readings from dually-qualified radiologists, two negative readings from similarly-qualified physicians, and one interpretation from Dr. Sargent that a film (the December 26, 1990 film) was unreadable. Director's Exhibits 16, 27, 29; Claimant's Exhibits 7, 13, 21, 22; Employer's Exhibits 2, 3. Employer does not challenge the accuracy of these findings. We thus affirm, as supported by substantial evidence and in accordance with law, the administrative law judge's finding that the majority of readings from the highest-qualified readers was positive for complicated pneumoconiosis and that claimant established, therefore, the presence of the disease pursuant to Section 718.304(a).

[4]Pursuant to 20 C.F.R. §718.304(a), a miner may establish the existence of complicated pneumoconiosis based upon an x-ray diagnosis of one or more large opacities greater than one centimeter in diameter, and which would be classified in category A, B, or C. *See* 20 C.F.R. §718.304(a).

Employer also argues that the administrative law judge mischaracterized the biopsy evidence and never resolved the conflict presented by the competing evidence under Section 718.304(b), but rather merely referenced Dr. Jones's opinion that claimant has progressive massive fibrosis. There were two biopsies performed, on December 27, 1990 and January 24, 1997. Claimant's Exhibit 11; Employer's Exhibit 23. Dr. Jones found the December 1990 slides showed progressive massive fibrosis.[5] Claimant's Exhibit 18. Dr. Jones indicated that the 1997 slides were suggestive of progressive massive fibrosis, but not diagnostic of it due to the fact that the tissue samples were not large enough to show a firm black nodule measuring the required one to two centimeters in maximum diameter. Claimant's Exhibit 30. In contrast, Dr. Naeye viewed the 1997 slides and stated that the tissue sample was too small for him to read the biopsy and make any diagnosis of complicated pneumoconiosis. Employer's Exhibit 33. Employer contends that the administrative law judge mischaracterized Dr. Jones's opinion regarding the 1997 biopsy slides as supportive of a finding of progressive massive fibrosis since Dr. Jones stated that he could not make a definitive diagnosis of progressive massive fibrosis. Employer also contends that Dr. Jones did not address the size of the tissue samples on the 1997 slides, and that the administrative law judge erred in failing to weigh that factor against Dr. Naeye's opinion that the tissue sample was too small to be of any diagnostic use. Employer asserts that, in view of these factors, and because Dr. Fino agreed with Dr. Naeye that the tissue sample was too small to document progressive massive fibrosis, the administrative law judge should have found the biopsy evidence insufficient to establish complicated pneumoconiosis under §718.304(b). Employer's contentions lack merit.

Employer is incorrect in asserting that Dr. Jones did not address the problem regarding the sample size of the 1997 biopsy tissue. Moreover, substantial evidence supports the administrative law judge's finding that Dr. Jones's opinion with regard to the 1997 biopsy slides supports a finding of progressive massive fibrosis. In his January 8, 1998 report, Dr. Jones states:

> The only reason a firm diagnosis of Progressive Massive Fibrosis was not made pathologically [with the 1997 slides] was that the standard for making the diagnosis requires a firm black nodule of at least 1 to 2 centimeters in

[5]Drs. Soper and Bonnin performed the biopsy in 1990, and diagnosed dense fibrosis with hyalinization. Employer's Exhibit 23. Drs. Soper and Bonnin also reported the presence of anthracotic pigment, although they did not specifically indicate whether claimant had complicated pneumoconiosis or progressive massive fibrosis. Employer's Exhibit 23. The administrative law judge properly found that the qualifications of the two physicians are not contained in the record. Decision and Order at 9. Dr. Kashlan performed the January 24, 1997 bronchoscopy. Claimant's Exhibit 11. In his report, Dr. Kashlan found the presence of anthracosis and interstitial fibrosis, but did not indicate that claimant had complicated pneumoconiosis or progressive massive fibrosis. *Id*. The administrative law judge properly found that Dr. Kashlan's qualifications are not contained in the record. Decision and Order at 12.

> maximal dimension. *Unfortunately, the biopsy is far smaller than that*. However, the histological features of the biopsy indicate it is from pulmonary tissue...and the radiologic findings are *virtually diagnostic for Progressive Massive Fibrosis*. In other words, this case is equivalent to you showing me a picture of a large gray animal with a trunk and white tusks and then allowing me to examine a hair from the animal shown in the picture. My opinion would be the hair you showed me was from an elephant.

Claimant's Exhibit 33. (emphasis added). Contrary to employer's contention, the administrative law judge properly found that the positive biopsy evidence of Dr. Jones, a Board-certified pathologist, was supported by the objective evidence of record – *i.e.*, the radiographic evidence of complicated pneumoconiosis and the CT scan reports of Drs. Tarver and Zancanaro, which indicated the presence of large opacities – and was, therefore, sufficient to establish complicated pneumoconiosis under Section 718.304(b). *See King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); Decision and Order at 17; Claimant's Exhibits 18, 20, 33; Employer's Exhibit 17.

Next, we reject employer's contention that the administrative law judge erred in invoking the presumption at Section 718.304 without considering the evidence of record which, if credited, would support a finding that claimant is not totally disabled.[6] The inquiry at Section 718.304 is not whether claimant is totally disabled. Establishing complicated pneumoconiosis gives rise to the irrebuttable presumption that claimant is totally disabled due to pneumoconiosis. *See* 20 C.F.R. §718.304. Contrary to employer's contention, the administrative law judge properly considered all of the relevant evidence under Section 718.304(a)(c), as discussed *supra*, prior to finding that claimant established invocation of the irrebuttable presumption of total disability due to pneumoconiosis. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991). Accordingly, we affirm the administrative law judge's award of benefits on the merits.

With regard to the award of attorney fees, employer first generally argues that the administrative law judge's fee award is arbitrary, capricious and an abuse of discretion because the administrative law judge erroneously put the burden on employer to show that counsel's fee application was unreasonable rather than requiring claimant's counsel to establish what was necessary and reasonable. Employer contends that the administrative law judge awarded $26,850.70 in fees and expenses based solely on claimant's counsel's

[6]Employer suggests that the evidence of record which indicates that claimant has no respiratory impairment or only a mild impairment is inconsistent with a finding of complicated pneumoconiosis, and that the administrative law judge should have so found. Had the administrative law judge done so, his conclusion would have been tantamount to an improper substitution of his own opinion for that of the medical experts. *See Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

unsupported assertions that the hours and rates billed were reasonable and necessary. We disagree. The administrative law judge duly addressed each of employer's objections to claimant's fee applications, and provided reasons in support of his conclusions that claimant's counsel's fees and expenses were reasonable and necessary.

Employer specifically argues that the administrative law judge improperly made it incumbent on employer to show that the requested rates of $175.00 per hour for Mr. Fearnow, $125.00 per hour for Rick Rauch, and $50.00 to $100.00 per hour for Ms. Moran were excessive.[7] We disagree. The administrative law judge properly found that these hourly rates were reasonable after considering the requisite criteria used to determine a fee award under 20 C.F.R. §725.366(b), including the quality of legal representation provided, the qualifications of claimant's counsel, and the complexity of the legal issues involved in this case. *See* 20 C.F.R. §725.366(b); *Pritt v. Director, OWCP*, 9 BLR 1-159 (1986); Supplemental Decision and Order at 5. Additionally, the administrative law judge acted within his discretion in determining that employer merely asserted, and failed to show, why the requested rates were unreasonable. *See Jones v. Badger Coal Co.*, 21 BLR 1-102 (1998).

Furthermore, contrary to employer's contention, the administrative law judge properly awarded claimant's counsel the requested supplemental fee for 2.9 hours of time billed in defense of the original fee application. *See Workman v. Director, OWCP*, 6 BLR 1-1281 (1984); Supplemental Decision and Order at 5. The administrative law judge also acted within his discretion in finding nothing objectionable about the entries to which employer refers as clerical; specifically, setting up doctors' appointments and preparing a mailer. The administrative law judge noted that the entries referred to by employer indicate that counsel conducted telephone conferences with the doctors to discuss matters relating to the case, and reviewed doctors' reports; *i.e.* that counsel performed more than what employer refers to as simply clerical tasks. Additionally, we find no merit in employer's contention that the Act bars shifting the expenses of fees of non-testifying witnesses to employer, and that the administrative law judge thus erred in allowing these expenses. The administrative law judge acted within his discretion in finding that the expenses requested by claimant's counsel for physicians' fees were necessary and reasonable for claimant to successfully prosecute his claim. *See Abbott, supra*; Supplemental Decision and Order at 3. Finally, we reject employer's contention that the administrative law judge erred in

[7]Claimant's motion to strike this issue on grounds that employer was raising this issue for the first time on appeal is rejected. The administrative law judge's Supplemental Decision and Order Granting Attorney Fees indicates that employer raised the issue before the administrative law judge. *See* Supplemental Decision and Order at 5.

awarding reimbursement for postal and copying expenses, inasmuch as it is within the administrative law judge's discretion to determine which of these expenses are reasonable and necessary given the complexity of the case, and whether the expenses should be considered compensable or disallowed as overhead. *See Picinich v. Lockheed Shipbuilding*, 23 BRBS 128 (1989); Supplemental Decision and Order at 3-4.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits and Supplemental Decision and Order Granting Attorney Fees are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge