BRB No. 00-1038 BLA

LUCILLE HARDIN (Widow of JAMES HARDIN)	)	
Claimant-Respondent	)	
v.	)	
OLD BEN 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 on Remand and Supplemental Decision and Order - Granting Attorney Fees of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Jack N. VanStone (VanStone & Kornblum), Evansville, Indiana, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

Edward Waldman (Howard M. Radzely, 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 and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand and Supplemental Decision and Order - Granting Attorney Fees (94-BLA-1487) of Administrative Law Judge Donald W. Mosser 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).[1] This case is before the Board for the third time. In the original Decision and Order, the administrative law judge credited the miner with twenty-three years of coal mine employment and adjudicated both the miner's claim and the survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. With regard to the miner's claim, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2) (2000) and 718.203(b) (2000). However, the administrative law judge found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). Accordingly, the administrative law judge denied benefits in the miner's claim. With regard to the survivor's claim, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) (2000). However, the administrative law judge found the evidence insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1)-(3)[2] (2000). Accordingly, the administrative law judge denied benefits in the survivor's claim.

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. 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). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The administrative law judge stated, "I note that the presumption at Section 718.304 is not applicable to this claim because there is no credible evidence of complicated pneumoconiosis." [1996] Decision and Order at 13.

In response to the first appeal filed by claimant,[3] the Board affirmed the administrative law judge's length of coal mine employment finding. However, the Board vacated the administrative law judge's finding that the evidence is insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis or death due to pneumoconiosis at 20 C.F.R. §718.304 (2000), and remanded the case for further consideration of the evidence. Further, the Board vacated the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c) (2000), and remand the case for further consideration of the evidence. *Hardin v. Old Ben Coal Co.*, BRB No. 97-0140 BLA (Oct. 27, 1997)(unpub.). On initial remand, the administrative law judge found the evidence insufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis or death due to pneumoconiosis at 20 C.F.R. §718.304 (2000). The administrative law judge also found the evidence insufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(1)-(3) (2000). Accordingly, the administrative law judge again denied benefits in both the miner's claim and the survivor's claim.

In disposing of claimant's second appeal, the Board affirmed the administrative law judge's finding at 20 C.F.R. §718.205(c)(1) (2000). However, the Board vacated the administrative law judge's findings at 20 C.F.R. §§718.205(c)(2), (c)(3) (2000) and 718.304 (2000), and remanded the case for further consideration of the evidence. *Hardin v. Old Ben Coal Co.*, BRB No. 98-1436 BLA (Sept. 29, 1999)(unpub.). Further, the Board subsequently denied employer's request for reconsideration. *Hardin v. Old Ben Coal Co*., BRB No. 98-1436 BLA (Jan. 7, 2000)(unpub. Order). On most recent remand, the administrative law judge found the evidence sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis or death due to pneumoconiosis at 20 C.F.R. §718.304(a)-(c) (2000). The administrative law judge also found the evidence sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(2) (2000). Accordingly, the administrative law judge ordered benefits in the miner's claim to

[3]Claimant is the widow of the deceased miner, James Hardin. Director's Exhibits 24, 29; Employer's Exhibit 10. The miner filed his claim on May 6, 1991. Director's Exhibit 1. However, while his claim was pending before the Office of Administrative Law Judges, the miner died on October 15, 1992. Director's Exhibits 24, 29; Employer's Exhibit 10. Claimant subsequently filed her survivor's claim on January 25, 1993. Director's Exhibit 24.

commence as of July 1, 1983 and he ordered benefits to commence in the survivor's claim as of October 1, 1992.

On appeal, employer challenges the administrative law judge's finding that the evidence is sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis or death due to pneumoconiosis at 20 C.F.R. §718.304(a)-(c) (2000). Employer also challenges the administrative law judge's finding that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(2) (2000). Lastly, employer challenges the administrative law judge's onset date of disability determination with regard to the miner's claim at 20 C.F.R. §725.503A. Claimant responds to employer's appeal, urging affirmance of the administrative law judge's Decision and Order on Remand.[4] The Director, Office of Workers' Compensation Programs (the Director), has declined to respond to employer's appeal.

With regard to attorney's fees, claimant's counsel filed an Application For Approval of a Representative's Fee of $15,376.46 on August 2, 2000 for work performed from July 17, 1993 to July 6, 2000 at an hourly rate of $200.00, and for miscellaneous expenses incurred from July 17, 1993 to July 6, 2000. In a Supplemental Decision and Order dated December 15, 2000, the administrative law judge awarded claimant's counsel a fee of $10, 920.05 for 50 ½ hours of legal services at an hourly rate of $200.00, and for $820.05 incurred in miscellaneous expenses.[5] On appeal, employer contends that the administrative law judge erred in finding that claimant's counsel is entitled to an hourly rate of $200.00 for legal services performed before him. Employer also contends that the administrative law judge erred by compensating claimant's counsel for an unreasonable number of hours for legal

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

[5]The administrative law judge stated, "I find that two hours were rendered before the district director, 50-1/2 hours were performed before the Office of Administrative Law Judges and the remaining 20-1/4 of services were devoted to the case while it was pending before the Benefits Review Board." Supplemental Decision and Order at 4. The administrative law judge therefore stated, "I shall only address the 50-1/2 hours of services rendered while the case was pending before the Office of Administrative Law Judges." *Id*. In addition, the administrative law judge stated, "[t]he only expenses claimed in the application which I believe should not be reimbursed by the employer are the long distance charges in the amount of $1.89 and the postage charges of $4.52, which I believe should be included as a part of claimant's counsel's overhead." *Id*. at 6. Hence, the administrative law judge stated, "I therefore disallow $6.41 of the expenses claimed by [claimant's counsel] and approve $820.05." *Id*.

services. Claimant's counsel responds, urging affirmance of the administrative law judge's award of attorney's fees.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on April 23, 2001, to which claimant, employer and the Director have responded. In a brief dated April 30, 2001, claimant indicated that the revisions to the regulations would not affect the outcome of the case. Similarly, in a brief dated May 9, 2001, employer indicated that the revisions to the regulations which are the subject of litigation would not affect the outcome of the case.[6] Lastly, in a brief dated May 14, 2001, the Director indicated that his position is that the instant case would not be affected by application of the litigated regulations. The Director, therefore, indicated that the Board could decide the instant case. Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

[6]Employer notes that it contests the retroactive application of the revised regulations to pending claims. Employer also states that if the Board believes that the administrative law judge's award of benefits should be affirmed based on the new regulations, the case must be stayed for the duration of the briefing, hearing and decision schedule set by United States District Court for the District of Columbia in the preliminary injunction. Further, employer states that if the challenged regulations are upheld following litigation, the Board may not adjudicate this appeal in any event since remand would be required for the administrative law judge to afford the parties an opportunity to respond to the changes in the law with new proof and for further fact-finding under the revised regulations.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

We will first address the administrative law judge's award of benefits in the miner's claim under 20 C.F.R. Part 718. Initially, employer contends that the administrative law judge erred in finding the evidence sufficient to establish invocation of the irrebuttable presumption at 20 C.F.R. §718.304(a) (2000). Employer's contention is based on the premise that the administrative law judge did not provide a valid basis for weighing the conflicting x-ray evidence. The administrative law judge stated, "I reiterate from my previous decision that the x-ray evidence is tipped in favor of a finding of complicated pneumoconiosis under Section 718.304(a)." Decision and Order on Remand at 2. Of the thirty-four x-ray interpretations of record, six readings demonstrated the presence of complicated pneumoconiosis, Director's Exhibits 9; Claimant's Exhibits 1, 2, 7, and twenty-eight readings were negative for pneumoconiosis, Director's Exhibits 17, 32-34; Employer's Exhibits 1-6, 10. In his prior decision, the administrative law judge observed that "[o]f these twenty-eight [negative x-ray readings], ten [readings] are classified in accordance with the regulations."[7] [1998] Decision and Order on Remand at 3. The administrative law judge also observed that "[o]f the remaining ten [negative readings], only two of the readings were made by a doctor (Dr. Cole) who is both [B]oard-certified in radiology and classified as a B-reader." *Id*. However, based on his finding that the x-ray readings provided by Dr. Cole are conflicting, the administrative law judge discredited all of Dr. Cole's x-ray interpretations.

The administrative law judge further stated that "[o]ne other physician (Dr. Brandon) certified as both a B-reader and as a [B]oard-certified radiologist found the existence of complicated pneumoconiosis." *Id*. The administrative law judge observed that "[t]his doctor, Dr. Brandon, found [complicated pneumoconiosis] twice, but did not read any x-ray taken after 1986." *Id*. The administrative law judge also observed that "[f]ive physicians certified as B-readers, but not [B]oard-certified radiologists, did read x-rays performed after that date, and none of them found any pneumoconiosis, much less complicated pneumoconiosis." *Id*. Nonetheless, the administrative law judge stated, "[o]n balance, I find the two readings by the more qualified Dr. Brandon ever so slightly tip[ped] the scales in

[7]The administrative law judge stated, "I give little weight to the unclassified x-rays." [1998] Decision and Order on Remand at 3.

favor of x-ray indications of complicated pneumoconiosis." *Id*.

While Dr. Cole indicated that the x-ray dated June 25, 1991 demonstrated the presence of complicated pneumoconiosis, Director's Exhibit 9; Claimant's Exhibit 1, Dr. Cole read subsequent x-rays dated September 2, 1991 and September 24, 1991 as negative for pneumoconiosis, Director's Exhibits 32, 33. The administrative law judge stated, "I find it significant, however, that [Dr. Cole] read two later x-rays and found no presence of the disease at all." [1998] Decision and Order on Remand at 3. The administrative law judge therefore stated that "[t]his calls [Dr. Cole's] prior reading into question, and I discount his interpretations because they are contradictory." *Id*. Contrary to the administrative law judge's finding, an administrative law judge may not discredit the x-ray readings of a radiologist on the basis that the radiologist rendered a positive interpretation indicating the presence of complicated pneumoconiosis and a negative interpretation of different x-rays. *See generally Gober v. Reading Anthracite Co.*, 12 BLR 1-67 (1988). Unlike physicians who render medical opinions with respect to the existence of complicated pneumoconiosis on the bases of physical examinations, x-ray evidence, objective evidence, smoking and coal mine employment histories, and reviews of medical evidence, radiologists render interpretations of the presence or absence of roentgenographic manifestations of the disease solely on the basis of the x-ray film that is before them. *Compare* 20 C.F.R. §§718.202(a)(1) and 718.304(a) with 20 C.F.R. §§718.202(a)(4) and 718.304(c). Thus, inasmuch as the administrative law judge did not provide a valid basis for discounting Dr. Cole's x-ray readings, we vacate the administrative law judge's finding that the x-ray evidence is sufficient to establish invocation of the irrebuttable presumption at 20 C.F.R. §718.304(a) (2000), and remand the case for further consideration of the x-ray evidence. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Employer also contends that the administrative law judge erred in finding the evidence sufficient to establish invocation of the irrebuttable presumption at 20 C.F.R. §718.304(b) (2000). Specifically, employer asserts that the relevant autopsy report evidence does not support a finding of complicated pneumoconiosis since it does not contain a diagnosis of massive lesions. The record contains the relevant pathology reports of Drs. Crouch, Cymbala and Porro. In a surgical pathology report dated March 26, 1992, Dr. Porro diagnosed chronic obstructive pulmonary disease. Director's Exhibit 31. In an autopsy report dated October 16, 1992, Dr. Cymbala opined that "[t]here are numerous macular anthracotic spots on the pleura, the largest measuring about 1 cm. in diameter and about 0.2 cm. thick." Director's Exhibit 30; Employer's Exhibit 10. Lastly, in a pulmonary pathology consultation report dated October 27, 1993, Dr. Crouch opined that tissue from a single section of the lung showed no discernable evidence of pneumoconiosis. Employer's Exhibit 13. The administrative law judge stated, "[w]hile I did not believe the autopsy evidence and the CT scan report were sufficient to support...a finding [of complicated pneumoconiosis], I must now conclude that such evidence, considered with Dr. Houser's opinion, is sufficient to

support a finding of complicated pneumoconiosis under Section 718.304." Decision and Order on Remand at 3. Autopsy findings can support a finding of complicated pneumoconiosis where a physician diagnoses "massive lesions"[8] or where an evidentiary basis exists for the administrative law judge to make an equivalency finding between autopsy findings and x-ray findings.[9] *See* 20 C.F.R. §718.304; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Lohr v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-1264 (1984). The

[8]The pertinent regulation provides that "[t]here is an irrebuttable presumption...that a miner's death was due to pneumoconiosis...if such miner is suffering or suffered from a chronic dust disease of the lung which...[w]hen diagnosed by biopsy or autopsy, yields massive lesions in the lung." 20 C.F.R. §718.304(b).

[9]The pertinent regulation also provides that "[t]here is an irrebuttable presumption...that a miner's death was due to pneumoconiosis...if such miner is suffering or suffered from a chronic dust disease of the lung which...[w]hen diagnosed by chest X-ray...yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C in...[t]he ILO-U/C International Classification of Radiographs of the Pneumoconioses." 20 C.F.R. §718.304(a)(1).

administrative law judge appears to have implicitly equated Dr. Cymbala's finding, that the largest macular anthracotic spot measured about 1 centimeter in diameter, with the one centimeter requirement for large opacities on x-ray set out at 20 C.F.R. §718.304(a). Decision and Order on Remand at 3. However, the administrative law judge did not set out a proper evidentiary basis for making such a finding.[10] *Id*. Thus, we vacate the administrative law judge's finding that the autopsy evidence is sufficient to establish invocation of the irrebuttable presumption at 20 C.F.R. §718.304(b) (2000), and remand the case for further consideration of the autopsy evidence.

[10]In *Clites v. Jones & Laughlin Steel Corp.*, 663 F.2d 14, 3 BLR 2-86 (3d Cir. 1981), the United States Court of Appeals for the Third Circuit held that Dr. Ayres's autopsy report and deposition testimony supported the administrative law judge's finding that the miner had massive lesions in his lungs prior to his death. Dr. Ayres' autopsy report did not specifically state that the miner had massive lesions. The court reasoned that equivalency determinations between autopsy findings and x-ray findings can be made by an administrative law judge when there is an evidentiary basis for doing so. In *Clites*, the court held that an evidentiary basis did exist for the administrative law judge to render an equivalency determination since Dr. Ayres' deposition testimony was to the effect that had the nodules he found been x-rayed while the miner was alive, they would show opacities measuring between 1 and 1.5 centimeters.

Further, employer contends that the administrative law judge erred in finding the evidence sufficient to establish invocation of the irrebuttable presumption at 20 C.F.R. §718.304(c) (2000). Employer asserts that Dr. Houser's opinion is not reasoned. As previously noted, the administrative law judge stated, "[w]hile I did not believe that the autopsy evidence and the CT scan report were sufficient to support such a finding, I must now conclude that such evidence, considered with Dr. Houser's opinion, is sufficient to support a finding of complicated pneumoconiosis under Section 718.304." *Id*. In considering Dr. Houser's opinion, the administrative law judge stated, "[s]ince the physician's diagnoses were based upon a thorough examination of the evidentiary record, I find that his opinion is documented and reasoned." Decision and Order on Remand at 3. The administrative law judge observed that "[Dr. Houser's] opinion that the miner had progressive massive fibrosis due to coal dust exposure from coal mine employment is not merely a reiteration of his x-ray findings." *Id*. Rather, the administrative law judge observed that "Dr. Houser, who is Board-certified in internal medicine and pulmonary diseases, reviewed the medical records in this case, which included the autopsy reports, biopsy slides and medical records, in addition to the findings from the x-rays, in rendering his opinion." *Id*. Thus, we reject employer's assertion that Dr. Houser's opinion is based solely upon x-ray evidence. Moreover, inasmuch as the above mentioned documentation supports Dr. Houser's basis for concluding that the miner suffered from complicated pneumoconiosis, we reject employer's assertion that Dr. Houser's opinion is not reasoned.[11]

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[11]Citing *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994), employer also asserts that the administrative law judge erred in relying on Dr. Houser's opinion since it was based on "questionable" x-ray readings. In *Fitts*, the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, rejected the administrative law judge's reliance upon the opinion of Dr. Houser because Dr. Houser's opinion was based on a discredited x-ray reading. The administrative law judge, in *Fitts*, found that despite the subsequent negative x-ray readings, Dr. Tuteur's opinion that Mr. Fitts did not have pneumoconiosis was outweighed by the contrary opinions of Drs. Rao and Houser. In rejecting the administrative law judge's findings, the court stated, [o]f course the fact that [Drs.] Rao and Houser each relied on a questionable piece of evidence - an x-ray they thought positive for pneumoconiosis but more experienced x-ray readers thought negative - did not by itself invalidate their conclusions." *Fitts*, 39 F.3d at 783, 18 BLR at 2-387. The court observed that "[w]hen a witness relies for his conclusion on facts A, B, and C, and fact A is knocked out, it does not follow that his conclusion must change." *Id*. The court reasoned that "[i]t may be that his conclusion would be unchanged as long as two out of the three facts, or even just one of the three facts, were true." *Id*. Nonetheless, the court concluded that "[n]o one reading either [Dr.] Rao's or [Dr.] Houser's report of their examination of [Mr.] Fitts would know what weight they had given the x-ray evidence." *Id*. However, the facts in the instant case are distinguishable from the facts in *Fitts*. Here, the opinion of Dr. Houser is based on Dr. Houser's readings of x-rays dated July 8, 1983 and

June 13, 1986, and Dr. Cole's reading of an x-ray dated June 25, 1991, which all demonstrated the presence of complicated pneumoconiosis. Drs. Cole and Houser are B-readers and Board-certified radiologists. The x-ray readings of Drs. Cole and Houser were not reread as negative for pneumoconiosis by physicians with superior qualifications. To the contrary, Dr. Houser's July 8, 1983 and June 13, 1986 x-rays were reread by Drs. Brandon and Tarver as demonstrating the presence of complicated pneumoconiosis. Dr. Tarver is a B-reader and Dr. Brandon is a B-reader and a Board-certified radiologist. Dr. Craig reread the July 8, 1983 x-ray as negative for pneumoconiosis. Employer's Exhibit 10. However, Dr. Craig is neither a B-reader nor a Board-certified radiologist. Similarly, although Drs. Hippensteel and Stewart reread the June 25, 1991 x-ray as negative for pneumoconiosis, Director's Exhibit 17, Drs. Hippensteel and Stewart are B-readers, and not Board-certified radiologists. Thus, we reject employer's assertion that the administrative law judge erred in relying on Dr. Houser's opinion since it was based on discredited x-ray readings.

However, as argued by employer and as revealed by an examination of the record, the administrative law judge failed to consider all of the relevant evidence of record. Decision and Order on Remand at 2-4. Specifically, the administrative law judge did not consider the opinions of Drs. Castle, Renn and Tuteur. Drs. Castle, Renn and Tuteur opined that the miner did not suffer from pneumoconiosis. Employer's Exhibits 15, 16, 18, 20. While an administrative law judge is not required to accept medical evidence that he determines is not credible, he nonetheless must address and discuss all of the relevant evidence of record. *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984). Thus, inasmuch as the administrative law judge did not consider all of the relevant evidence of record, we vacate the administrative law judge's finding that the other evidence of record is sufficient to establish invocation of the irrebuttable presumption at 20 C.F.R. §718.304(c) (2000), and remand the case for further consideration of such evidence. If reached on remand, the administrative law judge must weigh together the various categories of evidence prior to making a determination as to whether invocation is established in accordance with *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

We therefore vacate the administrative law judge's award of benefits in the miner's claim, and remand the case for further consideration. If reached on remand, the administrative law judge must render an onset date of disability determination in the miner's claim. *See* 20 C.F.R. §725.503A.

We next address the administrative law judge's award of benefits in the survivor's claim under 20 C.F.R. Part 718. Benefits are payable on survivor's claims filed on or after January 1, 1982 only when the miner's death was due to pneumoconiosis.[12] *See* 20 C.F.R. §§718.1, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a

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[12]Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

> (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
> (3) Where the presumption set forth at §718.304 is applicable.
> ...
> (5) Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death.

20 C.F.R. §718.205(c).

survivor's claim, a claimant must establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1)-(4); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). A claimant must also establish that the miner's pneumoconiosis arose out of coal mine employment. *See* 20 C.F.R. §718.203; *Boyd, supra*.

Employer contends that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c)(2) (2000). The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has held that pneumoconiosis is a substantially contributing cause of a miner's death under 20 C.F.R. §718.205(c)(2) (2000) in a case in which the disease actually hastens his death. *See Peabody v. Director, OWCP* [*Railey*], 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992); *see also* 20 C.F.R. §718.205(c)(2) and (c)(5). In the instant case, the administrative law judge considered Dr. Houser's report. Dr. Houser opined that pneumoconiosis was a significant contributing factor to the miner's death. Claimant's Exhibits 1, 6. The administrative law judge stated, "[s]ince I have now concluded that this opinion must be accepted as documented and reasoned, it follows that Dr. Houser's opinion is sufficient to meet the claimant's burden of proof under this section of the regulations." [2000] Decision and Order on Remand at 5. However, the administrative law judge did not consider the death certificate signed by Dr. Gootee and the relevant medical reports of Drs. Castle, Long and Tuteur. In the death certificate, Dr. Gootee indicated that diffuse mesothelioma was the cause of the miner's death. Director's Exhibit 29; Employer's Exhibit 10. Whereas Dr. Long opined that pneumoconiosis contributed to the miner's death, Director's Exhibit 35, Drs. Castle, Renn and Tuteur opined that pneumoconiosis did not contribute to the miner's death, Employer's Exhibits 10, 15, 16, 18. As previously noted, while an administrative law judge is not required to accept medical evidence that he determines is not credible, he nonetheless must address and discuss all of the relevant evidence of record. *See McCune, supra*. Thus, we vacate the administrative law judge's finding that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis, *see* 20 C.F.R. §718.205(c)(2), and remand the case for further consideration of the evidence.

In addition, the administrative law judge must determine whether the evidence is sufficient to establish that the miner's death was due to pneumoconiosis based on evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.205(c)(3) and 718.304. Therefore, we vacate the administrative law judge's award of benefits in the survivor's claim, and remand the case for further consideration.

With regard to the administrative law judge's award of attorney's fees, employer contends that the administrative law judge erred in failing to explain why claimant's counsel is entitled to an hourly rate of $200.00 for legal services that he performed before the administrative law judge. The pertinent regulation provides that "[a]ny fee approved

under...this section shall be reasonably commensurate with the necessary work done and 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 fee requested." 20 C.F.R. §725.366(b). The administrative law judge stated that "[o]f particular importance to this case, that section provides [that] the approved fee shall be reasonably commensurate with the necessary work performed taking into consideration other factors and other information which may be relevant to the amount of the fee requested." Supplemental Decision and Order at 2. The administrative law judge also stated, [a]s correctly noted by [claimant's counsel] in his supplement, several administrative law judges, including me, have previously approved an hourly rate of $200.00 for this attorney." *Id.* Thus, inasmuch as the administrative law judge rationally found that an hourly rate of $200.00 in this case is reasonable for claimant's counsel "[b]ased upon [his] knowledge of [claimant's counsel's] handling of cases of this nature," *id*., we reject employer's assertion that the administrative law judge erred in failing to explain why claimant's counsel is entitled to an hourly rate of $200.00 for legal services that he performed before the administrative law judge. Therefore, we decline to disturb the administrative law judge's award of an hourly rate of $200.00 for claimant's counsel's legal services.[13] *See O'Kelley v. Dept. of the Army/NAF*, 34 BRBS 39 (2000); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*., 32 BRBS 251 (1998).

Employer additionally contends that the administrative law judge erred by compensating claimant's counsel for an unreasonable number of hours. Specifically, employer argues that the administrative law judge failed to provide an adequate explanation for compensating claimant's counsel for performing clerical tasks. The administrative law judge stated, "I do not believe the services are necessarily clerical in nature since they involve the receipt or review of correspondence or pleadings which necessarily should be considered by counsel rather than a member of [claimant's counsel's] clerical staff." Supplemental Decision and Order at 5. Thus, inasmuch as the administrative law judge

[13]Notwithstanding the recent holding of the Seventh Circuit in *Peabody Coal Co. v. McCandless*, Nos. 00-1449, 00-2788, 95-3291 (7th Cir. June 29, 2001)(published), the facts in the instant case indicate that claimant's counsel asserts that his normal hourly rate is $200.00. *See* Application for Approval of a Representative's Fee; Claimant's Response to Employer's Petition for Review Attorney's Fee.

rationally found that these services performed by claimant's counsel were reasonable and necessary, we reject employer's argument that the administrative law judge erroneously compensated claimant's counsel for time spent performing clerical duties. *See Lanning v. Director, OWCP*, 7 BLR 1-314 (1984). Moreover, since the administrative law judge considered the reasonableness of the time claimed by claimant's counsel and properly found that billing in 15 minute increments is acceptable, Supplemental Decision and Order at 6, we reject employer's argument that the administrative law judge erred by approving claimant's counsel's request for compensation in increments of one-quarter of an hour for services which do not require that much time to perform. *See Neeley v. Newport News Shipbuilding & Dry Dock Co.*, 19 BLR 138 (1986); *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 83 (1982).

Employer further asserts that the administrative law judge erred in finding that claimant's counsel is entitled to expenses for medical records since claimant's counsel did not provide bills or invoices for these expenses. The administrative law judge stated, "[claimant's counsel] has represented in a document filed before me and certified in the application for approval of a representative's fee that the information contained therein is true and accurate to the best of his knowledge." Supplemental Decision and Order at 6. The administrative law judge additionally stated that "[claimant's counsel] has itemized the date of the expenses, the specific nature of the expenses and the amounts, all of which appear to be reasonable under the circumstances of this case." *Id*. Thus, we reject employer's assertion that the administrative law judge erred in finding that claimant's counsel is entitled to expenses for medical records since claimant's counsel did not provide bills or invoices for these expenses.[14]

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is vacated and the case is remanded for further proceedings consistent with this opinion. The administrative law judge's Supplemental Decision and Order - Granting Attorney Fees is affirmed.

[14]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).

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge