BRB No. 05-0127 BLA

MANFORD J. HENLINE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: 08/26/2005
ISLAND CREEK COAL COMPANY	)	
	)	
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 L. Leland, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Kathy L. Snyder (Jackson & Kelly, PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (01-BLA-0709) of Administrative Law Judge Daniel L. Leland 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). This case has been before the Board previously. In the original decision, the parties stipulated to, and Administrative Law Judge Robert J. Lesnick found, at least twenty-one years of coal mine employment and that employer was the proper responsible operator. Decision and Order dated February 25, 2003. Considering entitlement pursuant to 20 C.F.R. Part 718, the administrative law judge concluded that claimant established the existence of pneumoconiosis arising out of coal mine employment

and that he was totally disabled by the disease pursuant to 20 C.F.R. §§718.202, 718.203 and 718.204.[1] Decision and Order dated February 25, 2003. Accordingly, benefits were awarded.

On appeal, the Board rejected employer's assertions that the claim was untimely filed and that the administrative law judge erred in retroactively applying the amended regulations to this claim. The Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1)-(3) and that the evidence of record was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). The Board vacated, however, the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(4) and his disability causation finding pursuant to 20 C.F.R. §718.204(c) and remanded the case for the administrative law judge to determine whether the medical reports of record were reasoned and documented, to set forth the basis for his conclusions, and to consider if the existence of pneumoconiosis was established in light of *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).[2] *Henline v. Island Creek Coal Co.*, BRB No. 03-0403 BLA (Feb. 25, 2004)(unpub.).

On remand, Administrative Law Judge Daniel L. Leland found the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[3] Decision and Order on Remand at 5-10. Considering the evidence pursuant to *Compton*, the administrative law judge further concluded that the evidence of record as a whole was sufficient to establish the existence of pneumoconiosis. Decision and Order on Remand at 10. The administrative law judge further found that the medical opinion evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(c). Decision and Order on Remand at 10-11. Accordingly, benefits were awarded.

Employer contends on appeal that the administrative law judge erred in finding the existence of pneumoconiosis established and in finding that claimant's total disability was due to pneumoconiosis. Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of

---

[1] Claimant filed his claim for benefits with the Department of Labor on July 18, 2000. Director's Exhibit 1.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was last employed in the coal mine industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 2, 3, 8.

[3] On remand, the case was assigned to Administrative Law Judge Daniel L. Leland as Administrative Law Judge Robert J. Lesnick was no longer with the Office of Administrative Law Judges.

Workers' Compensation Programs has filed a letter indicating that he will not participate in this appeal.

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).

Initially, we will address employer's contention that the administrative law judge violated employer's fundamental rights to due process and to a full and fair hearing by taking judicial notice of the qualifications of Dr. Rasmussen and the West Virginia Occupational Pneumoconiosis Board without following the proper procedure and/or allowing employer an opportunity to contradict the noticed fact. Employer's Brief at 30-34. We reject employer's contention. The administrative law judge noted that the credentials of Dr. Rasmussen and the physicians of the West Virginia Occupational Pneumoconiosis Board, Drs. Walker, Revercomb, and Kugel, were not in the record. Decision and Order on Remand at 2, 9. The administrative law judge then took judicial notice of the credentials of Drs. Rasmussen, Walker, and Revercomb as set forth on the American Board of Medical Specialties website. Decision and Order on Remand at 2, 9. The administrative law judge further noted that Dr. Kugel had been a B reader since 1970 based upon the United States Department of Health and Human Services, NIOSH approved B reader list. Decision and Order on Remand at 9.

An administrative law judge may take judicial notice of a fact if substantial prejudice will not result and the parties are given an adequate opportunity to show the contrary of the noticed fact. 29 C.F.R. §18.45; *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990), *aff'd sub nom. Maddaleni v. Director, OWCP*, 961 F.2d 1524, 16 BLR 2-68 (10th Cir. 1992); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Simpson v. Director, OWCP*, 9 BLR 1-99 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1988); *Pruitt v. Amax Coal Co.*, 7 BLR 1-544 (1984). In this case, because the administrative law judge identified the sources of information upon which he relied, employer knew where to seek confirmation of the noticed facts. *See Maddaleni*, 14 BLR at 1-139; *Onderko*, 14 BLR at 1-4; *Simpson*, 9 BLR at 1-100. Employer also had an opportunity to contest the administrative law judge's finding before the Decision and Order became final by filing a motion for reconsideration with the administrative law judge, *see* 20 C.F.R. §725.480, but did not do so and, therefore, did not avail itself of the opportunity to contest the administrative law judge's finding before it became final. Further, employer does not aver on appeal that the qualifications identified by the administrative law judge are inaccurate. We therefore reject employer's argument that it was denied its due process right to a full and fair hearing as the administrative law judge's

taking of judicial notice in this case does not result in manifest injustice. *See Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998).

With respect to the merits of entitlement, employer contends that the administrative law judge failed to follow the Board's remand instructions, as he did not adequately explain his findings with respect to the probative weight of the medical opinion evidence pursuant to Sections 718.202(a)(4) and 718.204(c). Employer also alleges that the administrative law judge impermissibly accorded less weight to the opinions of Drs. Zaldivar, Renn, and Castle and greater weight to the opinions of Drs. Cohen and Rasmussen.

Contrary to employer's contention, the administrative law judge did not fail to apply the Board's remand instructions in his consideration of the medical evidence. In accordance with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), the administrative law judge noted the Board's instructions and set forth his findings and their underlying rationale in sufficient detail to permit review on appeal.

Regarding the administrative law judge's weighing of the relevant medical opinions, employer asserts that the administrative law judge failed to accord appropriate weight to the opinions in which Drs. Zaldivar, Renn, and Castle stated that claimant does not have pneumoconiosis or is not totally disabled by it. Employer contends that the administrative law judge erroneously found the opinions not well reasoned and shifted the burden of proof to employer to explicitly rule out coal mine dust exposure as a cause of the miner's totally disabling pulmonary or respiratory impairment. We disagree.

Contrary to employer's contention, the administrative law judge specifically recognized that it is claimant's burden to establish the existence of pneumoconiosis. Decision and Order on Remand at 10. Further, in addressing the medical opinions of record pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204, the administrative law judge acted within his discretion as fact-finder in according greater weight to the opinions of Drs. Cohen and Rasmussen in light of their qualifications and as their opinions are well reasoned, documented, and supported by the objective evidence of record. Decision and Order on Remand at 5-11; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). In considering the opinions of Drs. Zaldivar, Renn, and Castle pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204, the administrative law judge, within a reasonable exercise of his discretion as fact-finder, rationally determined that these opinions were not well-reasoned. The administrative law judge permissibly accorded less weight to the opinions of Drs. Zaldivar and Castle as they did not adequately explain their rationale for completely excluding coal dust exposure as a significant factor in the miner's pulmonary impairment. *See* Decision and Order on Remand at 6-7; Employer's Exhibits 3, 7, 10, 18; *Compton*, 211

F.3d 203, 22 BLR 2-162; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(en banc); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Employer further asserts that the administrative law judge erred in according less weight to Dr. Renn's opinion, that there was no evidence of pneumoconiosis and that claimant suffered from chronic bronchitis and emphysema due to smoking, as the administrative law judge substituted his opinion for that of the physician. We disagree. In considering Dr. Renn's opinion pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c), the administrative law judge, within a reasonable exercise of his discretion as fact-finder, rationally determined that the opinion was not well-reasoned as Dr. Renn made inconsistent statements with respect to claimant's cardiac status which called into question the credibility of his opinion. *See Trumbo v. Reading Anthracite Coal Co.*, 17 BLR 1-85 (1993); *Clark*, 12 BLR at 1-155; *Kuchwara*, 7 BLR at 1-169.

Employer also contends that the administrative law judge erred in failing to accord greater weight to the opinions of Drs. Zaldivar, Renn, and Castle in light of their qualifications. This argument has no merit. Although an administrative law judge may assign more weight to a physician's opinion based on his qualifications, the administrative law judge, contrary to employer's contention, is not obligated to do so. *See Trumbo*, 17 BLR 1-85; *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990). Contrary to employer's assertion, the administrative law judge acted within his discretion as fact-finder in concluding that the opinion of Dr. Cohen, in comparison to the contrary opinions of Drs Zaldivar, Renn, and Castle, was entitled to greater weight as his opinion was highly persuasive, supported by the objective diagnostic studies, claimant's history of underground coal mine employment, medical history, social history, claimant's progressively worsening symptoms and findings on physical examination, and was further supported by the well reasoned opinion of Dr. Rasmussen. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Although, as the administrative law judge found and the record indicates, the Board certifications of Drs. Zaldivar, Renn, and Castle are equal to those of Dr. Cohen and superior to those of Dr. Rasmussen, the administrative law judge has provided valid reasons for finding their opinions, that claimant does not suffer from pneumoconiosis, entitled to less weight. *See Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); Decision and Order on Remand at 5-11; Director's Exhibit 11; Employer's Exhibits 3, 7, 10, 18; Claimant's Exhibit 13.

Employer's contention that the administrative law judge has demonstrated bias in favor of claimant in this case, is without merit. Employer's allegation of bias is not supported by the analysis reflected in the Decision and Order as the administrative law judge

properly discharged his duty as fact-finder and adequately explained the basis for his findings. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991); *Clark*, 12 BLR at 1-155; *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *Zamora v. C.F.& I. Steel Corp.*, 7 BLR 1-568 (1984); Decision and Order on Remand at 5-11. Contrary to employer's contention, the administrative law judge's Decision and Order reflects consideration of all the relevant evidence, and the administrative law judge rationally chose to credit the opinions of Drs. Cohen and Rasmussen as being the better reasoned. *See Trumbo*, 17 BLR at 1-89; *Clark*, 12 BLR at 1-155; *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); Decision and Order on Remand at 5-10; Director's Exhibit 11; Employer's Exhibits 3, 7, 10, 18; Claimant's Exhibit 13. We therefore affirm the administrative law judge's credibility determinations as the administrative law judge has provided at least one reasonable rationale for according less weight to the opinions of Drs. Zaldivar, Renn, and Castle. *See Kuchwara*, 7 BLR at 1-169; *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Consequently, as the administrative law judge's credibility determinations are rational and supported by substantial evidence, we affirm the administrative law judge's findings that claimant has established the existence of pneumoconiosis and that the miner's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §§718.202 and 718.204(c). *See Compton*, 211 F.3d 203, 22 BLR 2-162. In light of our affirmance of the administrative law judge's weighing of the medical evidence and his finding that the evidence is sufficient to establish entitlement to benefits, we decline employer's request that this case be remanded to a new administrative law judge for reconsideration of the evidence.

Lastly, claimant's counsel has filed a complete, itemized statement requesting a fee for services performed during the initial appeal of this case to the Board. *See Henline v. Island Creek Coal Co.*, BRB No. 03-0403 BLA (Feb. 25, 2004)(unpub.); *see also* 20 C.F.R. §802.203. Specifically, counsel seeks a fee of $2,940.00 for 14.70 hours at an

hourly rate of $200.00. Employer has submitted an objection to claimant's counsel's fee request, asserting that the requested hourly rate of $200.00 is excessive and unreasonable.

Claimant is entitled to an attorney's fee payable by employer for successfully prosecuting his claim. *See* 33 U.S.C. §928; *Beasley v. Sahara Coal Co.*, 16 BLR 1-6 (1991); *Director, OWCP v. Baca*, 927 F.2d 1122, 15 BLR 2-42 (10th Cir.1991); *Yates v. Harman Mining Co.*, 12 BLR 1-175 (1989), *aff'd on recon.*, 13 BLR 1-56 (1989) (*en banc*). After reviewing counsel's fee petition and employer's objections, we disagree with employer that the hourly rate requested, $200.00, is excessive. *See Hargrove v. Strachan Shipping Co.*, 32 BRBS 224 (1998). Rather, contrary to employer's assertions, counsel has requested a reasonable hourly rate and has provided an adequate explanation for her billing rate as is required by 20 C.F.R. §725.366. Consequently, we approve 14.70 hours of services rendered by counsel in support of claimant's appeal to the Board in BRB No. 03-0403 BLA, at a rate of $200.00 per hour, for a total fee of $2,940.00, payable directly to counsel by employer. *See* 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed. Claimant's counsel is awarded a fee of $2,940.00 for work performed before the Board in BRB No. 03-0403 BLA, payable directly to counsel by employer.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge