BRB No. 00-0277 BLA

ILMA JEAN MORTON (Widow of HOMER S. MORTON) Claimant-Respondent v. UNION CARBIDE CORPORATION Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits and the Supplemental Decision and Order Granting Attorney's Fees of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Crane, L.C.), Charleston, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly, PLLC), Charleston, West Virginia, for employer.

Edward Waldman (Henry L. Solano, 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, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits and the Supplemental Decision and Order Granting Attorney's Fees (99-BLA-0666) of

Administrative Law Judge Gerald M. Tierney 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 granted claimant's Motion for Summary Judgment and awarded benefits in this survivor's claim. The relevant procedural history is as follows. The miner filed an application for benefits on April 2, 1973. This claim was denied by the Social Security Administration and the Department of Labor. Director's Exhibit 28. The miner filed a subsequent application for benefits on December 11, 1987. The district director issued an initial finding of entitlement, which was controverted by employer, and employer requested a formal hearing before an administrative law judge. However, in a letter dated November 4, 1988, employer withdrew its controversion to the initial finding of entitlement, and signed an Agreement to Pay Benefits. Accordingly, the district director issued an Award of Benefits on December 5, 1988. Director's Exhibit 29.

The miner died on April 12, 1998, Director's Exhibit 8, and on April 13, 1998, the survivor filed the instant claim. Director's Exhibit 1. The district director made an initial finding of entitlement, Director's Exhibit 21, which employer controverted, Director's Exhibits 22, 26, and on March 11, 1999, the case was transferred to the Office of Administrative Law Judges, Director's Exhibit 30.

The administrative law judge held a hearing, at which time the Director's exhibits were admitted into evidence, and claimant objected to employer's exhibits, *see* Hearing Transcript at 5, 8. Claimant then moved for summary judgment. Hearing Transcript at 8, 10.

On November 3, 1999, the administrative law judge issued a Decision and Order - Award of Benefits. The administrative law judge noted the procedural history of the claim. In granting summary judgment for claimant, the administrative law judge stated:

> The Motion of the claimant for Summary Judgment can be granted under any one of three different legal analyses. Under the law established in *Richardson v. Dir. supra,* the doctrine of collateral estoppel, or as a matter of fundamental fairness, the claimant will prevail.

Decision and Order at 4.

Employer appeals, asserting that the administrative law judge erred by granting summary judgment. Employer maintains that the administrative law judge erred by applying the doctrine of collateral estoppel in this case. Employer also urges the Board to re-examine the propriety of routinely applying the doctrine of collateral estoppel in black lung litigation. In addition, employer challenges the administrative law judge's comment that employer could have discovered evidence earlier had it requested modification during the miner's lifetime. Employer also contends that the administrative law judge

erred in finding that employer stipulated to the existence of complicated pneumoconiosis in the miner's case. Finally, employer asserts that fundamental fairness and due process require that it be permitted to defend this survivor's claim.

The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand. The Director contends that the administrative law judge's application of *Richardson v. Director*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996) is improper in this case. The Director also asserts that collateral estoppel does not bar employer from litigating the issue of complicated pneumoconiosis in this survivor's claim because there was no finding of complicated pneumoconiosis in the miner's case. Finally, the Director agrees with employer that fundamental fairness does not bar litigation of the issue of complicated pneumoconiosis in the survivor's claim. Claimant responds, urging affirmance of the award of benefits.

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).

As an initial matter, we agree with employer and the Director that the administrative law judge erred in finding that employer stipulated to the existence of complicated pneumoconiosis in the miner's claim. A review of the record indicates that on November 4, 1988, employer withdrew its controversion in the miner's claim stating "Based upon the enclosed [x-ray] opinions... that the captioned Federal Black Lung Claimant has complicated pneumoconiosis [employer] has elected to withdraw its controversion to your initial finding of entitlement dated April 1, 1988." Director's Exhibit 29-63. Based upon employer's withdrawal of controversion, the district director issued an Award of Benefits dated December 5, 1988. In this Award of Benefits, the findings of fact state:

> as a result of the conditions of coal mine employment, the claimant has contracted a severe chronic respiratory disease diagnosed as coal workers' pneumoconiosis, as that term is defined in the Act and the Regulations pertaining thereto.

Director's Exhibit 29-69. The Award of Benefits does not contain a finding that the miner suffered from complicated pneumoconiosis. Director's Exhibit 29-69. Inasmuch as employer's letter does not concede the existence of complicated pneumoconiosis, there was no stipulation to the existence of complicated pneumoconiosis, nor any finding in the miner's case of the existence of complicated pneumoconiosis, we hold that the

[1] The instant claim is a survivor's claim. Claimant is Wilma Jean Morton, the widow of Homer S. Morton, the miner. Director's Exhibits 1, 8.

administrative law judge mischaracterized the record when he found that employer stipulated to the existence of complicated pneumoconiosis in the miner's case, *see generally Tackett v. Director, OWCP*, 7 BLR 1-703 (1985), and we reverse this finding.

The administrative law judge found, based on his finding that employer stipulated that the miner suffered from complicated pneumoconiosis, and relying on *Richardson, supra*, that the "party stipulating in a living miner's case is bound by that stipulation in the subsequent survivor's claim." Decision and Order at 2. Inasmuch as we have reversed the administrative law judge's finding that employer stipulated to the existence of complicated pneumoconiosis in the miner's claim, we hold that the administrative law judge erred by relying on *Richardson* to grant summary judgment and we vacate this finding.

The administrative law judge also found that the doctrine of collateral estoppel precluded litigation of the issue of complicated pneumoconiosis in the survivor's case. The administrative law judge detailed the requirements that a party must establish in order for collateral estoppel to apply, and he determined that these requirements were satisfied in this case. *See* Decision and Order at 3*; Hughes v. Clinchfield Coal Co.*, 21 BLR 1-135 (1998). In view of our reversal of the administrative law judge's finding that employer stipulated to the existence of complicated pneumoconiosis in the miner's case, we hold that the administrative law judge erred in finding that collateral estoppel applies in this case, since the issue of complicated pneumoconiosis was not litigated, resolved or a necessary part of the judgment in the miner's claim. *See Hughes, supra*. Therefore, we vacate the administrative law judge's finding that collateral estoppel applies to the issue

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[2] In *Richardson v. Director*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996), an appeal of a survivor's claim, the Director, Office of Workers' Compensation Programs (the Director), stipulated to the findings of fact in the award of benefits on the miner's claim.

[3] In *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-135 (1998), the Board set forth a five-part test for determining whether the doctrine of collateral estoppel applies. The party seeking to apply collateral estoppel must establish that:

(1) the issue sought to be precluded is identical to one previously litigated;
(2) the issue was actually determined in the prior proceeding;
(3) the issue was a critical and necessary part of the judgment in the prior proceeding;
(4) the prior judgment is final and valid; and
(5) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum.

Hughes v. Clinchfield Coal Co., 21 BLR 1-135, 1-137 (1998).

of the existence of complicated pneumoconiosis in this case.

The administrative law judge also found that :

> Fundamental fairness also precludes the Responsible Operator from contesting complicated pneumoconiosis. All of the evidence relied on by the Responsible Operator was in existence well before the death of the miner. The Responsible Operator could have, at any time, prior to the miner's death, petitioned for modification. 20 C.F.R. §725.310. If such action had been taken the miner would have had the opportunity to schedule additional exams and testing to defend his position. By waiting until the filing of the survivor's claim, the Responsible Operator has prevented the development of such evidence.

Decision and Order at 4. We vacate the administrative law judge's finding that fundamental fairness precludes employer from contesting the existence of complicated pneumoconiosis, in view of our holding that the issue was not conceded by employer in the miner's claim. In addition, we disagree with the administrative law judge's finding that employer's failure to request modification of the miner's award of benefits during the miner's lifetime precluded the development of evidence favorable to claimant. Moreover, we agree with employer that the judicial economy would not be served by suggestion that a party paying benefits should regularly file a petition for modification simply to schedule examinations and obtain evidence.

Accordingly, we vacate the administrative law judge's Decision and Order granting summary judgment and his award of benefits. On remand, the administrative law judge must hold a hearing and address the issues of the merits of entitlement.

We now turn to employer's appeal of the administrative law judge's Supplemental Decision and Order Granting Attorney's Fees. The administrative law judge issued his Supplemental Decision and Order on January 10, 2000. The administrative law judge indicated that claimant's counsel requested a fee of $3,785.00 for 15.1 hours of legal work at an hourly rate of $250.00. The administrative law judge noted that employer objected to claimant's counsel's fee petition. The administrative law judge addressed employer's objection to the hourly rate and, after reviewing the affidavits submitted with claimant's counsel's fee petition, the administrative law judge found that the "requested hourly rate of $250.00 is consistent with the rates charged for black lung work in this area." Supplemental Decision and Order at 2. The administrative law judge stated that employer "has not objected to the number of hours spent on this case," Supplemental

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[4] We decline employer's invitation to re-examine the propriety of applying the doctrine of collateral estoppel in black lung litigation. The Board has recently considered the application of collateral estoppel in *Hughes*, *supra*.

Decision and Order at 2, and ordered employer to pay the attorney's fee as requested. Supplemental Decision and Order.

On appeal, employer asserts that the administrative law judge erred in awarding attorney's fees. Employer contends that the administrative law judge erroneously stated that employer did not object to the number of hours claimed by claimant's counsel. Employer maintains that the administrative law judge erred by failing to specifically address its objections to the hourly rate requested by claimant's counsel. Further, employer alleges that the administrative law judge's finding that the requested 15.1 hours of legal work "appears reasonable" is arbitrary, capricious and irrational.

Claimant responds, urging affirmance of the administrative law judge's Supplemental Decision and Order. The Director has indicated that he will not participate in this aspect of the case.

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*, 12 BLR 1-15 (1989).

At the outset, it is noted, as employer alleges, that the administrative law judge erred by finding that employer "has not objected to the number of hours claimant's counsel spent on this case." Supplemental Decision and Order at 2. Employer did challenge the number of hours claimed by claimant's counsel in his petition for attorney's fees. *See* Employer's Objection to Fee Petition. *See Busbin v. Director, OWCP***,** 3 BLR 1-375 (1981). Inasmuch as the administrative law judge failed to consider employer's challenge to the number of hours requested by claimant's counsel, we vacate the administrative law judge's award of attorney's fees. On remand, the administrative law judge must address employer's objections to the number of hours requested by claimant's counsel in employer's Objection to Fee Petition.

Employer also alleges that the administrative law judge did not address the arguments it made below concerning the hourly rate requested by claimant's counsel. We agree. Employer challenged the hourly rate requested by claimant's counsel, asserting that the hourly rate requested is excessive, unreasonable and not justified. Employer's Objection to Fee Petition at 1-2.

While the administrative law judge noted the regulations contained in 20 C.F.R. §725.366(b), his analysis is limited to the following:

> After reviewing the affidavits of Grant Crandall, Jane Cohen and Robert Cohen, Jr., who are also black lung attorneys practicing in West Virginia, and considering the numerous Decision and Orders Granting Attorney's fees in similar cases, I find that counsel's requested hourly rate of $250.00 is consistent with the rates charged

for black lung work in this area.

Supplemental Decision and Order at 1-2. Inasmuch as the administrative law judge did not respond to employer's challenges to the hourly rate requested by claimant's counsel, we vacate the administrative law judge's finding that this rate is reasonable. On remand, the administrative law judge must consider employer's objections to the hourly rate requested by claimant's counsel. *See Busbin, supra*.

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[5] The regulations regarding attorney's fees state that any approved fee:

> 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 complexities 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). Further, we note that the United States Supreme Court has held that fee-shifting statutes do not permit enhancement of a fee award to reflect that a party's attorney was retained on a contingent-fee basis. *See City of Burlington v. Dague*, 112 S.Ct. 2638 (1992). Finally, 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 reversed in part and vacated in part, and the Supplemental Decision and Order Granting Attorney's Fees is vacated. This case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge