BRB No. 07-0144 BLA
and 07-0144 BLA-S

T.S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CARTER BRANCH MINING COMPANY	)	
	)	
and	)	DATE ISSUED: 12/14/2007
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order, Decision and Order on Reconsideration, and Decision and Order Granting Attorney Fees of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams & Rutherford), Norton, Virginia, for claimant.

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

Barry H. Joyner (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and Decision and Order on Reconsideration (04-BLA-6064) of Administrative Law Judge Thomas F. Phalen, Jr. awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). Employer also appeals the administrative law judge's Decision and Order Granting Attorney Fees. This case involves a claim filed on November 18, 2002. After crediting claimant with at least twenty years of coal mine employment, the administrative law judge found that the biopsy evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). The administrative law judge also found that the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b) and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits. The administrative law judge subsequently denied employer's motion for reconsideration.

On appeal, employer argues that the administrative law judge's failure to identify claimant by name, rather than initials, constitutes error. Employer also argues that the administrative law judge erred in his application of the evidentiary limitations set forth at 20 C.F.R. §725.414. Employer further challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2), (4) and 718.204(c). Claimant responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that the administrative law judge was not required to identify claimant by name. The Director also responds in support of the administrative law judge's application of the Section 725.414 evidentiary limitations. Employer has filed a reply brief, reiterating its previous contentions of error.[1]

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

[1] We accept claimant's response brief and employer's reply brief as a part of the record before the Board. 20 C.F.R. §802.217.

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).

Use of Claimant's Initials as Identification

Employer contends that administrative law judge erred in using claimant's initials, rather than his full name, to identify him on the first page of the Decision and Order and on the first page of the Decision and Order on Reconsideration. Employer asserts that the administrative law judge's actions are in violation of 20 C.F.R. §725.477(b) (2006).

When the administrative law judge issued his Decision and Order on August 24, 2006 and his Decision and Order on Reconsideration on September 20, 2006, Section 725.477(b) provided that a "decision and order shall contain…the names of the parties." 20 C.F.R. §725.477(b) (2006). The Department of Labor (the Department), however, issued a revised version of Section 725.477(b) on January 30, 2007, in which the latter requirement was stricken. 20 C.F.R. §725.477(b) (2007); 72 Fed. Reg. 4205 (Jan. 30, 2007). As the Director asserts, the administrative law judge's Decision and Order and Decision and Order on Reconsideration are in compliance with the regulation now in effect. Moreover, we agree with the Director that the administrative law judge's Decision and Order and Decision and Order are in substantial compliance with the prior version of Section 725.477(b) (2006), as the administrative law judge included service cover sheets on which claimant was identified by name.

We also hold that, contrary to employer's contention, the Department's initials-only policy is rational and not contrary to law.[2] Consequently, employer's argument that the administrative law judge erred in identifying claimant by his initials in his Decision and Order and Decision and Order on Reconsideration is rejected.[3]

[2] The Director has adequately explained how the Departmental policy balances the public interest in disclosure of the information with the individual's privacy interest. *See* Director's Response Brief at 4.

[3] Employer contends that the use of initials in the caption of the case is an impediment to tracking the subsequent history of a claim and performing legal research. Employer's concerns, however, are merely speculative and do not constitute evidence that employer has suffered prejudice in this case. *See Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190 (1989); *Worrell v. Consolidation Coal Co.*, 8 BLR 1-158 (1985).

Evidentiary Limitations

Employer contends that the administrative law judge erred in his application of the evidentiary limitations set forth at 20 C.F.R. §725.414. Employer contends that the administrative law judge violated its due process rights when he applied the Board's decision in *Webber v. Peabody Coal Co*., 23 BLR 1-123 (2006) (*en banc*) (Boggs, J., concurring), *aff'd on recon.*, BLR , BRB No. 05-0335 BLA (Mar. 15, 2007) (*en banc*), without permitting employer an opportunity to respond to the change in the law.

Prior to the formal hearing in this case, the Board issued *Webber*, which addressed the interplay of 20 C.F.R. §§718.107 and 725.414 with respect to the admission and consideration of CT scan evidence. In *Webber*, the Board held that, under Section 718.107, the parties are permitted to submit, as "other medical evidence" in support of their affirmative case, only one reading of each separate test or procedure undergone by a claimant. *Webber*, 23 BLR at 1-133-135. Medical evidence in excess of the limitations contained in Section 725.414 may be admitted into the hearing record for good cause. 20 C.F.R. §725.456(b)(1).

Employer argues that *Webber* changed the law regarding the evidentiary limitations on CT scans after employer had already developed its evidence. There is no basis to conclude that the administrative law judge's application of the law in effect at the time of the decision results in a "manifest injustice" to employer. *See Hill v. Director, OWCP*, 9 BLR 1-126, 1-127 n.1 (1986)(holding that an appellate body must apply the law in effect at the time it renders its decision unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary); *Tackett v. Benefits Review Board*, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986). Moreover, the limitation on CT scan evidence decided by the Board in *Webber* is consistent with the intent of the Department in placing evidentiary limitations on the evidence at 20 C.F.R. §725.414. *See* 65 Fed. Reg. 79989 (Dec. 20, 2000); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *see also Ward v. Consolidation Coal Co.*, 23 BLR 1-151 (2006).

Moreover, at the February 22, 2006 hearing, employer demonstrated its awareness of the implications of *Webber*, stating: "Judge, the Employer will argue good cause as to the additional readings of the CT scans despite *Weber* [sic]." Transcript at 24.

Employer subsequently submitted its "Proposed Evidence Summary Form" on May 24, 2006. Employer's Exhibit 14. Consistent with *Webber*, employer designated Dr. Wheeler's interpretations of claimant's December 9, 2004, January 31, 2005, February 8, 2005, and March 21, 2005 CT scans as its "other medical evidence" under 20 C.F.R. §718.107. *See* Employer's Exhibits 7, 9. Employer also listed additional interpretations of these CT scans rendered by Drs. Rosenberg and Fino as evidence "to be

considered under [the] good cause exception." Employer's Exhibit 14. Therefore, we reject employer's argument that the administrative law judge erred in applying *Webber* to rule on the admissibility of employer's CT scan readings.

In his Decision and Order, the administrative law judge admitted Dr. Wheeler's interpretations of claimant's December 9, 2004, January 31, 2005, February 8, 2005, and March 21, 2005 CT scans. Decision and Order at 6. The administrative law judge further stated:

> Attached to Employer's evidence summary form was a sheet that listed Drs. Rosenberg and Fino's interpretations of four CT scans. However, since Employer had designated Dr. Wheeler's interpretations of these scans, consideration of additional interpretations would exceed the limitations of §725.414. While the list states that these interpretations are "to be considered under [the] good cause exception,["] Employer does not provide any rationale for inclusion of this duplicative evidence. Therefore, I find that the CT scan interpretations by Drs. Rosenberg and Fino are redundant, and thus, that "good cause" does not exist for their consideration in the instant adjudication.

Decision and Order at 6-7 (case citation and footnote omitted).

Employer contends that the administrative law judge erred in failing to afford employer the opportunity to designate the CT scan of its choosing for admission into the record. Contrary to employer's contention, the administrative law judge properly found that employer designated the CT scans rendered by Dr. Wheeler as its affirmative CT scan evidence. *See* Employer's Exhibit 14.

Employer also contends that the administrative law judge erred in failing to determine whether good cause existed, pursuant to 20 C.F.R. §725.456(b)(1), for the admission of additional CT scans from employer. The comments to the regulations provide that:

> A showing of "good cause" is necessary only in the event that a party seeks to convince the administrative law judge that the particular facts of a case justify the submission of additional medical evidence, either in the form of a documentary report or testimony.

65 Fed. Reg. 80000 (Dec. 20, 2000). Thus, if employer wanted to submit evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414, it was required to make a showing of "good cause" for its submission. An administrative law judge is not obligated to conduct an independent assessment as to whether or not "good cause"

justifies the admission of evidence in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414. *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141, 1-145 (2006). In this case, the administrative law judge found that employer did not provide any rationale for the admission of duplicative CT scan evidence. Decision and Order at 6. Consequently, we affirm the administrative law judge's finding that employer failed to demonstrate that "good cause" existed for the admission of additional CT scan evidence in this case.[4]

We, therefore, reject employer's contention that the administrative law judge erred in his application of the evidentiary limitations regarding the admission of employer's proffered CT scan evidence.

The Existence of Pneumoconiosis

Section 718.202(a)(2)

Employer argues that the administrative law judge erred in finding that the biopsy evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). In a report dated May 27, 2005, Dr. Caffrey interpreted a needle biopsy slide as representing "changes consistent with simple coal workers' pneumoconiosis." Employer's Exhibit 6. The administrative law judge found that Dr. Caffrey's opinion was well reasoned and well documented. Decision and Order at 16. Noting that there was no contrary biopsy evidence of record, the administrative law judge found that the biopsy evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 16.

Employer, however, argues that the administrative law judge erred in not considering all of the relevant evidence. Employer's argument has merit. In his January 26, 2005 report, Dr. Rosenberg questioned the validity of Dr. Caffrey's diagnosis.[5]

[4] Employer argues that the administrative law judge erred in finding that "good cause" existed for claimant's submission of a May 5, 2005 arterial blood gas study. Employer's Brief at 21. Employer contends that the administrative law judge rendered a *sua sponte* finding of "good cause" on behalf of claimant, but did not make such a finding on its behalf in regard to the CT scan evidence. We disagree. Because claimant had not designated any arterial blood gas study evidence in support of his affirmative case, the administrative law judge's admission of the May 5, 2005 arterial blood gas study was in compliance with the evidentiary limitations set forth at 20 C.F.R. §725.414.

[5] Dr. Rosenberg stated that:

Employer's Exhibit 1. Because the administrative law judge has not considered all of the relevant evidence regarding the reliability of the biopsy evidence, *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985), we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(2) and remand the case for further consideration.[6]

Section 718.202(a)(4)

Employer argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge stated that:

> I have determined that the opinions by Drs. Rasmussen and Rosenberg are entitled to no weight, and that Dr. Wheeler's opinion is entitled to little weight. On the other hand, I have determined that Drs. Fino and Forehand's diagnoses of clinical pneumoconiosis are well-reasoned and well-documented, and thus, I have accorded them probative weight. As a result, I find that the weight of the medical narrative evidence is positive for the existence of clinical pneumoconiosis under subsection (a)(4).

Decision and Order at 18.[7]

> The needle aspiration biopsy, demonstrating the presence of anthracotic pigment, is consistent with a condition of CWP, but without the finding of macules and/or micronodular formation is not diagnostic of such a pneumoconiosis. A video assisted thorascopic biopsy would be needed to definitively define what is causing the changes within [claimant's] lungs.

Employer's Exhibit 1.

[6] Employer argues that the administrative law judge did not consider that during a February 15, 2006 deposition, Dr. Wheeler also questioned the accuracy of Dr. Caffrey's needle biopsy. *See* Employer's Exhibit 9 at 39-40. However, in this case, we note that employer submitted, and the administrative law judge admitted into the record, Dr. Wheeler's interpretations of claimant's CT scans, and Dr. Wheeler's deposition, as "other evidence" pursuant to 20 C.F.R. §718.107. Consequently, before considering Dr. Wheeler's deposition testimony regarding the biopsy evidence, the administrative law judge must first address whether Dr. Wheeler's deposition testimony is admissible for this purpose. *See* 20 C.F.R. §§718.107, 725.414(c), 725.457, 725.458.

[7] The administrative law judge found that Dr. Rasmussen's diagnoses of both simple and complicated pneumoconiosis were merely restatements of his x-ray interpretation. Decision and Order at 17; Claimant's Exhibit 1. The administrative law

Employer initially argues that the administrative law judge erred in his consideration of Dr. Forehand's opinion. In a report dated December 13, 2002, Dr. Forehand diagnosed coal workers' pneumoconiosis based upon a positive x-ray interpretation, history, a physical examination and an arterial blood gas study. Director's Exhibit 10. The administrative law judge found that:

> Based on a positive x-ray interpretation, history, the physical examination, and the ABG, Dr. Forehand concluded that Claimant suffered from pneumoconiosis. While it is clear that Dr. Forehand diagnosed clinical pneumoconiosis, I note that the preponderance of the x-ray evidence does not support such a finding, but that the biopsy evidence does. Furthermore, I note that while the post-exercise ABG was qualifying for total disability, and while his physical examination did reveal potentially significant results, Dr. Forehand did not explain how these findings, in and of themselves, were sufficient to support a finding of pneumoconiosis, either clinical or legal. *See Duke v. Director, OWCP*, 6 BLR 1-673 (1983) (a report is properly discredited when the physician does not explain hw underlying documentation supports his or her diagnosis). However, as Dr. Forehand based his diagnosis on the objective evidence before him, and as his clinical pneumoconiosis diagnosis is supported by the pathology findings, I find that his opinion is adequately well-reasoned, documented, and thus, entitled to probative weight.

Decision and Order at 16-17.

In light of our decision to vacate the administrative law judge's finding that the biopsy evidence was sufficient to establish the existence of pneumoconiosis, the administrative law judge's basis for crediting Dr. Forehand's opinion cannot stand. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Moreover, because Dr. Forehand did not rely upon claimant's biopsy results to support his diagnosis of coal workers' pneumoconiosis,[8] the administrative law judge erred in finding that Dr. Forehand's opinion was well reasoned and documented because it was consistent with the pathology findings. Although the administrative law judge noted that Dr. Forehand based

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judge, therefore, accorded Dr. Rasmussen's diagnosis of pneumoconiosis "no weight" in his consideration of the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). Because no party challenges this finding, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[8] The record reflects that Dr. Forehand prepared his medical report over two years prior to claimant's lung biopsy.

his diagnosis on the objective evidence, the administrative law judge acknowledged that Dr. Forehand did not explain how the objective evidence supported his diagnosis. Consequently, we remand the case to the administrative law judge to reconsider whether Dr. Forehand's opinion is sufficiently reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Employer also argues that the administrative law judge erred in his consideration of Dr. Wheeler's opinion. Contrary to employer's contention, the administrative law judge permissibly found that Dr. Wheeler's opinion was too equivocal to support a finding that claimant did not suffer from pneumoconiosis.[9] *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Director's Exhibit 17; Employer's Exhibits 7, 9.

Employer next contends that the administrative law judge erred in his consideration of Dr. Rosenberg's opinion. Dr. Rosenberg examined claimant on October 27, 2003. Dr. Rosenberg also reviewed the medical evidence. In a report dated January 26, 2006, Dr. Rosenberg opined that "[w]hen all the…information is looked at in total, [claimant] probably has at worst a degree of simple CWP."[10] Employer's Exhibit 1.

The administrative law judge found that "Dr. Rosenberg's CWP conclusions were inadmissible because they were inseparably based on of [sic] interpretations of CT scans

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[9] Dr. Wheeler noted that some small nodules on claimant's December 9, 2004 and March 21, 2005 CT scans "could be" coal workers' pneumoconiosis. Employer's Exhibit 7. During a February 15, 2006 deposition, Dr. Wheeler testified that he could not state that there was no dust-related lung disease on claimant's March 21, 2005 CT scan. Employer's Exhibit 9 at 27-28.

[10] In his summary of the medical evidence, the administrative law judge stated that Dr. Rosenberg "diagnosed COPD based on a reduced FEV1%." Decision and Order at 10. As employer argues, the administrative law judge mischaracterized Dr. Rosenberg's opinion. Dr. Rosenberg actually opined that:

> [W]ith [claimant's] FEV1/FVC or FEV1% being normal, he does *not have* chronic obstructive pulmonary disease or COPD. As reported by Pauwels and supported by the American Thoracic Society, the presence of COPD is defined functionally by a reduced FEV1%.

Employer's Exhibit 1 (emphasis added).

in excess of the limitations of §725.414."[11] Decision and Order at 17. The administrative law judge therefore accorded Dr. Rosenberg's pneumoconiosis diagnosis "no weight." *Id.*

In *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting), the Board held that an administrative law judge should not automatically exclude medical opinions without first ascertaining what portions of the opinions are tainted by review of inadmissible evidence. If the administrative law judge finds that the opinion is tainted, he is not required to exclude the report or testimony in its entirety. *Harris*, 23 BLR at 1-108. Rather, he may redact the objectionable content; ask the physician to submit a new report; or factor in the physician's reliance upon the inadmissible evidence when deciding the weight to which the physician's opinion is entitled. *Harris*, 23 BLR at 1-108; s*ee Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-66-67 (2004) (*en banc*). Exclusion of evidence, however, is not the favored option, as it would result in the loss of probative evidence developed in compliance with the evidentiary limitations. *Id.*

In this case, it is not clear whether the administrative law judge adequately explored all of the options available to him. Specifically, the administrative law judge did not indicate whether he considered the possibility of requesting Dr. Rosenberg to submit a supplemental report or whether he attempted to factor in Dr. Rosenberg's reliance upon the inadmissible CT scan evidence when deciding the weight to which his opinion is entitled. Consequently, on remand, the administrative law judge is instructed to reconsider the weight, if any, to accord Dr. Rosenberg's opinion.

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[11] In addition to reviewing Dr. Wheeler's interpretations of claimant's December 9, 2004, January 31, 2005, February 8, 2005, and March 21, 2005 CT scans, Dr. Rosenberg also independently reviewed these CT scans. The administrative law judge explained:

> While Dr. Rosenberg's interpretations of these CT scans are not admissible, his review and consideration of Dr. Wheeler's findings are. I note, however, that it is not possible to distinguish which of his findings concerning CWP were based strictly on the admissible evidence alone. Specifically, in dismissing the existence of CWP and complicated pneumoconiosis, Dr. Rosenberg considered the combined CT scan, x-ray, and biopsy evidence. Therefore, I find that Dr. Rosenberg's pneumoconiosis conclusions are inadmissible.

Decision and Order at 10 n.12.

Employer also contends that the administrative law judge erred in his consideration of Dr. Fino's opinion. Dr. Fino reviewed the medical evidence. In a report dated January 27, 2006, Dr. Fino opined that claimant suffered from "some kind of infiltrative interstitial pulmonary process that is resulting in a disabling respiratory impairment." Employer's Exhibit 3. Dr. Fino also opined that there was "pathologic evidence of simple coal workers' pneumoconiosis." *Id.* Dr. Fino, however, noted that until he was provided with an opportunity to review claimant's CT scans, he could not say with a reasonable degree of medical certainty the cause of claimant's pulmonary impairment and abnormal chest film interpretations.[12] *Id*.; *see also* Employer's Exhibit 5 at 19.

The administrative law judge initially noted that:

> [U]nlike Dr. Rosenberg, Dr. Fino's January 2006 report only considered the CT scan interpretations by Dr. Wheeler and the treating physicians, and thus, his conclusions based on this evidence are admissible.

Decision and Order at 10 n.15.

The administrative law judge next found that:

> Based on Dr. Caffrey's biopsy report, Dr. Fino opined that Claimant suffers from CWP. As this finding is consistent with the objective evidence of record, I find that Dr. Fino's conclusion is well-reasoned and well-documented. Therefore, I accord his clinical pneumoconiosis finding probative weight.

Decision and Order at 18.

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[12] Dr. Fino subsequently reviewed claimant's December 9, 2004, January 31, 2005, February 8, 2005, and March 21, 2005 CT scans. In a report dated February 2, 2006, Dr. Fino indicated that, after personally reviewing the CT scans, he could state that claimant does not suffer from simple coal workers' pneumoconiosis. Employer's Exhibit 4. Dr. Fino also opined that there were "no changes consistent with a coal mine dust associated occupational lung disease." *Id.* The administrative law judge permissibly elected not to address Dr. Fino's conclusions found in his February 2, 2006 report, because they were based entirely upon Dr. Fino's additional consideration of inadmissible CT scan evidence. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006) (*en banc*) (McGranery & Hall, JJ., concurring and dissenting). As previously noted, the administrative law judge excluded Dr. Fino's interpretations of claimant's CT scans as exceeding the evidentiary limitations set forth at 20 C.F.R. §725.414.

Employer accurately notes that Dr. Fino's diagnosis of coal workers' pneumoconiosis was based upon his review of Dr. Caffrey's biopsy report. In light of our decision to vacate the administrative law judge's finding that Dr. Caffrey's biopsy report is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge's basis for crediting Dr. Fino's opinion, that there was pathology evidence of pneumoconiosis, cannot stand.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and remand the case for further consideration.

Additionally, because the administrative law judge must reevaluate whether the biopsy and medical opinion evidence is sufficient to establish the existence of pneumoconiosis, an analysis that could affect his weighing of the evidence on the issue of disability causation, we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c).

Attorney Fee Award

Employer also appeals the administrative law judge's Decision and Order Granting Attorney Fees. The administrative law judge awarded claimant's counsel a total fee of $11,012.50 for 36.75 hours of legal services at an hourly rate of $250.00 (Joseph E. Wolfe), 2.00 hours of legal services at an hourly rate of $250.00 (Bobby S. Belcher, Jr.), 2.75 hours of legal services at an hourly rate of $200.00 (W. Andrew Delph), and 7.75 hours of legal services at an hourly rate of $100.00 (legal assistant). On appeal, employer contends that the administrative law judge's attorney's fee award is excessive.

The award of an attorney's fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Jones v. Badger Coal Co*., 21 BLR 1-102 (1998) (*en banc*); *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989).

Employer contends that the administrative law judge erred in approving a hourly rate of $250.00 for Mr. Wolfe on the ground that it is excessive. In support of his request for an hourly rate of $400.00, Mr. Wolfe attached a 2002 attorney fee survey for the South Atlantic Region. Taking into consideration Mr. Wolfe's thirty years of experience, the fact that Mr. Wolfe's practice consists almost entirely of black lung claims, and the fact that Mr. Wolfe "has developed an expertise" federal black lung claims, the administrative law judge determined an hourly rate of $250.00 was appropriate for his level of expertise and years of experience. Decision and Order Granting Attorney Fees at 4; s*ee* 20 C.F.R. §725.366(b); *Pritt v. Director, OWCP*, 9 BLR 1-159 (1986). Because

employer has failed to demonstrate that the administrative law judge's ruling was arbitrary, capricious or an abuse of discretion, *Abbott*, 13 BLR at 1-16, and since his determination to reduce Mr. Wolfe's hourly rate to $250.00 is reasonable, it is affirmed.[13]

We further reject employer's contention that the administrative law judge erred in awarding 2.25 hours for legal services provided by Mr. Belcher, Mr. Wolfe's co-counsel. The administrative law judge did not abuse his discretion in allowing compensation for Mr. Belcher's legal services, noting that "it is reasonable to have some attorney overlap in some areas." Decision and Order Granting Attorney Fees at 4; *see Jones*, 21 BLR at 1-108.

Employer next contends that the administrative law judge's award of compensation for 7.75 hours of work performed by a legal assistant should be reduced. Employer specifically argues that the administrative law judge erred in granting compensation for the 4.25 hours spent by a legal assistant performing clerical work. The fee petition indicates that the legal assistant spent a total of 4.25 hours from March 8, 2004 through June 25, 2006 scheduling and confirming appointments, hand delivering documents, and performing other clerical tasks. The administrative law judge, without elaboration, found that the "legal assistant provides assistance to the attorney at a much lower rate than what the attorney would charge to do it himself." Decision and Order Granting Attorney Fees at 4. The administrative law judge, therefore, allowed compensation for these services. The Board has held that clerical services are considered part of overhead expenses and are figured into the hourly rate. *See Whitaker v. Director, OWCP*, 9 BLR 1-216 (1986). Consequently, we instruct the administrative law judge to reconsider what portion of the hours spent by the legal assistant is compensable.[14]

[13] We also reject employer's contention that the administrative law judge erred in allowing Mr. Wolfe to bill in quarter-hour increments. The administrative law judge permissibly found that counsel's practice of billing in quarter-hour increments was reasonable. *See Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230, 237 n.6 (1993); Decision and Order Granting Attorney Fees at 5.

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

Accordingly, the administrative law judge's Decision and Order, Decision and Order on Reconsideration, and Decision and Order Granting Attorney Fees are affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge