BRB No. 01-0464 BLA

CHARLES W. LEMUNYON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
CYPRUS CUMBERLAND RESOURCES	)	
	)	
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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Anthony J. Kovach (Kovach & Kovach), Uniontown, Pennsylvania, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Helen H. Cox (Eugene Scalia, 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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order (1998-BLA-1137) of Administrative Law Judge Michael P. Lesniak 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 a second time. In the initial Decision and Order, the administrative law judge found, and employer stipulated to,

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[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 20 C.F.R. Parts 718, 725 and 726 (2001).

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao,* No. 1:00CVO3086 (D.D.C. Feb. 9, 2001)(order granting preliminary inunction). The Board subsequently issued an order requesting briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao,* 160 F.Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

seventeen years and one month of coal mine employment. Based on the date of filing, the administrative law judge adjudicated this claim pursuant to 20 C.F.R Part 718 (2000). Decision and Order at 2-3, 7; Hearing Transcript at 6-8. On the merits, the administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4), 718.203(b)(2000), and also sufficient to demonstrate the presence of a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c) (2000). Decision and Order at 6-7. Accordingly, benefits were awarded.

On appeal, the Board affirmed the administrative law judge's findings pursuant to Section 718.202(a)(1)-(3) and Section 718.204(c) (2000), but vacated the findings pursuant to Section 718.202(a)(4) and Section 718.204(b) (2000). The Board remanded the case to the administrative law judge to determine whether the medical reports of record were documented and reasoned and to weigh all relevant evidence regarding the existence of pneumoconiosis together in light of the United States Court of Appeals for the Third Circuit's decision in *Penn Allegheny Coal Co. v. Williams,* 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).[2] *Lemunyon v. Cyprus Cumberland Resources,* BRB No. 99-1198 BLA (Aug. 21,2000)(unpub.). On remand, the administrative law judge again found that the presence of pneumoconiosis arising out of coal mine employment was established pursuant to Sections 718.202(a)(4), 718.203 (2000), and that the evidence was also sufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(b) (2000). Accordingly, benefits were again awarded.

On appeal, employer challenges the findings of the administrative law judge that claimant has established the existence of pneumoconiosis and total disability due to pneumoconiosis. Claimant responds, urging affirmance of the Decision and Order on Remand of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in the merits of this appeal.[3]

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[2]This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was employed in the coal mine industry in the Commonwealth of Pennsylvania. Director's Exhibit 4; *see Shupe v. Director, OWCP,* 12 BLR 1-200 (1989)(*en banc*).

[3]We affirm the administrative law judge's findings pursuant to Section 718.203 (2000) as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204(2000). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order on Remand of the administrative law judge is supported by substantial evidence in the record and that there is no reversible error contained therein. Employer contends that the administrative law judge erred in crediting the opinions of Drs. Weinberg and Cho, that claimant has pneumoconiosis, over the contrary opinion of Dr. Fino at Section 718.202(a)(4) (2000). We disagree. The administrative law judge rationally accorded little weight to Dr. Fino's diagnosis that claimant did not suffer from pneumoconiosis, because he found the physician's report was "not well reasoned" since this physician failed to provide an adequate explanation for his opinion that claimant's coal mine employment played no part in his respiratory condition.[4] Employer's Exhibit 1; Decision and Order on Remand at 3-4; *Lango v. Director, OWCP,* 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Director, OWCP v. Siwiec,* 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Trumbo v. Reading Anthracite Co.,* 17 BLR 1-85 (1993); *Revnak v. Director, OWCP,* 7 BLR 1-771 (1985).

It was also within the administrative law judge's discretion to credit the opinions in which Drs. Weinberg and Cho diagnosed pneumoconiosis, as the administrative law judge specifically found that they were documented and reasoned, and better supported by claimant's history, symptoms, objective test results, and also by Dr. Weinberg's status as claimant's treating physician since 1991, which the administrative law judge found afforded this physician a greater familiarity with claimant's condition. Claimant's Exhibit 1; Director's Exhibit 15, 25, 39; Decision and Order on Remand at 2-5; *Schaaf v. Matthews,* 574 F.2d 157 (3d Cir. 1978); *Tedesco v. Director, OWCP,* 18 BLR 1-103 (1994); *Trumbo,*

[4]The administrative law judge specifically considered that Dr. Fino was aware that claimant ended his "30 pack year smoking history" in 1982 and continued to work in underground coal mining until 1992. Decision and Order at 3.

supra; Onderko v. Director, OWCP, 14 BLR 1-2 (1989); *Anderson v. Valley Camp of Utah, Inc.,* 12 BLR 1-111(1989).[5] As the administrative law judge has provided a rational basis for his findings in accordance with our instructions on remand, including weighing the medical reports of record with the other relevant evidence of record, we affirm the administrative law judge's findings pursuant to Section 718.202(a) (2000). *Williams, supra.*

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[5]We also reject employer's assertion that the administrative law judge erred by relying on the opinion of Dr. Cho as his physician's qualifications are not contained in the record. The administrative law judge acknowledged that Dr. Cho's credentials were not in the record, but reasonably evaluated the opinion and found it well reasoned and documented. *Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989)(*en banc*). Further, the administrative law judge is not required to credit the opinions of physicians with specialized qualifications. *Clark, supra*; *Worley v. Blue Diamond Coal Co.,* 12 BLR 1-20 (1988).

Employer additionally maintains that the evidence of record is insufficient to satisfy claimant's burden of establishing disability causation pursuant to Section 718.204(b) (2000).[6] Employer's arguments are without merit. The administrative law judge considered Dr. Weinberg's diagnosis of disability due to industrial bronchitis, pneumoconiosis and asthma, and stated that "[n]otwithstanding some equivocation by Dr. Weinberg in part of his deposition, I find that taken as a whole, he clearly found that Claimant's pneumoconiosis was a substantial cause of Claimant's totally disabling respiratory impairment." Decision and Order on Remand at 5-6; Claimant's Exhibit 1 at 13, 23; *Justice v. Island Creek Coal Co.,* 11 BLR 1-91 (1988).[7] In addition, Dr. Weinberg's opinion regarding the source of claimant's total disability satisfies the amended regulation concerning total disability causation as well as the Third Circuit's standard. 20 C.F.R. §718.204(c) (2001); *Bonessa v. U.S. Steel Corp.,* 884 F.2d 726, 13 BLR 2-23 (3d Cir. 1989).[8]

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[6]The administrative law judge applied the disability causation regulation set forth at 20 C.F.R. §718.204(b) (2000). After revision of the regulations, the disability causation regulation is now set forth at 20 C.F.R. §718.204(c) (2001).

[7]In his deposition of June 15, 1998, Dr. Weinberg when asked the cause of claimant's disability, stated that "I suspect it is an industrial bronchitis causing hyper reactive airways", Claimant's Exhibit 1 at 10, and also indicated in answer to a hypothetical question, that he couldn't rule out the possibility that claimant's condition would be the same if he had never worked in the mines. Claimant's Exhibit 1 at 19.

[8]Dr. Weinberg has attributed claimant's disability to industrial bronchitis, coal workers' pneumoconiosis and asthma, the administrative law judge permissibly concluded that this opinion satisfied the previous standard which has since been codified into the new regulations. 20 C.F.R. §718.204(c) (2001).

We also hold that the administrative law judge permissibly relied on the opinion of Dr. Cho, who attributed claimant's disability due to coal dust exposure, cigarette smoking and asthma, based on claimant's history, examination and pulmonary function studies. Moreover, the administrative law judge's findings satisfy the provisions of the Administrative Procedure Act (APA), 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), as the administrative law judge identified the relevant evidence and applicable regulations and set forth his findings in sufficient detail, including the underlying rationale. Director's Exhibit 15; Decision and Order on Remand at 2-3; *Wojtowicz v. Duquesne Light Co.,* 12 BLR 1-162 (1989).

We further hold that it was not reversible error for the administrative law judge to apply the holding in *Toler v. Eastern Associated Coal Co.,* 34 F.3d 109, 19 BLR 2-70 (4th Cir. 1995), in this case arising in the Third Circuit. The administrative law judge acted within his discretion as fact-finder in according less weight to Dr. Fino's opinion on the ground that he failed to diagnose the existence of pneumoconiosis, which conflicts with the administrative law judge's finding of the presence of the disease. Employer's Exhibit 1; Decision and Order on Remand at 5-6; *Trujillo v. Kaiser Steel Corp.,* 8 BLR 1-472 (1986). We therefore affirm the administrative law judge's findings pursuant to Section 718.204(b) (2000), as supported by substantial evidence and affirm the award of benefits.

Claimant's counsel has filed two, complete, itemized statements requesting a fee for services performed in this appeal pursuant to 20 C.F.R. §802.203. Claimant's counsel requests a fee of $2800.00 for services performed between February 12, 2001 to April 19, 2001, for fourteen hours of work at a rate of $200.00 per hour. Counsel also requests a fee of $2,475.00 for services performed between May 14, 2001 to May 17, 2001, for eleven hours of work at a rate of $225.00 per hour. Claimant's counsel is therefore requesting a total fee of $5,275.00 for twenty-five hours of services performed in pursuit of claimant's appeal before the Board. Employer has filed a Motion to Dismiss Fee Application contending that claimant's counsel has failed to demonstrate the reasonableness of his hourly rate and the number of hours spent pursuing the instant claim.

Pursuant to Section 802.203(d)(4), (e) (2001), we hold that the rate of $225.00 per hour is not reasonable in the present case. Therefore, we reduce the hourly rate payable to claimant's counsel to $200.00. In addition, we agree with employer's contention that the eleven hours of time requested for the drafting of claimant's four page reply to employer's reply brief is excessive. Thus, the time for which claimant seeks compensation is reduced to five hours. *Brodhead v. Director, OWCP,* 17 BLR 1-138 (1993); *Cox v. Director, OWCP,* 7 BLR 1-810 (1985).

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed, employer's Motion to Dismiss Fee Application is denied, and claimant's counsel is awarded a fee of $3,800.00 to be paid directly to him by employer. 33 U.S.C. §928; 20 C.F.R. §802.203 (2001).

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge