BRB Nos. 08-0459 BLA and
08-0459 BLA-S

R.C.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MIDWEST COAL COMPANY	)	
	)	DATE ISSUED: 02/26/2009
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 – Awarding Benefits and Attorney Fee Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

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

Richard H. Risse (White & Risse, L.L.P.), Arnold, Missouri, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits and Attorney Fee Order (06-BLA-5644) of Administrative Law Judge Donald W. Mosser rendered 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 credited claimant with at least 19.86 years of coal mine employment[1] based on the parties' stipulation, Decision and Order at 3, and found that, although claimant did not establish the existence of clinical pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(3), he established the existence of legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) arising out of coal mine employment, pursuant to 20 C.F.R. §§718.201(a)(2), 718.202(a)(4), 718.203(b). The administrative law judge further determined that claimant established the existence of a totally disabling respiratory impairment that is due to pneumoconiosis under 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits. In an Attorney Fee Order issued on July 1, 2008, the administrative law judge directed employer to pay claimant's counsel a fee of $9,949.82 for legal services rendered and expenses incurred while the case was pending before the administrative law judge.

On appeal, employer challenges the administrative law judge's findings that the evidence establishes the existence of pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a)(4), 718.203, and that claimant is totally disabled due to pneumoconiosis under 20 C.F.R. §718.204(c). Claimant responds, urging the Board to affirm the administrative law judge's award of benefits. Employer filed a reply brief reiterating its allegations of error. Further, employer challenges the administrative law judge's fee award. Claimant filed a response in support of the fee award. The Director, Office of Workers' Compensation Programs, has declined to file a response brief in these appeals.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable 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).

[1] The law of the United States Court of Appeals for the Seventh Circuit is applicable as claimant was last employed in the coal mining industry in Indiana. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc)*.

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) and 19.86 years of qualifying coal mine employment. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

To establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989).

20 C.F.R. §718.202(a)(4)

Employer initially asserts that in discounting the opinions of employer's experts, Drs. Repsher and Tuteur, under Section 718.202(a)(4), the administrative law judge impermissibly shifted the burden of proof to employer to rule out the existence of legal pneumoconiosis, and selectively analyzed the opinions of Drs. Repsher and Tuteur by focusing on a small portion of each opinion. Employer's Brief at 14, 18-20. We disagree. The record reflects that the administrative law judge discounted the opinions of Drs. Repsher and Tuteur, that claimant's COPD was not related to coal dust exposure, because the administrative law judge found that the opinions were not well-reasoned. Decision and Order at 14; Director's Exhibit 21; Employer's Exhibit 1. In so finding, the administrative law judge explained that Drs. Repsher and Tuteur based their opinions on statistical evidence, indicating that it is rare for coal dust to cause clinically significant COPD, rather than claimant's individual circumstances. Decision and Order at 14; Director's Exhibit 21; Employer's Exhibits 1, 6, 6-A, 8. Although employer asserts that the administrative law judge selectively analyzed the opinions of Drs. Repsher and Tuteur by focusing on their use of statistics, substantial evidence supports the administrative law judge's finding that this statistical analysis was an integral part of the physicians' opinions. Director's Exhibit 21; Employer's Exhibits 1, 6 at 12, 18, 8 at 27, 30. Contrary to employer's assertion, therefore, the administrative law judge rationally discounted the opinions of Drs. Repsher and Tuteur on this basis. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008).

We additionally reject employer's contention that the administrative law judge failed to state a valid reason for crediting the opinions of Drs. Cohen and Harris, that claimant's COPD was caused by both smoking and coal dust exposure, pursuant to Section 718.202(a)(4). Director's Exhibit 10; Claimant's Exhibit 1; Employer's Brief at 12, 24. The record reflects that the administrative law judge credited Dr. Cohen's opinion, as buttressed by Dr. Harris's opinion, because he found Dr. Cohen's opinion to be the best reasoned. Decision and Order at 14. Although employer asserts that the administrative law judge applied a disparate standard in crediting the opinions submitted by claimant, whether the doctor's opinions were well-reasoned is the same standard that the administrative law judge applied to the opinions of Drs. Repsher and Tuteur. Further, in finding Dr. Cohen's opinion to be the best reasoned, the administrative law judge explained that Dr. Cohen accounted for both claimant's smoking and coal dust exposure

histories, and he explained how the objective medical evidence was consistent with his diagnosis.[3] *See Peabody Coal Co. v. McCandless*, 255 F.3d 465, 469, 22 BLR 2-311, 2-318 (7th Cir. 2001); *Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988); Decision and Order at 14; Director's Exhibit 10; Claimant's Exhibit 1. As it is supported by substantial evidence, we affirm the administrative law judge's finding under Section 718.202(a)(4). *See McCandless*, 255 F.3d at 469, 22 BLR at 2-318; *Burns*, 855 F.2d at 501.

20 C.F.R. §718.203(b)

Employer next contends that the administrative law judge failed to state a valid reason for finding that claimant's legal pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b). Employer's Brief at 31-33. We disagree. As the administrative law judge observed, his finding that claimant established the existence of legal pneumoconiosis obviated the need for a separate inquiry under Section 718.203(b), since the definition of legal pneumoconiosis requires that the miner's chronic obstructive disease have arisen out of coal mine employment. *See* 20 C.F.R. §718.201(a)(2); *Andersen v. Director, OWCP*, 455 F.3d 1102, 1107, 23 BLR 2-332, 2-341-42 (10th Cir. 2006); *Kiser v. L&J Equip. Co.*, 23 BLR 1-246, 1-259 n.18 (2006); *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999); Decision and Order at 14.

20 C.F.R. §718.204(c)

Relevant to Section 718.204(c), the administrative law judge credited the opinions of Drs. Cohen and Harris to find that legal pneumoconiosis is a substantially contributing cause of claimant's totally disabling respiratory impairment. Decision and Order at 16. The administrative law judge accorded less weight to the opinions of Drs. Tuteur and Repsher because their opinions were rendered under the mistaken impression that

[3] In crediting Dr. Cohen's diagnosis of legal pneumoconiosis, the administrative law judge stated that Dr. Cohen explained that the objective evidence "support[ed] his diagnosis of smoke-induced COPD." Decision and Order at 14. Although employer contends that this statement renders the administrative law judge's decision internally inconsistent, Employer's Brief at 26, as claimant points out, the administrative law judge's statement is clearly an editorial error. Decision and Order at 14; Claimant's Brief at 8 n.1. The administrative law judge made this statement in support of his determination that Dr. Cohen's opinion was a well-reasoned diagnosis of legal pneumoconiosis. Further, the administrative law judge previously noted that Dr. Cohen attributed claimant's severe obstructive defect to both smoking and coal dust. Decision and Order at 9; Claimant's Exhibit 1.

claimant did not have legal pneumoconiosis, contrary to the administrative law judge's finding. *Id.*; *see Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986). Employer argues that because the administrative law judge's finding of legal pneumoconiosis is erroneous for the same reasons that employer argued under Section 718.202(a)(4), his finding under Section 718.204(c) should be vacated. However, since we have affirmed the administrative law judge's finding of legal pneumoconiosis, employer's contention lacks merit. Consequently, we affirm the administrative law judge's finding under Section 718.204(c).

As claimant has established each element of entitlement, we affirm the administrative law judge's award of benefits.

ATTORNEY FEE ORDER

Employer also appeals the administrative law judge's Attorney Fee Order awarding claimant's counsel $220.00 per hour for 39.5 hours of services rendered by Sandra Fogel and Bruce Wissore, and $989.82 for expenses incurred in connection with the case. Specifically, employer contends that $220.00 per hour is excessive and is not a market-based rate. Employer does not challenge the number of hours billed nor the administrative law judge's award of $989.82 for expenses incurred in connection with 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, *Jones v. Badger Coal Co.*, 21 BLR 1-102 (1998) (*en banc*); *Abbott v. Director, OWCP*, 133 BLR 1-15 (1989).

The United States Court of Appeals for the Seventh Circuit has held that although the rate at which an attorney is compensated must be market-based, *McCandless*, 255 F.3d at 473, 22 BLR 2-319, the calculation of an hourly rate based upon fee awards in similar cases, and counsel's representation that the rates requested reflect his firm's usual fees, is appropriate. *Peabody Coal Co. v. Estate of J.T. Goodloe*, 299 F.3d 666, 672, 22 BLR 2-483, 493 (7th Cir. 2002). In the present case, the administrative law judge applied the regulatory criteria appropriately in awarding claimant's counsel an hourly rate of $220.00. With respect to attorney Fogel, the administrative law judge took into account the complexity of the legal issues involved, as well as claimant's counsel's qualifications, experience, quality of representation, and the fact that she had previously been awarded an hourly rate of $220.00, to find that this requested hourly rate was reasonable. *See* 20 C.F.R. §725.366(b); *Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 895, 22 BLR 2-514, 2-535 (7th Cir. 2002); *Goodloe*, 299 F.3d at 672, 22 BLR at 493; Attorney Fee Order at 3. Similarly, with respect to attorney Wissore, the administrative law judge found that the hourly rate of $220.00 was also "reasonable and proper, given his

extensive experience and limited involvement in this claim."[4] *Id*. Although employer asserts that the rate is unreasonable, employer fails to demonstrate any abuse of discretion by the administrative law judge.[5] *See generally Lanning v. Director, OWCP*, 7 BLR 1-314 (1984). Based on the administrative law judge's proper analysis of the regulatory criteria, we affirm his finding that an hourly rate of $220.00 was reasonable. *McCandless*, 255 F.3d at 473, 22 BLR 2-319; *Goodloe*, 299 F.3d at 672, 22 BLR at 493. As employer fails to challenge any other aspect of the administrative law judge's fee award, we affirm the administrative law judge's award of $8,960.00 for 39.5 hours of services rendered and $989.82 for expenses incurred in connection with this case.

[4] Counsel's fee petition reflects that attorney Wissore is a partner in the firm of Culley & Wissore, who concentrates exclusively in matters involving occupational diseases and has represented "hundreds of coal miners and their widows in claims for state and federal black lung benefits." Application for Representative's Fees at 5-6. The petition additionally indicates that attorney Wissore spent 9.75 hours preparing for and participating in the depositions of Drs. Repsher and Tuteur. *Id*. at 5.

[5] Contrary to employer's contention, the administrative law judge did not commit reversible error in failing to consider the declaration of Ms. Christine Terrill, attesting that Old Republic Insurance Company pays attorneys working in Carbondale, Illinois $125 per hour to litigate black lung claims. By applying the factors set forth in 20 C.F.R. §725.366(b), the administrative law judge provided a rationale for his determination that the hourly rate requested by counsel was reasonable. *See Peabody Coal Co. v. Estate of J.T. Goodloe*, 299 F.3d 666, 672, 22 BLR 2-483, 493 (7th Cir. 2002); *see also Searls v. Southern Ohio Coal Co*., 11 BLR 1-161 (1988); *Kozele v. Rochester & Pittsburg Coal Co*., 6 BLR 1-378 (1983).

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits and Attorney Fee Order are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge