BRB Nos. 08-0313 BLA
and 08-0577 BLA

L.A.C. Claimant-Respondent	)	
v.	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 01/27/2009
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 and the Supplemental Decision and Order Awarding Attorney Fees of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

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

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

Sarah M. Hurley (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, Acting 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: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and the Supplemental Decision and Order Awarding Attorney Fees (2007-BLA-5120) of Administrative Law Judge Linda S. Chapman 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). The administrative law judge credited claimant with 30.58 years of qualifying coal mine employment, and adjudicated this claim, filed on December 19, 2005, as a subsequent claim subject to the provisions at 20 C.F.R. §725.309(d).[1] She found that the newly submitted evidence of record established the existence of complicated pneumoconiosis, and thereby established a change in an applicable condition of entitlement.[2] 20 C.F.R. §725.309(d); Decision and Order at 28. On the merits of entitlement, the administrative law judge concluded that the evidence of record established the existence of complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.304, 718.203(b), affording claimant the irrebuttable presumption of total disability due to pneumoconiosis. Accordingly, benefits were awarded. Upon consideration of the fee petition of claimant's counsel and employer's objections thereto, the administrative law judge awarded claimant's counsel an attorney fee in the amount of $9,775.00 for 50.5 hours of legal services at the rate of $300.00 per hour for counsel's services, $200.00 per hour for the services of counsel's two associates, and $100.00 per hour for the services of counsel's legal assistant.

On appeal, employer contends that the administrative law judge erroneously evaluated the relevant evidence and applied an improper standard in finding the existence of complicated pneumoconiosis established under Section 718.304. Employer also challenges the administrative law judge's award of attorney fees, arguing that the $300.00 hourly rate awarded for the services of claimant's counsel is excessive. Claimant responds, urging affirmance of the award of benefits and the award of attorney fees. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response addressing several issues raised by employer on the merits.

APPEAL OF THE MERITS OF THE CLAIM

We first address employer's challenge to the administrative law judge's findings on the merits of this subsequent claim in BRB No. 08-0313 BLA. The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be

[1] The miner' previous claim, filed on April 16, 2002, was denied on November 10, 2004 for failure to establish any of the elements of entitlement. Decision and Order at 2, 16.

[2] In his November 10, 2004 denial of benefits, Administrative Law Judge Stephen L. Purcell found that the evidence was insufficient to establish the existence of either simple or complicated pneumoconiosis. *See* Decision and Order at 28.

affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 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 under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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*).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The applicable conditions of entitlement "shall be limited to those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). As claimant's prior claim was denied because he failed to establish any element of entitlement, claimant had to submit new evidence establishing any of the elements of entitlement in order to obtain review of the merits of his claim.[4] 20 C.F.R. §725.309(d)(2), (3).

Employer first contends that "the ALJ's finding that the 2005 biopsy evidence established the existence of complicated pneumoconiosis" is incorrect "as a matter of law." Employer's Brief at 17. Contrary to employer's argument, however, the administrative law judge found that the 2005 biopsy evidence established the presence of simple pneumoconiosis, not complicated pneumoconiosis. In her discussion, the administrative law judge first reviewed the x-ray and CT scan evidence of record, concluding that although the conflicting x-ray evidence alone failed to establish the existence of pneumoconiosis, "the results of the January 6, 2005 bronchoscopy, especially when considered with the results of the two previous biopsies, established that

[3] The law of the United States Court of Appeals for the Fourth Circuit is applicable, as the miner was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 3-6.

[4] In this connection, we agree with the Director, Office of Workers' Compensation Programs (the Director), that the administrative law judge was not required to consider whether the newly submitted evidence differed qualitatively from the evidence submitted in the previously denied claim, *see* Director's Response at 3; 20 C.F.R. §725.309; employer's assertion to the contrary is therefore without merit.

[claimant] has pneumoconiosis." Decision and Order at 19. Consequently, we agree with the Director's argument that no equivalency determination was required.

Employer next challenges the administrative law judge's finding of invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304. Employer argues that the administrative law judge's evaluation of the evidence failed to comply with the standard established in *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000), and thus "improperly shifted the burden of proof to employer to disprove [that] large opacities seen radiographically are inconsistent with a diagnosis of complicated pneumoconiosis." Employer's Brief at 8. Additionally, employer asserts that the administrative law judge's evaluation of the biopsy and medical opinion evidence was irrational, contrary to law and unsupported by substantial evidence. Employer's arguments are without merit.

Section 411(c)(3) of the Act, as implemented by Section 718.304, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (A) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, is a condition which would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. In order to determine whether claimant has established invocation of the irrebuttable presumption pursuant to Section 718.304, the administrative law judge is required to weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *See Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*). However, the introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at Section 718.304. *Melnick*, 16 BLR at 1-33; *Truitt v. North Am. Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North Am. Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has explained:

> Evidence under one prong can diminish the probative force of evidence under another prong if the two forms of evidence conflict….[I]f the x-ray evidence vividly displays opacities exceeding one centimeter, its probative force is not reduced because the evidence under some other prong is inconclusive or less vivid. Instead, the x-ray evidence can lose force only if other evidence affirmatively shows that the opacities are not there or are not what they seem to be, perhaps because of an intervening pathology, some technical problem with the equipment used, or incompetence of the reader.

Scarbro, 220 F.3d at 256, 22 BLR at 2-101.

We reject as unfounded employer's general argument that the administrative law judge improperly applied the standard outlined in *Scarbro*. Contrary to employer's assertion, the administrative law judge did not merely accept a single positive x-ray interpretation demonstrating an opacity larger than one centimeter, and then shift the burden to employer to affirmatively rule out the presence of complicated pneumoconiosis. Rather, the administrative law judge's detailed evaluation of the evidence demonstrates that she adequately weighed all of the evidence together. Decision and Order at 19-21, 27.

Employer specifically asserts that the administrative law judge improperly evaluated the medical evidence and should have accepted the medical opinions of Drs. Hippensteel and Rosenberg that claimant did not have complicated pneumoconiosis. We disagree, as our review indicates that the administrative law judge adequately considered the relevant evidence of record in determining that claimant satisfied his burden of proving the existence of complicated pneumoconiosis, both by the newly submitted evidence and by the weight of the evidence of record, old and new. After finding that the x-ray evidence alone was insufficient to establish complicated pneumoconiosis, but revealed "large masses in [the miner's] lungs, and that these masses show as opacities of at least one cm. on his x-rays,"[5] Decision and Order at 23, the administrative law judge reviewed all other relevant evidence. The administrative law judge noted that claimant's treatment records dating from at least 1998 revealed abnormal x-rays and CT scans showing the presence of a large mass in his upper right lung, and that claimant's medical records and the reports of his treating and consulting physicians consistently evinced concern that the lung masses were cancerous.[6] Decision and Order at 21. Referencing the narrative medical reports, the administrative law judge also reviewed the CT scan and PET scan evidence dating from 2002 through 2006, and the accompanying reports of Drs. Tholpady, Scott, Foster, Messerschmidt, Baron, McSharry, Westerfield, Ward, Gopalon and DePonte, as well as those of Drs. Hippensteel and Rosenberg. She found "no dispute" that claimant has large lung masses, and she determined that the "overwhelming

[5] In particular, the administrative law judge referenced the interpretations of Drs. Forehand and DePonte, who found Category A and Category B opacities, respectively. Decision and Order at 5, 27.

[6] Employer does not challenge the administrative law judge's determination that the physicians designated by employer, while not categorizing the x-ray opacities as A, B, or C masses, nonetheless "acknowledged the presence of the masses supporting the interpretations by Drs. Forehand and DePonte, the findings on CT scans, and the reports by claimant's physicians." Decision and Order at 27.

preponderance" of the evidence showed a process involving opacities of at least one centimeter in diameter.[7] Decision and Order at 22-23. The administrative law judge determined that testing performed in October 2002 and January 2005 ruled out concerns that the lung mass was cancerous; instead, the biopsy of January 2005 showed anthrasilicotic material in association with reactive fibrohistiocytic proliferation, consistent with pneumoconiosis. Decision and Order at 27. Further, Dr. DePonte interpreted claimant's most recent CT scan of July 10, 2006 as showing the "classic" findings of pneumoconiosis with progressive massive fibrosis, and Category B large opacities. Decision and Order at 23. While Drs. Hippensteel and Rosenberg opined that the large masses did not represent complicated pneumoconiosis, the administrative law judge found that the contrary opinions of claimant's treating physicians were more persuasive. Noting that "pneumoconiosis has consistently been the only other etiology that [claimant's] physicians have ascribed over the years to the large masses in his chest," Decision and Order at 23, the administrative law judge concluded that, subsequent to the denial of the earlier claim in November 2004, based on additional medical procedures, "including x-rays, CT scans, PET scans, and bronchoscopy, [claimant's] physicians have determined that the abnormal processes in his lungs are not cancerous, but rather represent complicated pneumoconiosis…[claimant] has established that he has a condition of such severity that it appears on x-rays as opacities of at least one centimeter in diameter, and that his condition is due to his exposure to coal mine dust."[8] Decision and Order at 28.

In contrast, the administrative law judge found that employer's physicians "speculate that the x-ray abnormalities could be due to another disease process." Decision and Order at 27. Dr. Hippensteel reported an opacity greater than 4 cm. in the right mid-lung zone that he described as partly calcified in a manner not typical for coal workers' pneumoconiosis, and that he opined was not typical of complicated pneumoconiosis as it was not associated with ventilatory or permanent gas exchange

[7] The medical evidence included, *inter alia*, a finding of a 5 cm. lung mass described by Dr. Messerschmidt in 2002; a 2002 PET scan identifying a 3 cm. lung mass; and a 2006 CT scan exhibiting large opacities described as measuring at least 5 cm., 3 cm. and 2 cm. by Dr. DePonte. Claimant's Exhibits 3, 4, 7.

[8] Employer also asserts that the administrative law judge's references to opacities measuring "at least one centimeter in diameter," rather than the regulatory requirement of opacities "greater than one centimeter," constitutes error requiring that the decision be reversed or vacated and remanded. However, we agree with the Director that the administrative law judge's error in this respect is harmless, because the physicians, including those designated by employer, agree that the opacity seen on claimant's x-rays is greater than one centimeter in diameter. Director's Brief at 2; *see also* Decision and Order at 22-24, 26.

impairment. He concluded that claimant's CT scans also reflected a granulomatous disease or inflammation, but failed to indicate progressive massive fibrosis. Moreover, while ruling out simple or complicated pneumoconiosis, and opining that claimant's condition "could be" histoplasmosis, Dr. Hippensteel agreed that if the opacities in claimant's lungs were caused by his coal mine employment, "they were large enough to be complicated pneumoconiosis." Employer's Exhibit 4 at 16-17, 25; Decision and Order at 12-13, 23. Based on a review of claimant's medical records, Dr. Rosenberg also concluded that claimant did not have either simple or complicated pneumoconiosis. While acknowledging the presence of large opacities on x-ray, he noted the conflicting interpretations of progressive massive fibrosis versus granulomatous scarring, and relied on the opinion of Dr. Wiot that the x-ray anomalies represented histoplasmosis or a non-infectious granulatomatous disease. Employer's Exhibits 3, 5; Decision and Order at 24.

Reviewing the evidence provided by Drs. Hippensteel and Rosenberg, the administrative law judge found that while Dr. Hippensteel opined that the x-ray abnormalities were partly calcified in a manner not typical for pneumoconiosis, he failed to explain the "typical presentation for pneumoconiosis." Decision and Order at 24. She determined that Dr. Rosenberg relied upon the opinion of Dr. Wiot as to the significance of the progressive x-ray changes; however, she noted that Dr. Wiot did not review the CT scans, although he had stated that they would be important in making a definitive finding. Decision and Order at 25. Additionally, the administrative law judge noted that although Dr. Rosenberg's testimony stressed the accuracy of CT scans in diagnosis, he failed to discuss claimant's CT scan results on deposition. Accordingly, the administrative law judge found that Dr. Rosenberg "did not address the consistent findings by [claimant's] physicians that the changes shown on CT scan were due to pneumoconiosis, or possibly cancer." Decision and Order at 25. Further, she observed that both Dr. Hippensteel and Dr. Rosenberg strongly relied on the fact that claimant did not evidence a permanent significant pulmonary impairment, in opining that claimant did not have complicated pneumoconiosis. Decision and Order at 24.

We conclude that the administrative law judge's review and analysis represents a proper exercise of her duty as finder-of-fact to identify and resolve inconsistencies in the medical evidence. We therefore reject employer's specific challenges to the administrative law judge's evaluation and weighing of the medical opinions of Drs. Hippensteel and Rosenberg, and the x-ray findings of Dr. Wiot. First, the administrative law judge rationally identified evidentiary deficiencies, citing a lack of sufficient explanation and support, in according less weight to the physicians' opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *see also Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-587, 2-606 (4th Cir. 1999); *Ellison v. Ranger Fuel Corp.*, 73 F.3d 357, 20 BLR 2-125 (4th Cir. 1995); *Allen v. Mead Corp.*, 22 BLR 1-63, 1-67 n.7 (2000); *Church v. Eastern Associated Coal Co.*, 20 BLR 1-8, 1-12 (1996); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21-22 (1987).

With respect to employer's specific contention that the medical opinions of Drs. Hippensteel and Rosenberg were improperly discredited due to their reliance on claimant's absence of respiratory impairment,[9] the administrative law judge properly noted that invocation of the irrebuttable presumption at Section 718.304 does not require a showing of respiratory impairment. Therefore, while the absence of a respiratory or pulmonary impairment may be considered by the administrative law judge, in the exercise of her discretion, as a factor in evaluating the evidence relevant to a determination of the existence of complicated pneumoconiosis, *see Mullins Coal Co., Inc. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484, U.S. 1047 (1988), it need not be determinative. In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 n.4, 3 BLR 2-36, 2-38 n.4 (1975), the Supreme Court observed: "There was evidence before Congress that the complicated stage of the disease is sometimes exhibited with 'mild pulmonary function changes and little or no disability.' Hearings on S. 355 [before the Subcommittee on Labor of the Senate Committee on Labor and the Public Welfare, 91st Congress, 1st Session Part 2], n.1, at 858 (1969)." The administrative law judge's decision to accord less weight to the opinions of Drs. Hippensteel and Rosenberg on this basis was therefore permissible. *See generally Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); Employer's Exhibits 4 at 14-16, 22; 5 at 13-14, 27-29. Further, she determined that the physicians designated by employer provided speculative opinions as to the etiology of the large masses in claimant's lungs "as being attributable to another disease process, without substantiation or corroboration." Decision and Order at 26. As a speculative or inconclusive opinion may validly be accorded less weight, *see U.S. Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 391, 21 BLR 2-639, 2-652-653 (4th Cir. 1999); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988), the administrative law judge's finding in this regard provides a further permissible reason for according less weight to the opinions of employer's experts.[10]

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[9] None of the pulmonary function studies, arterial blood gas studies, or the medical opinion evidence of record established the existence of a totally disabling pulmonary or respiratory impairment. Decision and Order at 5-6, 17.

[10] Employer notes the administrative law judge's statement: "Nor has the employer offered affirmative evidence that establishes that the acknowledged masses in [the miner's] lungs are due to a process other than pneumoconiosis." *See* Decision and Order at 26, 27; Employer's Brief at 10. Employer contends that the administrative law judge is incorrect because employer provided the opinions of Drs. Wiot, Scatarige, Wheeler, Scott and Hippensteel that the opacities were caused by other disease processes. Employer's Brief at 10. However, the administrative law judge went on to say:

> As discussed above, a diagnosis of cancer has not been established. There is no evidence in the record to suggest that [the miner] has ever been evaluated for, diagnosed with, or treated for any conditions such as

By contrast, in evaluating the medical evidence of claimant's treating and consulting physicians, the administrative law judge determined:

> [Claimant's] treating physicians have reviewed his objective findings over a considerable span of time. They have uniformly and consistently offered two differential diagnoses for the abnormalities on [claimant's] x-rays and CT scans – pneumoconiosis or cancer. …There is no mention in the newly submitted medical evidence by [claimant's] treating physicians of even the possibility of sarcoidosis, or for that matter, histoplasmosis, tuberculosis, or any other granulomatous condition as the cause for his x-ray abnormalities.

Decision and Order at 25-26. The administrative law judge accorded the opinions of claimant's treating physicians greater weight due to their lengthy involvement in his medical history, and the consistent nature of their evaluations of his condition. Such consideration of the quality of the treating physicians' evidence is rational and appropriate, and supported by substantial evidence. *See* 20 C.F.R. §718.104(d)(5); *Consolidation Coal Co. v. Director, OWCP* [*Held*], 314 F.2d 184, 22 BLR 2-564 (4th Cir. 2002); *see generally Nat'l Mining Ass'n v. U.S. Dept of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002). Accordingly, her reliance on the opinions of claimant's treating physicians, as well as consulting physicians who reviewed the totality of his medical records and objective testing over the years, represents a rational exercise of her discretion to resolve evidentiary conflicts, and accords with law. *See* Decision and Order at 21-22, 25-26; *see generally Minnich v. Pagnotti Enterprises, Inc*., 9 BLR 1-89, 1-90, n.1 (1986); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *accord Hicks*, 138 F.3d 524 21 BLR 2-323; *Church v. Eastern Assoc. Coal Co*., 21 BLR 1-108 (1996). Moreover, these treating physicians' consistent and uniform assessment of claimant's condition over time provides a proper and rational evaluative basis here for crediting their evidence over that of Drs. Hippensteel and Rosenberg, s*ee generally Ellison v. Ranger Fuel Corp*., 73 F.3d 357, 20 BLR 2-125 (4th Cir. 1995); Decision and Order at 25, and the Board will not substitute its inferences for those of the administrative law judge. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). We note that the administrative law judge's reliance on the opinions of the miner's treating physicians is not challenged by employer; rather, employer asserts that contrary evidence should have been credited instead. Accordingly, we conclude that the administrative law judge has provided sufficient rationale for her weighing and crediting of the evidence, and we need not address employer's further arguments respecting the administrative law judge's

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> sarcoidosis, histoplasmosis, or tuberculosis, or any other granulomatous condition.

Decision and Order at 26. Thus, when the administrative law judge's statement is read in context, it appears that she used "affirmative" to mean "persuasive" and "substantial."

determination to accord less weight to the medical opinions of Drs. Hippensteel and Rosenberg. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

The administrative law judge, in her role as finder of fact, is charged with evaluating the relative value of conflicting medical evidence and assessing the credibility of medical experts. *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986). As substantial evidence supports the administrative law judge's findings that the newly submitted evidence is sufficient to establish a change in an applicable condition of entitlement pursuant to Section 725.309(d), and that the weight of the evidence of record, old and new, is sufficient to establish complicated pneumoconiosis arising out of coal mine employment pursuant to Sections 718.304 and 718.203(b), they are affirmed. *See Scarbro*, 220 F.3d 250, 22 BLR 2-93. Consequently, we affirm the administrative law judge's award of benefits.

APPEAL OF THE AWARD OF ATTORNEY FEES

We next address employer's appeal of the Supplemental Decision and Order Awarding Attorney Fees in BRB No. 08-0577 BLA. Claimant's counsel, Joseph E. Wolfe, submitted a fee petition to the administrative law judge requesting a fee of $11,775.00, representing 50.5 hours of legal services at the rate of $400.00 per hour for his services, $250.00 per hour for his associate, Bobby S. Belcher, $200.00 for another associate, W. Andrew Delph, and $100.00 per hour for his legal assistant. Following consideration of employer's objections to the fee petition, the administrative law judge reduced the hourly rates awarded to Mr. Wolfe and his two associates to $300.00 and $200.00, respectively, and awarded a total fee of $9,775.00 for 50.5 hours of legal services. On appeal, employer challenges the hourly rate awarded for Mr. Wolfe's services as excessive.

An award of attorney fees is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law. *Abbot v. Director, OWCP*, 13 BLR 1-15 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

Employer submits that the administrative law judge's award of an hourly rate of $300.00 for Mr. Wolfe's services is an abuse of discretion and contrary to law. In support, employer argues that this rate "greatly exceeds the rate that attorney Wolfe receives from clients that pay an hourly rate," and that the administrative law judge failed

to discuss this factor.[11] Employer's Brief at 2, 4, 9. Employer argues that the administrative law judge's award of a $300.00 hourly rate to Mr. Wolfe is insufficiently supported, and incorrectly includes a consideration of the risk of loss in litigating federal black lung claims. Further, employer submits that the Altman & Weil survey of attorney fees considered by the administrative law judge is "virtually useless," arguing that it fails to accurately reflect attorney fee levels in rural western Virginia. Employer's Brief at 7. Finally, employer submits that the Fourth Circuit has previously reduced Mr. Wolfe's hourly rate from $300.00 to $250.00 per hour, in *Westmoreland Coal Co. v. Barker*, No. 04-1869 (4th Cir, Jan. 4, 2006)(unpub.), and suggests that the hourly rate award represents an unjustified "premium rate." Employer's Brief at 7, 9.

We hold that the administrative law judge properly addressed employer's objections to the fee petition, addressed the regulatory criteria at 20 C.F.R. §725.366, and acted within her discretion in awarding fees based on an appropriate hourly rate of $300.00 for Mr. Wolfe's services, $200.00 per hour for the services of his associates, Mr. Belcher and Mr. Delph, and $100.00 per hour for the services of his legal assistant. *See generally Lanning v. Director, OWCP*, 7 BLR 1-314 (1984); *Busbin v. Director, OWCP*, 3 BLR 1-374 (1981). The administrative law judge appropriately considered "the quality of the representation, the qualifications of the representative, the complexity of the legal issues presented, the level of proceedings to which the claim was raised, [and] the level at which the representative entered the proceedings." Supplemental Decision and Order at 4. Based on her observations of Mr. Wolfe and his associates on a number of occasions in addition to the instant claim, she found each to be highly competent, highly experienced, and highly qualified. She noted as well that Mr. Wolfe has over thirty-two years of experience in black lung law practice, that he is rated as high to very high in the Martindale-Hubbell ratings, and that his firm's attorneys teach legal techniques in black lung litigation at seminars. Moreover, she noted "the zealous and competent representation rendered" in this matter. *Id.*

With respect to employer's objection to Mr. Wolfe's inclusion of the Altman & Weil hourly rate survey, the administrative law judge acknowledged that the excerpt provided by Mr. Wolfe failed to include the lower quartile hourly rates, or to indicate whether the survey figures included only attorneys who practice in the area of black lung law.[12] Next, while employer asserts that the administrative law judge inappropriately referred to "risk of loss" as a factor in determining the hourly rate, *see City of Burlington*

[11] Employer does not challenge the total number of hours claimed, or the respective hourly rates awarded for work performed by Mr. Wolfe's associates and legal assistant.

[12] The administrative law judge permissibly took judicial notice of the hourly rates reported in the *2006 Survey of Law Firm Economics*, published by Altman & Weil.

v. Dague, 505 U.S. 557, 567 (1992); *Broyles v. Director, OWCP*, 974 F.2d 508, 509, 17 BLR 2-1, 2-3 (4th Cir. 1992), there is no indication that in setting Mr. Wolfe's hourly rate at $300.00, the administrative law judge used contingency multipliers to "enhance" the fee award in order to compensate for a risk of loss in black lung claims. *See* Employer's Brief at 5, 6; Supplemental Decision and Order at 3, 4. As the administrative law judge, in her discretion, rationally determined that Mr. Wolfe's legal representation justified an hourly rate of $300.00, we reject employer's argument that this rate was excessive.

Accordingly, we conclude that employer has failed to demonstrate that the attorney fee awarded in this matter was arbitrary, capricious, or an abuse of discretion. *Lanning*, 7 BLR 1-314. To the contrary, the administrative law judge's discussion supports her reduction of the hourly rate requested from $400.00 to $300.00, while fully evaluating counsel's level of expertise, the quality of his representation of claimant, and other relevant factors. Consequently, the administrative law judge's award of an attorney fee of $9,775.00 is affirmed.

Accordingly, the administrative law judge's Decision and Order awarding benefits and her Supplemental Decision and Order Awarding Attorney Fees are affirmed.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge