BRB No. 13-0184 BLA

ROMAINE SHORT (Widow of CLAUDE SHORT)	)	
Claimant- Respondent	)	
v.	)	
SAHARA COAL TRUST	)	DATE ISSUED: 01/23/2014
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 on Remand – Award of Survivor's Benefits of Stephen R. Henley, Administrative Law Judge, United States Department of Labor.

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

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

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 on Remand – Award of Survivor's Benefits (2007-BLA-05162) of Administrative Law Judge Stephen R. Henley, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended,

30 U.S.C. §§901-944 (2012) (the Act). This survivor's claim, filed on January 18, 2006, is before the Board for the second time.[1] In the initial Decision and Order dated May 19, 2010, Administrative Law Judge Jeffery Tureck found that claimant established invocation of the amended Section 411(c)(4) rebuttable presumption of death due to pneumoconiosis, *see* 30 U.S.C. §921(c)(4), by establishing that the miner worked for at least fifteen years in underground coal mine employment, and that he had a totally disabling respiratory or pulmonary impairment.[2] However, Judge Tureck further found that employer rebutted the presumption by establishing that the miner's death was unrelated to pneumoconiosis. Accordingly, Judge Tureck denied benefits.

Pursuant to claimant's appeal, the Board rejected claimant's challenges to several procedural rulings by Judge Tureck and affirmed, as unchallenged, Judge Tureck's findings that the Section 411(c)(4) presumption was invoked and that employer established that the miner's clinical pneumoconiosis did not contribute to his death. *Short v. Sahara Coal Trust*, BRB No. 10-0533 BLA, slip op. at 6 n.9 (July 27, 2011) (unpub.). The Board held, however, that Judge Tureck did not properly weigh the evidence relevant to whether employer disproved the existence of legal pneumoconiosis and that the miner's death was unrelated to that condition. *Id*. at 9-10. Thus, the Board vacated Judge Tureck's denial of benefits and remanded the case for further consideration as to whether employer established rebuttal of the amended Section 411(c)(4) presumption. *Id*. at 10. The Board specifically instructed the administrative law judge on remand to consider the credibility of the physicians' opinions in light of their respective analyses, the quality of their reasoning, and their qualifications. *Id*. The Board further instructed that the administrative law judge to consider the entirety of Dr. Cohen's opinion regarding the various types of emphysema, prior to determining whether the opinions of Drs. Tuteur and Oesterling are sufficient to disprove that the miner's emphysema/death was unrelated to coal dust exposure and establish rebuttal of the Section 411(c)(4) presumption. *Id*.

[1] Claimant is the widow of the miner, who died on February 4, 2005. Director's Exhibits 8, 10. The miner's lifetime claim for benefits, filed on December 17, 1996, was finally denied by the district director on May 20, 1997. Director's Exhibit 1.

[2] Relevant to this claim, amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305), provides a rebuttable presumption that a miner's death was due to pneumoconiosis if the claimant establishes fifteen or more years of underground coal mine employment, or employment in conditions substantially similar to those in an underground mine, and that the miner suffered from a totally disabling respiratory or pulmonary impairment. *See* Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010).

On remand, the case was transferred to Judge Henley (the administrative law judge), who found that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption, based on the opinions of Drs. Oesterling and Tuteur. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in failing to reopen the record to allow employer to submit evidence addressing the change in law resulting from the reinstatement of Section 411(c)(4). Additionally, employer contends that the administrative law judge erred in his analysis of the medical opinion evidence in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, urging the Board to reject employer's argument that the administrative law judge erred in considering the preamble to the revised regulations when he weighed the medical opinion evidence regarding the cause of the miner's obstructive lung disease. Additionally, claimant's counsel has filed a fee petition for work performed before the Board in the prior appeal. Employer has filed objections to the fee petition.

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.[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).

I. Denial of Employer's Request to Reopen the Record on Remand

On April 7, 2010, Judge Tureck ordered the parties to file position statements addressing whether the Section 411(c)(4) presumption applied to this claim. He further instructed the parties to file any "[m]otions to reopen the record and/or file supplemental briefs due to the effects of" the amendment to the Act. April 7, 2010 Order at 1. Claimant responded and requested permission to file a supplemental brief addressing this issue in detail. Employer responded and acknowledged that amended Section 411(c)(4) was potentially applicable, based on the filing date of the claim. Employer also moved that the administrative law judge remand the claim to the district director, "so that it may respond to the changes in the law with proof and raise defenses available to it."

[3] The record reflects that the miner's coal mine employment was in Illinois. Director's Exhibits 3-5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

Employer's Motion for Remand at 1. In the Director's response, he maintained that the amended Section 411(c)(4) presumption applied to the survivor's claim.

Judge Tureck ruled on the parties' requests in his 2010 Decision and Order denying benefits, stating:

> . . . [T]he primary issue in this case - whether the miner's total disability is due to pneumoconiosis - was adequately addressed by both parties in their evidentiary submissions and in their briefs. Although the 15-year presumption essentially swaps the parties' burdens of proof in regard to this issue, the employer's medical experts, Drs. Oesterling and Tuteur, fully address this issue in their reports and deposition testimony, and were subject to extensive cross-examination by claimant's counsel. There is no need for additional evidence or briefing in response to the [Patient Protection and Affordable Care Act].

2010 Decision and Order at 2-3. On appeal of Judge Tureck's denial of benefits, claimant argued that he erred in denying claimant's request to submit a supplemental brief. Employer indicated in response that Judge Tureck's determination "that the issues were adequately addressed both in the briefs that already had been submitted [to Judge Tureck] and in the evidence that the parties had developed," represented a reasonable exercise of his discretion. Employer's 2011 Response Brief at 22. After the Board remanded the case and the parties received notice of Judge Tureck's unavailability, and the reassignment of the case, employer did not renew its request that the record be reopened.

Employer argues in the present appeal that "due process considerations required the new [administrative law judge] to revisit" Judge Tureck's denial of its 2010 motion to remand the case to the district director. Because the Board did not instruct the administrative law judge to reopen the record on remand, and employer did not submit a motion seeking this action on remand, we reject employer's contention that the administrative law judge erred by failing to reconsider Judge Tureck's denial of its request to reopen the record. *See Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-62 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

II. Rebuttal of the Amended Section 411(c)(4) Presumption

Because claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to disprove the existence of

both clinical and legal pneumoconiosis,[4] or establish that the miner's death was unrelated to his coal mine employment. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,115 (to be codified at 20 C.F.R. §718.305(d)(2)(i)); *see Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789, 794, BLR (7th Cir. 2013). On remand the administrative law judge was instructed to consider whether employer established rebuttal by proving that the miner did not have legal pneumoconiosis and/or that his death was unrelated to legal pneumoconiosis. *Short*, BRB No. 10-0533 BLA, slip op. at 10. The administrative law judge found that Dr. Cohen's opinion, that the miner's chronic obstructive pulmonary disease (COPD) was caused, in part, by coal dust exposure, and contributed to the miner's death, was well-documented and consistent with the evidence and the premises underlying the regulations. *See* Decision and Order on Remand at 8; Claimant's Exhibits 3 at 15, 5 at 4. In contrast, the administrative law judge determined that the opinion of Dr. Tuteur, that the miner's COPD and emphysema were due entirely to smoking, was entitled to little weight because his conclusion, that coal dust-induced COPD is extremely rare, was not based "on data or observations particular to the [m]iner" and "is contrary to the position taken by the [Department of Labor (DOL)] in the preamble." Decision and Order on Remand at 8; *see* Director's Exhibit 12; Employer's Exhibit 4. The administrative law judge also found that Dr. Oesterling's opinion, that the type of emphysema suffered by the miner is not related to coal dust exposure, "is similarly contrary" to the DOL's position. *See* Decision and Order on Remand at 8; Employer's Exhibit 5. The administrative law judge concluded, therefore, that "employer has not rebutted the presumption that the [m]iner ha[d] legal pneumoconiosis." Decision and Order on Remand at 8.

Employer maintains that the administrative law judge erroneously relied on the preamble to the regulations when discrediting the opinions of Drs. Tuteur and Oesterling. Employer's allegation of error is without merit. The preamble to the revised regulations that became effective in 2001 sets forth the DOL's resolution of questions of scientific fact concerning the elements of entitlement that a claimant must establish in order to secure an award of benefits. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007). Therefore, an administrative law judge may assign weight to a medical opinion based upon a determination of whether the opinion is supported by accepted scientific evidence, as determined by the DOL when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-

[4] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2) (2013).

97, 2-103 (7th Cir. 2008); *Shores*, 358 F.3d at 490, 23 BLR at 2-26; *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011).

In the present case, Dr. Tuteur opined that there was a 1% percent chance that coal dust exposure caused the miner's COPD, as opposed to a 20% chance that smoking caused it. Director's Exhibit 12 at 5. Contrary to employer's contention, the administrative law judge rationally determined that Dr. Tuteur's view conflicted with the DOL's positions, that coal dust exposure can cause a clinically significant obstructive disease and that nonsmoking miners develop moderate and severe obstruction at the same rate as smoking miners. *See* 65 Fed. Reg. 79,920, 79,938 (Dec. 20, 2000); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-265, 2-281 (7th Cir. 2001); Decision and Order on Remand at 5. Accordingly, the administrative law judge acted within his discretion in giving little weight to Dr. Tuteur's opinion. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103. Similarly, the administrative law judge permissibly discredited the medical opinion of Dr. Oesterling, based on his failure to adequately explain why the miner's coal dust exposure "had no effect on his emphysema," given the definition of legal pneumoconiosis, which is not limited to impairments directly caused by dust exposure in coal mine employment, but includes those that are significantly related to, or substantially aggravated by, coal dust exposure. *See* 20 C.F.R. §718.201(a)(2), (b) (2013); 65 Fed. Reg. 79,920, 79,943-44 (Dec. 20, 2000); *Shores*, 358 F.3d at 490, 23 BLR at 2-26; Decision and Order on Remand at 7.

Consequently, we affirm the administrative law judge's determination that employer did not rebut the amended Section 411(c)(4) presumption by affirmatively proving that the miner did not have legal pneumoconiosis.[5] 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,115 (to be codified at 20 C.F.R. §718.305(d)(2)(i)); *Bailey*, 721 F.3d at 794; Decision and Order on Remand at 8. We further affirm, as unchallenged on appeal, the administrative law judge's determination that employer did not rebut the amended Section 411(c)(4) presumption by affirmatively proving that the miner's death did not arise out of, or in connection with, his coal mine employment. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,115 (to be codified at 20 C.F.R. §718.305(d)(2)(ii)); *Bailey*, 721 F.3d at 794; Decision and Order on Remand at 8-9. Thus, we affirm the award of survivor's benefits in this case.

[5] Because employer bears the burden of proof on rebuttal, and we have affirmed the administrative law judge's credibility findings with regard to the opinions of employer's experts, Drs. Tuteur and Oesterling, we need not address employer's argument with regard to the weight accorded Dr. Cohen's opinion. *See Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789, 794, BLR (7th Cir. 2013); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

III. Attorney Fee Petition

On January 16, 2013, claimant's counsel filed a fee petition with the Board, requesting a total fee of $4,668.00, representing 19.45 hours of legal services at an hourly rate of $240.00, for work performed before the Board from June 8, 2010 to August 2, 2011 in the prior appeal, BRB No. 10-0533 BLA. Employer objects to the requested hourly rate, contending that claimant's counsel has not established that an hourly rate of $240.00 is the prevailing market rate.[6] We disagree.

In her fee petition, claimant's counsel provided affidavits from other lawyers who are familiar with her skills and with black lung litigation. Affidavits from lawyers who are familiar with the skills of the fee applicant and with the type of work performed in the relevant community are appropriate evidence to consider in establishing a market rate. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 289, 24 BLR 2-269, 2-291 (4th Cir. 2010); *Maggard v. Int'l Coal Grp., Knott Cnty., LLC*, 24 BLR 1-172, 1-175 n.20 (2010) (Order); *see also Bowman v. Bowman Coal Co.*, 24 BLR 1-167, 1-170 n.8 (2010) (Order), *petition for review denied*, *Bowman Coal Co. v. Director, OWCP* [*Bowman*], No. 12-1642 (4th Cir. Sept. 18, 2013) (unpub.). In support of her requested hourly rate, claimant's counsel has also provided evidence of her expertise and experience in the field of black lung litigation, as well as her normal billing rate. 20 C.F.R. §802.203(d). Therefore, we conclude that claimant's counsel has provided sufficient evidence of a market rate for an attorney of her expertise and experience in her geographic area for appellate work before the Board, and we find the requested hourly rate to be reasonable.

Employer also challenges counsel's time entries indicating that, between July 27 and 28, 2010, three hours were spent preparing a petition for review and brief, and that fifteen hours were expended on the same task between August 17 and 19, 2010. Employer contends that the time entries are not sufficiently detailed and states that "[a] breakdown of the time spent on briefing on each day ensures accurate and contemporaneous time-keeping." Employer's Opposition to Fee Petition at 3. Although employer urges the Board to deny or reduce compensation for these entries, it does not

[6] Employer also states that "[t]he twenty-nine fee awards listed by [claimant's] counsel also do not establish that $240/hour is her market rate." Employer's Opposition to Fee Petition at 3. There is no indication in the fee petition submitted to the Board that claimant's counsel submitted a list of prior awards. Rather, counsel stated that she attached a copy of her resume and affidavits from attorneys in support of her requested hourly rate of $240. Application for Approval of Representative's Fee at 3. In addition, contrary to employer's assertion, evidence of fees received in the past may be consulted for guidance in determining a prevailing market rate. *See Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 894-95, 22 BLR 2-514, 2-535-36 (7th Cir. 2002).

allege that any of the services listed by counsel on those dates were not necessary to the successful prosecution of the case or were excessive in amount. Based on our review, we hold that the time requested in these entries is reasonable in light of the services performed. *See Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139-140 (1993). Thus, claimant's counsel is awarded a total fee of $4,668.00, representing 19.45 hours of services at an hourly rate of $240.00, for services performed before the Board in the prior appeal, BRB No. 10-0533 BLA.[7]

[7] In light of our affirmance of the award of benefits in this case, claimant's counsel may file a fee petition for services rendered in BRB No. 13-0184 BLA. See 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order on Remand – Award of Survivor's Benefits is affirmed, and claimant's counsel is awarded a fee of $4,668.00 for services performed before the Board in the prior appeal, BRB No. 10-0533 BLA, to be paid directly to claimant's counsel by employer. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge