BRB No. 13-0239 BLA

PATRICIA F. SHRADER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PINNACLE MINING COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 01/31/2014
	)	
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 on Remand of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Kevin T. Gillen (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (2009-BLA-05708) of Administrative Law Judge Kenneth A. Krantz awarding benefits on a claim filed on February 2, 2005, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012)(the Act.) This case involves a request for modification

and is on appeal to the Board for the second time.[1] When this case was previously before the Board, the Board affirmed the administrative law judge's finding of twenty-six years of underground coal mine employment, but held that the administrative law judge erred in his weighing of the medical opinion evidence and in finding that it established a total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Consequently, the Board held that the administrative law judge erred in finding that claimant was entitled to invocation of the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis, 30 U.S.C. §921(c)(4). The Board, therefore, found that the administrative law judge erred in finding that claimant established modification and in awarding benefits. The Board remanded the case for further consideration.[2]

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[1] This claim was initially denied by Administrative Law Judge Jeffrey Tureck on September 25, 2007, because claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Pursuant to claimant's appeal, the Board affirmed Judge Tureck's denial of benefits. *P.S.* [*Shrader*] *v. Pinnacle Mining Co.*, BRB No. 08-0155 BLA (Sept. 22, 2008)(unpub.). Upon claimant's timely request for modification pursuant to 20 C.F.R. §725.310, the case was assigned to Administrative Law Judge Kenneth A. Krantz (the administrative law judge), who credited claimant with twenty-six years of underground coal mine employment. The administrative law judge also noted that while claimant's request for modification was pending, Congress enacted the 2010 amendments to the Black Lung Benefits Act, which were applicable to this claim. Applying amended Section 411(c)(4), the administrative law judge found invocation of the presumption as claimant established over fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment. 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). The administrative law judge also found that the presumption was not rebutted. Consequently, the administrative law judge found that, pursuant to 20 C.F.R. §725.310, claimant established a mistake in the prior determination that claimant was not entitled to benefits. Accordingly, the administrative law judge granted claimant's request for modification, and awarded benefits on the claim.

[2] After determining that total respiratory disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), the administrative law judge found that the opinions of Drs. Rasmussen, Forehand, Castle, and Spagnolo established total *respiratory* disability that would preclude her from performing her usual coal mine employment as a fire boss and general inside laborer, and that these opinions outweighed the contrary opinion of Dr. Hippensteel. However, because Drs. Spagnolo and Castle opined that claimant is capable, from a *respiratory* standpoint, of performing her usual coal mine work as a fire boss and general inside laborer, but likely lacks the cardiac capacity to perform her usual work, the Board held that the administrative law judge erred in finding that their opinions established total *respiratory* disability at 20 C.F.R. §718.204(b)(2)(iv). Thus, the Board held that, as only Drs. Rasmussen and Forehand diagnosed a total *respiratory* disability, the administrative law judge's finding that total *respiratory* disability was established

On remand, the administrative law judge acknowledged that the opinions of Drs. Castle and Spagnolo could not establish a total respiratory disability pursuant to Section 718.204(b)(2)(iv), because they found that claimant was disabled from "a cardiac standpoint," not "a *respiratory* standpoint[.]" Decision and Order on Remand at 2 (emphasis added). The administrative law judge found, however, that the opinions of Drs. Rasmussen and Forehand, who found claimant totally disabled from a *respiratory* standpoint, were sufficient to establish a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(iv). Further, the administrative law judge found that, on weighing all of the evidence relevant to total respiratory disability together, both like and unlike, total respiratory disability was established pursuant to Section 718.204(b) overall. The administrative law judge, therefore, again found that the presumption at amended Section 411(c)(4) was invoked and not rebutted. Accordingly, the administrative law judge granted claimant's request for modification and awarded benefits on the claim.

On appeal, employer challenges the administrative law judge's finding that total respiratory disability was established pursuant to Section 718.204(b)(2), and that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4). Employer asserts that the administrative law judge again mischaracterized the opinions of Drs. Spagnolo and Castle, and that his analysis and weighing of the conflicting medical opinions violate the requirements 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). Employer requests that the award of benefits be vacated, and that the case be remanded for assignment to a different administrative law judge. Claimant has not filed a response to employer's appeal. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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,

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pursuant to 20 C.F.R. §718.204(b)(2)(iv) must be vacated. In addition, the Board held that the administrative law judge's finding that the amended Section 411(c)(4) presumption was invoked must be vacated. The Board, therefore, remanded the case to the administrative law judge, with instructions that he reassess the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), and then determine whether the weight of the evidence, like and unlike, established total *respiratory* disability pursuant to 20 C.F.R. §718.204(b). The Board further directed that, if, on remand, the administrative law judge found invocation of the amended Section 411(c)(4) presumption established, he must determine whether employer rebutted the presumption by disproving the existence of pneumoconiosis, or by establishing that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

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).

Invocation of the Section 411(c)(4) Presumption:
20 C.F.R. §718.204(b) - Total Disability

Employer contends that the administrative law judge again mischaracterized the opinions of Drs. Spagnolo and Castle, and erred in "uncritically accept[ing]" Dr. Rasmussen's opinion, together with the opinion of Dr. Forehand, over the contrary opinions of Drs. Spagnolo, Castle, and Hippensteel.[4] Employer's Brief at 7, 9-10, 13-14. Employer contends that the administrative law judge "wrongly stated there are four physicians' opinions that [claimant] is permanently disabled and erroneously concluded that Dr. Hippensteel's was the single opinion finding [claimant] capable of performing her usual coal mine employment." *Id*. at 12. Employer maintains that, to the contrary, "neither [Dr. Spagnolo's nor Dr. Castle's] assessment can support a finding of total disability from a pulmonary or respiratory standpoint," as only Drs. Rasmussen and Forehand found claimant totally disabled from a respiratory standpoint. *Id*. Thus, employer contends that the administrative law judge "conflated the disability inquiry and mischaracterized the medical assessments of Drs. Spagnolo and Castle as to the etiology of disability." *Id*. Employer also assigns error to the administrative law judge's weighing of the medical opinions, arguing that Dr. Rasmussen is less qualified than Drs. Spagnolo and Castle, and that Drs. Rasmussen and Forehand "lacked access to all available and relevant medical data," unlike Drs. Hippensteel, Castle and Spagnolo. *Id*. at 12 n.3. Additionally, employer argues that the administrative law judge failed to

[3] The record indicates that claimant's last coal mine employment was in West Virginia. Director's Exhibits 4, 5. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

[4] Drs. Rasmussen and Forehand opined that claimant is totally and permanently disabled from a respiratory standpoint from performing her usual coal mine work, with its attendant requirement for heavy manual labor. Director's Exhibits 9, 33, 41. In contrast, Drs. Spagnolo and Castle opined that claimant is capable of performing her usual coal mine work from a respiratory standpoint, but indicated that she likely does not have the cardiac capacity to perform her usual work. Director's Exhibits 27, 43, 44; Employer's Exhibit 3. Dr. Hippensteel initially opined that claimant has a totally disabling respiratory impairment; but after reviewing additional evidence, he concluded that claimant retains the respiratory capacity for hard manual labor, and is not totally disabled from a respiratory standpoint. Director's Exhibits 10, 39.

render findings regarding the "rigors and duties of [claimant's] last coal mine job" and to compare them to the physicians' disability assessments. *Id*. at 10. We disagree.

In considering the medical opinion evidence, contrary to employer's contention, the administrative law judge accurately stated that Drs. Rasmussen, Forehand, Spagnolo, and Castle found claimant totally disabled, while only Dr. Hippensteel found that she was not totally disabled. Employer contends that the administrative law judge "mischaracterized" the opinions of Drs. Spagnolo and Castle as supportive of a finding of total disability since they did not diagnose a total *respiratory* disability. However, because Drs. Spagnolo and Castle found that claimant was totally disabled from performing his usual coal mine employment, like Drs. Rasmussen and Forehand, we reject employer's contention that the administrative law judge "mischaracterized" the findings of Drs. Spagnolo and Castle. Consequently, we affirm the administrative law judge's finding rejecting Dr. Hippensteel's opinion because he was the only doctor who found that claimant was not totally disabled. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

The administrative law judge then considered whether claimant established that she had a total *respiratory* disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). In doing so, the administrative law judge considered whether the medical opinion evidence established that claimant's total disability was due to a *respiratory* or to a cardiac condition. The administrative law judge permissibly discounted the views of Drs. Spagnolo and Castle that claimant's disability is cardiac in nature, and concluded that claimant's "disability is respiratory in nature," on the basis of Dr. Rasmussen's "more clearly explained" opinion.[5] Decision and Order on Remand at 12, 14. *See 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).

As the trier-of-fact, the administrative law judge has the discretion to draw reasonable inferences and make credibility determinations, and the Board is not empowered to reweigh the evidence or to substitute its inferences for those of the administrative law judge, but must defer to his assessment of the physicians' credibility.

[5] Specifically, the administrative law judge noted that Drs. Rasmussen, Spagnolo and Castle all discussed claimant's cardiac condition. The administrative law judge noted, however, that while Drs. Spagnolo and Castle focused on claimant's impaired heart function and previous valve replacement, Dr. Rasmussen explained how claimant's disability was not due to her cardiac condition because claimant did not exceed her anaerobic threshold on exercise, demonstrating that her heart was capable of pumping an adequate amount of blood to her exercising muscles. Decision and Order on Remand at 4, 7-8, 9-10.

Underwood v. Elkay Mining, Inc., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Lane v. Union Carbide Corp*., 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Anderson*, 12 BLR at 1-112. We, therefore, reject employer's argument that the administrative law judge erred in crediting Dr. Rasmussen's opinion over the opinions of Drs. Spagnolo and Castle. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-155 (1989)(en banc).

We also reject employer's argument that the administrative law judge should have assigned greater probative weight to the opinions of Drs. Spagnolo and Castle than to the opinion of Dr. Rasmussen, because, unlike Dr. Rasmussen, they were qualified in pulmonary medicine.[6] Employer's Brief at 9-10, 12. While the administrative law judge may accord greater weight to the opinion of a physician on the basis of his superior qualifications, he is not required to do so. *Clark*, 12 BLR at 1-154. Here, the administrative law judge acknowledged the pulmonary qualifications of Drs. Spagnolo and Castle, but found that Dr. Rasmussen had extensive experience in the treatment of pulmonary diseases.[7] The administrative law judge adequately considered the physicians' qualifications, and the documentation underlying their opinions, in evaluating their overall reliability. We, therefore, reject employer's arguments to the contrary.

Finally, employer's contention that the administrative law judge failed to render findings regarding the exertional requirements of claimant's last coal mine job, and to compare them to the disability assessments of the physicians, is similarly unfounded. Employer did not request reconsideration of the Board's identification of claimant's last

[6] The administrative law judge noted that Drs. Spagnolo and Castle are Board-certified in Internal Medicine with subspecialties in pulmonary disease, while Dr. Rasmussen is Board-certified in Internal Medicine, Forensic Examination and Forensic Medicine. The administrative law judge also noted that Dr. Rasmussen is a Senior Disability Analyst and Diplomate for the American Board of Disability Analysts. Decision and Order on Remand at 4-10.

[7] For instance, the administrative law judge observed that, while Dr. Spagnolo authored a textbook with chapters on pneumoconiosis, Dr. Rasmussen had "special expertise in the field of pneumoconiosis in both smoking and non-smoking miners, having published extensively on this subject." Decision and Order on Remand at 14. The administrative law judge also observed that while Drs. Spagnolo and Castle have long practiced in the field of pulmonary disease and held teaching and consultative positions, Dr. Rasmussen has provided legislative testimony and has had "extensive experience" in the treatment of miners. *Id*. at 3-4, 7, 9-10.

coal mine employment as "general inside laborer and fireboss,"[8] and employer identifies no conflict in the physicians' understanding of the requirements of those positions, or any inaccuracies in the administrative law judge's summaries of the physicians' disability assessments, based on the exertional requirements of those positions.[9] *Shrader v. Pinnacle Mining Co.*, BRB No. 11-0504 BLA (2012), slip op. at 6; *see Hicks*, 138 F.3d at 524, 21 BLR at 2-323; *see Dempsey v. Sewell Coal Corp.*, 23 BLR 1-53 (2004)(en banc); Director's Exhibits 9 at 1-2, 33 at 2, 41 at 11-13, 19-20, 26-28, 43 at 2, 44 at 10, 23, 39; Employer's Exhibits 2 at 1-2, 6-7, 3 at 22, 4 at 9-11, 17, 24 (Director's Exhibit 39).

In sum, employer failed to demonstrate that the administrative law judge improperly weighed the medical evidence regarding total respiratory disability. Thus, in light of the discretion ascribed to the administrative law judge, as trier-of-fact, to weigh the credibility of the medical experts, *see Hicks*, 138 F.3d at 532, 21 BLR at 2-334; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76, and to evaluate the evidentiary record, we affirm the administrative law judge's finding that Dr. Rasmussen's opinion, as supported by the opinion of Dr. Forehand, is more persuasive than the opinions of Drs. Spagnolo, Castle, and Hippensteel. *Anderson*, 12 BLR at 1-112. We, therefore, affirm the administrative law judge's finding that claimant has established total respiratory disability pursuant to Section 718.204(b)(2)(iv) and that total respiratory disability is established pursuant to Section 718.204(b) overall. The administrative law judge, therefore, properly found that claimant is entitled to the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4).

[8] Employer references "[claimant's] last usual job as a fireboss." Employer's Brief at 9.

[9] Dr. Rasmussen recorded that claimant's last coal mine job as a general inside laborer and fireboss required much walking and crawling, unloading supplies, occasional operation of equipment, and cleanup. He concluded that claimant was unable to perform the type of heavy or very heavy manual labor required by her last job, and is thus "totally disabled for both her last coal mining job and her previous usual coal mine employment." He also opined that claimant's March 9, 2005 and April 20, 2005 pulmonary function studies demonstrated a "significant respiratory impairment which would prevent her from performing the physically demanding duties of her last coal mining job such as setting timbers, shoveling the belt line and pulling, dragging, carrying and hanging cables," and that claimant is, thus, totally disabled, even though her values were "slightly above" the regulatory disability standard. Dr. Forehand found that claimant's significant respiratory impairment would prevent her from performing the physically demanding duties of her last coal mining job. *See* Director's Exhibit 9 at 1-2, 33, 41; Decision and Order on Remand at 4, 6-7.

Rebuttal of the Section 411(c)(4) Presumption

Employer contends that the administrative law judge erred in finding that it failed to establish rebuttal of the amended Section 411(c)(4) presumption. Specifically, employer contends that the administrative law judge failed to "adequately explain" his conclusion that "the totality of the medical evidence supports a finding of legal pneumoconiosis,"[10] and failed "to engage in a full analysis of the second method of rebutting the presumption[,]" namely that claimant's disabling respiratory impairment was not due to coal mine employment. Employer's Brief at 15. We disagree.

On remand, the administrative law judge considered the opinions of Drs. Hippensteel and Spagnolo "rejecting legal pneumoconiosis," as well as the opinions of Drs. Rasmussen and Forehand diagnosing legal pneumoconiosis. Decision and Order on Remand at 14. As discussed, *supra*, the administrative law judge permissibly credited Dr. Rasmussen's opinion over the opinion of Dr. Castle, as it was better reasoned. *Id*. at 9, 11-12, 14. Regarding Dr. Hippensteel's opinion, finding that claimant did not have legal pneumoconiosis, but had bronchitis due to smoking, the administrative law judge found that it was outweighed by the contrary opinions of Drs. Rasmussen and Forehand, who discussed the additive nature of both cigarette smoking and coal mine dust exposure. *See* Director's Exhibits 9 at 6, 41 at 8-12, 15-19, 22-25, 39; Employer's Exhibit 4 at 12, 16-17, 27. Further, the administrative law judge rejected Dr. Hippensteel's opinion that claimant had smoking-induced bronchitis, rather than legal pneumoconiosis, because he "noted that [claimant's] condition appeared to be improving over time, contrary to the progressive nature of pneumoconiosis." Decision and Order on Remand at 14. As these credibility determinations are rational and consistent with the definition of legal pneumoconiosis, they are affirmed. *See* 20 C.F.R. §718.201(c); 65 Fed. Reg. at 79,937-79,945, 79,968-79,977 (Dec. 20, 2000); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); *Gunderson v. U.S. Dept. of Labor*, 601 F.3d 1013, 24 BLR 2-297 (10th Cir. 2010); *National Mining Ass'n v. Dept. of Labor*, 292 F.3d 849 (D.C. Cir. 2002). Consequently, we hold that the administrative law judge properly rejected Dr. Hippensteel's opinion on the existence of legal pneumoconiosis as it was less well-reasoned than those of Drs. Rasmussen and Forehand. *Clark*, 12 BLR at 1-155.

As the opinions of Drs. Castle, Spagnolo and Hippensteel are the only opinions arguably supportive of a finding that claimant does not suffer from legal pneumoconiosis, and the administrative law judge properly discounted them, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal

[10] The administrative law judge found that "the evidence does not establish clinical pneumoconiosis." Decision and Order on Remand at 13.

pneumoconiosis. *See* 30 U.S.C. §921(c)(4); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43 (4th Cir. 1980); *see also Morrison v. Tennessee Consolidated Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1, 2-8-9 (6th Cir. 2011); *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1320, 19 BLR 2-192, 2-203 (7th Cir. 1995). Therefore, we affirm the administrative law judge's finding that employer failed to establish rebuttal of the presumption by disproving the existence of legal pneumoconiosis. 30 U.S.C. §921(c)(4).

Employer next argues that the administrative law judge erred in finding that it failed to establish rebuttal of the presumption by showing that claimant's disabling pulmonary or respiratory impairment "did not arise out of, or in connection with, employment in a coal mine," pursuant to 30 U.S.C. §921(c)(4). *See* Employer's Brief at 17-18. Employer's argument lacks merit. The administrative law judge permissibly concluded that the reasons for which he discredited the opinions of Drs. Castle, Spagnolo and Hippensteel on the issue of legal pneumoconiosis also undercut their opinions that claimant's disabling respiratory impairment is unrelated to his coal mine employment. *See Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order on Remand at 19. Moreover, the United States Court of Appeals for the Fourth Circuit has held that, to satisfy the latter method of rebuttal, an employer must "effectively . . . rule out" any contribution to a miner's pulmonary impairment by coal mine dust exposure. *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Thus, we reject employer's implication that the administrative law judge misapplied the burden of proof or the rebuttal standard. Decision and Order on Remand at 13-14; *see* Employer's Brief at 18. The administrative law judge's finding that employer failed to meet its burden to establish rebuttal of the presumption by this second method of rebuttal is, therefore, affirmed. *See Blakley*, 54 F.3d at 1320, 19 BLR at 2-203; *Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-47 (1988), *aff'd sub nom., Island Creek Coal Co. v. Alexander*, No. 88-3863 (6th Cir. Aug. 29, 1989)(unpub.); *Defore v. Alabama By-Products Corp.*, 12 BLR 1-27, 1-29 (1988). Consequently, we affirm the administrative law judge's finding that employer failed to establish rebuttal of the presumption by proving that claimant's disability did not arise out of, or in connection with, his coal mine employment. 30 U.S.C. §921(c)(4); Decision and Order on Remand at 14-15; *Rose*, 614 F.2d at 939, 2 BLR at 2-43; *Morrison*, 644 F.3d at 479-80, 25 BLR at 2-8-9.

As administrative law judge's decision is supported by substantial evidence and comports with the requirements of the APA, it is affirmed. 30 U.S.C. §921(c)(4).[11]

[11] Because we affirm the administrative law judge's award of benefits, employer's request for re-assignment to another administrative law judge is moot.

Attorney Fees for Work Performed Before the Board

Finally, we address claimant's counsel's petition for attorney fees for services rendered when this case was previously before the Board. Claimant's counsel requests a fee of $3,100.00 for four hours of attorney services billed at an hourly rate of $300, two hours of attorney services billed at an hourly rate of $225, and fourteen and one-half hours of legal assistant services billed at an hourly rate of $100. Employer has responded to the fee petition, objecting to the two entries dated May 3, 2012,[12] totaling one-half hour, as non-compensable clerical services. Employer, therefore, requests that compensation for these services be disallowed.

Clerical services, whether performed by counsel and/or legal assistants, are considered part of overhead expenses and are figured into the hourly rate. *See Whitaker v. Director, OWCP*, 9 LR 1-216, 1-218 (1986); *McKee v. Director, OWCP*, 6 BLR 1-233 (1983). Here, the contested services consist of the answering and re-routing of a telephone call, the retrieval of a telephone message, and the scheduling of a client office appointment, with no indication that these matters comprised client contact beyond clerical tasks or ministerial and routine scheduling functions. *See Abbot v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989); *Lanning v. Director, OWCP*, 7 BLR 1-314 (1984). Thus, we disallow compensation for the contested services and reduce the total of compensable services by one-half hour.

We, therefore, award fees in the amount of $3,050.00 to be paid directly to claimant's counsel by employer, for four hours of attorney services billed at an hourly rate of $300, two hours of attorney services billed at an hourly rate of $225, and fourteen hours of legal assistant services billed at an hourly rate of $100. This fee is reasonably commensurate with the necessary work performed, the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. 33 U.S.C. §928; 20 C.F.R. §802.203.

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[12] The contested entries on the fee petition for May 3, 2012, are as follows:

> Phone call from client to speak to the attorney or legal assistant about her case; left a message and phone number (BSX) 0.25
>
> Phone call from client to speak to the attorney or legal assistant; transfer call to legal assistant; call from client with questions about the [B]oard's remand issued 4/19/12; transfer call back to reception; schedule an office visit to talk with the attorney about her case. (JEF, VWH, BSX) 0.25

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed and an attorney fee of $3,050.00 is awarded to claimant's counsel.

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