BRB No. 95-1137 BLA

LONNIE MATHIS, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
ISLAND CREEK COAL COMPANY	)	
	)	
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 Supplemental Decision and Order of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Crane), Charleston, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (93-BLA-1326) and Supplemental Decision and Order of Administrative Law Judge Frederick D. Neusner awarding benefits on a claim[1] filed pursuant to the provisions of Title IV of the Federal Coal

[1] Claimant is Lonnie Mathis, Jr., the miner, whose claim for benefits filed on July 17, 1992 was initially denied on December 17, 1992 and, after the consideration of

Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act), and awarding an attorney's fee. The administrative law judge credited claimant with forty-four years of coal mine employment, found that he had one dependent, and concluded that employer was the responsible operator. The administrative law judge found totally disabling pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and 718.204, and, accordingly, awarded benefits as of July 1, 1992. In his Supplemental Decision and Order, the administrative law judge awarded claimant's counsel a fee of $8,775.00 for services performed before the administrative law judge and $797.03 in expenses.

On appeal, employer challenges the administrative law judge's weighing of the evidence pursuant to Sections 718.202(a)(4) and 718.204. Employer also challenges the attorney's fee award. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[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 supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. § 921(b)(3), as incorporated into the Act by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to Section 718.202(a)(4), employer contends that the administrative law judge mischaracterized the medical opinion evidence. Employer's Brief at 11-12. In weighing the medical opinions, the administrative law judge focused primarily on the opinions of Drs. Rasmussen and Zaldivar. Dr. Rasmussen opined that claimant's respiratory impairment was due to both smoking and coal dust exposure. Claimant's Exhibits 1-3. Dr. Zaldivar, on the other hand, concluded that claimant had no pneumoconiosis but did have a mild impairment caused by smoking.[3] Dr.

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additional evidence, was again denied on March 8, 1993. Director's Exhibits 1, 16, 26. Claimant timely requested a hearing. Director's Exhibit 27.

[2] We affirm as unchallenged on appeal the administrative law judge's findings regarding length and nature of coal mine employment, dependency, responsible operator status, and pursuant to 20 C.F.R. §§718.202(a)(1)-(3), 718.203(b), and 718.204(c)(1) and (3). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

[3] Dr. Zaldivar examined claimant, recording a smoking history of one pack of cigarettes a day for thirteen years followed by three cigarillos a day for seventeen years. Employer's Exhibit 2.

Zaldivar also reviewed Dr. Rasmussen's report and disagreed with his conclusions regarding the etiology of claimant's respiratory impairment. Director's Exhibit 12; Employer's Exhibit 5.

The administrative law judge found that because Dr. Zaldivar "accepted without comment" and "agreed with Dr. Rasmussen's conclusion" that both coal dust and cigarette smoke caused claimant's respiratory impairment, Dr. Rasmussen's diagnosis merited greater weight than those of the other physicians of record. Decision and Order at 7-8. In addition, the administrative law judge stated that because Dr. Chillag's diagnosis of no pneumoconiosis was "clearly based on the negative chest x-ray readings . . . and on no other medical data or reasoning," his conclusions were "irrelevant." Decision and Order at 6.

The record indicates that Dr. Chillag based his opinion on his review and interpretation of the medical reports of Drs. Rasmussen, MacCallum, and Zaldivar, the results of several pulmonary function and blood gas studies, chest x-rays, and claimant's coal mine employment and medical histories. Employer's Exhibits 2, 15. Also, Dr. Zaldivar merely noted Dr. Rasmussen's conclusion in his review of the evidence; Dr. Zaldivar did not "agree" but rather attributed claimant's pulmonary impairment solely to smoking and concluded that claimant did not have pneumoconiosis. Employer's Exhibit 2. Inasmuch as the administrative law judge mischaracterized the opinions of Drs. Zaldivar and Chillag, *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985)(*en banc*), we vacate his finding pursuant to Section 718.202(a)(4) and remand the case for him to reweigh the relevant evidence.

Employer further contends that the administrative law judge weighed the medical opinions based on a medical theory not reflected in the record. Employer's Brief at 7-10. The administrative law judge stated that the notation by Drs. MacCallum and Rasmussen of:

> simultaneous and overlapping . . . exposure to coal mine dust and cigarette smoke . . . strongly implied that a cigarette smoke induced reduction in the . . . capacity of [claimant's] body to protect his lungs took place at a time when he was inhaling a substantial volume of coal dust particles on a daily basis.

Decision and Order at 2. Because neither Dr. Zaldivar nor any of the other physicians "address[ed] the effect of smoking on claimant's vulnerability to the effects of coal mine dust exposure," the administrative law judge credited Dr. Rasmussen's diagnosis. Decision and Order at 8.

Review of the record reveals no medical evidence that claimant's smoking made his lungs more vulnerable to coal dust. Dr. MacCallum considered claimant's smoking history and industrial exposure but concluded that there was no evidence of pneumoconiosis. Director's Exhibit 21. Dr. Rasmussen concluded that coal dust exposure was "the most significant contributing factor" to claimant's respiratory impairment and stated that there is no way to distinguish between the effects of smoking and coal dust exposure on ventilatory function. Claimant's Exhibit 1.

Because it is unclear whether the administrative law judge was searching the medical opinions for a persuasive explanation of why forty-four years of coal dust exposure played no role in claimant's respiratory impairment, *see Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), or whether he instead impermissibly relied upon a medical theory not reflected in the record, *see Hall v. Consolidation Coal Co*., 6 BLR 1-1306 (1984), we vacate his findings and instruct him on remand to explain fully his weighing of the medical opinion evidence.

Although we vacate the administrative law judge's findings at Section 718.202(a)(4), we reject employer's contentions that the administrative law judge summarily rejected Dr. Castle's opinion and "insinuated" that Dr. Rasmussen had better coal mine employment and smoking histories than did Dr. Zaldivar. Employer's Brief at 10-12. The administrative law judge considered Dr. Castle's opinion, and merely noted that the work and smoking histories taken by Dr. Rasmussen coincided with claimant's testimony. Decision and Order at 6-7.

Pursuant to Section 718.204(c), employer argues that the administrative law judge failed to consider all contrary probative evidence in finding total respiratory disability established. Employer's Brief at 13-15. The administrative law judge found the pulmonary function and blood gas studies to be non-qualifying[4] and noted that there was no evidence of cor pulmonale with right-sided congestive heart failure pursuant to Section 718.204(c)(1)-(3). Pursuant to Section 718.204(c)(4), the

[4] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

administrative law judge credited Dr. Rasmussen's opinion[5] that claimant was unable to perform his usual coal mine employment and concluded that "claimant has established his total disability . . . pursuant to 20 C.F.R. §718.204(c)(4)." Decision and Order at 12.

[5] Again, the administrative law judge focused primarily on the opinions of Drs. Rasmussen and Zaldivar. Decision and Order at 9-12.

There is conflicting evidence to be weighed. *See Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195 (1986), *aff'd on recon*., 9 BLR 1-236 (1987)(*en banc*). The four pulmonary function studies of record were non-qualifying, Director's Exhibits 7, 21; Employer's Exhibit 2; Claimant's Exhibit 1; three blood gas studies were non-qualifying and two were qualifying,[6] Director's Exhibits 9, 11; Employer's Exhibit 2; Claimant's Exhibits 1, 3 at 20. The administrative law judge failed to weigh the opinions of Drs. Castle, Jarboe, Chillag and Carrillo, who diagnosed no respiratory disability. Director's Exhibit 8; Employer's Exhibits 8, 12, 15-16. Therefore, we vacate the administrative law judge's finding pursuant to Section 718.204(c) and remand the case for him to consider all contrary probative evidence to determine whether total respiratory disability is established. *See Shedlock*, *supra*. Further, inasmuch as the administrative law judge predicated his causation finding at Section 718.204(b) on his analysis at Section 718.204(c), we vacate his Section 718.204(b) finding.

Employer contends that claimant's counsel is not entitled to an enhancement of attorney's fees for contingency.[7] Employer's Brief at 17. Further, employer asserts that the amount of time claimed for the preparation of a closing brief is excessive. Employer's Brief at 18.

In his Supplemental Decision and Order, the administrative law judge found the requested hourly rate of $250.00 excessive and concluded that, based on the attorney's training, expertise, length of time he participated in the case, its complexity, and the result achieved, "$200.00 per hour is a reasonable rate for the specialized services . . . provided . . . under this contingent fee contract." Supplemental Decision and Order at 3. The administrative law judge rejected employer's objection to the six hours claimed for preparation of claimant's closing brief.

The award of attorney's fees pursuant to Section 28 of the Longshore and

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[6] The qualifying blood gas study of July 28, 1992 is accompanied by an invalidation report. Director's Exhibit 9.

[7] Claimant's counsel indicated in his fee application that his "base hourly rate for handling a case of this nature at the ALJ matter [sic] is $125.00 an hour." Memorandum in Support of Motion for Attorney's Fee (Memo) at 1. Since the base rate does not account for the "contingent nature of the fee or the delays inherent," claimant's counsel devised a multiplier (based on Department of Labor statistics regarding how often claimants prevail), which, when applied to the base rate, yielded his requested hourly rate of $250.00. Memo at 4-7.

Harbor Workers' Compensation Act, 33 U.S.C. §928, as incorporated into the Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.367(a), is discretionary and will be sustained on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Goodloe v. Peabody Coal Co*., 19 BLR 1-91 (1995); *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

In *City of Burlington v. Dague*, 112 S.Ct. 2638 (1992), the United States Supreme Court held that enhancement of an award of attorney's fees on the basis of contingency is not permitted under various fee-shifting statutes.[8] In *Missouri v. Jenkins*, 109 S.Ct. 2463 (1989), however, the Court held that an adjustment for delay in payment is an appropriate factor in determining what constitutes a reasonable attorney's fee.

In this case, claimant's counsel expressly stated that he enhanced his customary hourly rate to account for contingency and delay. *See* n.7, *supra*. However, it is unclear how much of a role contingency played in the fee award, because the administrative law judge cited permissible factors in determining a reasonable attorney's fee, Supplemental Decision and Order at 3; *see* 20 C.F.R. §725.366(b), but also noted that "payment . . . was entirely contingent on the successful outcome of this case," and that the services were provided under a "contingent fee contract." Supplemental Decision and Order at 3. Moreover, the administrative law judge did not refer to enhancement for delay as a factor in the fee award. Because the basis of the administrative law judge's finding that $200.00 an hour is a reasonable rate is unclear, we vacate his finding and instruct the administrative law judge on remand to determine whether the requested fee is reasonable in light of *Dague*, *supra*; *Jenkins*, *supra*; and *Goodloe*, *supra*.

Regarding employer's contention that the hours claimed for the closing brief were unreasonable, the administrative law judge noted employer's objection and, within his discretion, permissibly concluded that the "effectiveness of a closing argument is measured by the result achieved and not by the number of citations or exhibits and decided cases." Supplemental Decision and Order at 3; *see Goodloe*, *supra*; *Marcum*, *supra*. Therefore, we reject employer's contention.[9]

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[8] In *Dague*, 112 S.Ct. at 2641, the Supreme Court stated that its case law construing what is a "reasonable fee" applies uniformly to all fee-shifting statutes granting a reasonable fee to a prevailing party. The United States Court of Appeals for the Fourth Circuit has since applied the Supreme Court's holding in *Dague* to the federal black lung attorney's fee provision. *Broyles v. Director, OWCP*, 974 F.2d 508, 17 BLR 2-1 (4th Cir. 1992).

[9] Although we vacate the $8,460.00 attorney fee award, we affirm as

Accordingly, the administrative law judge's Decision and Order awarding benefits and his Supplemental Decision and Order awarding attorney's fees are affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

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unchallenged on appeal the award of $315.00 for the services of a legal assistant and $797.03 in expenses. *See Skrack*, *supra*. No award will be effective, however, until there is a successful prosecution of the claim and all appeals are exhausted. *Goodloe*, 19 BLR at 1-100 n.9.