BRB No. 01-0731 BLA

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| DALE MARTIN | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| PEABODY COAL COMPANY | ) | DATE ISSUED: _____ |
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| Employer-Petitioner | ) | |
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| 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 - Awarding Benefits and Supplemental Decision and Order Granting Attorney Fees of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Paul (Rick) Rauch (McNamara Fearnow & McSharar P.C.), Indianapolis, Indiana, for claimant.

W. William Prochot (Greenburg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits and Supplemental Decision and Order Granting Attorney Fees (98-BLA-0370) of Administrative Law Judge Rudolf L. Jansen with respect to 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.*[1] Employer appeals from an award of benefits with respect to a miner=s claim filed on February 17, 1993. Director=s Exhibit 1. This is the second time that this case has been before the Board. In his initial Decision and Order, the administrative law judge denied benefits based upon his determination that although claimant is totally

[1] Claimant is the miner, Dale Martin, who filed his claim for benefits on February 17, 1993. Director=s Exhibit 1.

disabled, claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. ' 718.202(a) (2000).[2] Upon considering claimant=s appeal, the Board affirmed the administrative law judge=s findings under Section 718.202(a)(1)-(3) (2000), but vacated the administrative law judge=s determination that the medical opinions of record did not support a finding of pneumoconiosis pursuant to Section 718.202(a)(4) (2000). The Board remanded the case to the administrative law judge for reconsideration of the medical opinions of Drs. Combs, Garcia, and Cohen, holding that the administrative law judge did not adequately address their status as examining and/or treating physicians. The Board also indicated that the administrative law judge erred in rejecting the opinions of Drs. Combs and Garcia on the ground that each of these physicians underestimated claimant=s smoking history. *Martin v. Peabody Coal Co.*, BRB No. 99-1141 BLA (Oct. 30, 2000)(unpub.), slip. op. at 3-4.

On remand, the administrative law judge found that the medical opinions of record were sufficient to establish the existence of pneumoconiosis. The administrative law judge further determined that claimant was entitled to the presumption, set forth in 20 C.F.R. ' 718.203(b), that his pneumoconiosis arose out his coal mine employment and that the evidence of record was sufficient to establish that claimant is totally disabled due to pneumoconiosis.[3] Accordingly, benefits were awarded. In a Supplemental Decision and Order, the administrative law judge ordered employer to pay claimant=s counsel $27,578.33 in attorney fees and expenses.

Employer argues on appeal that the administrative law judge did not properly weigh the relevant medical opinions under Sections 718.202(a)(4) and 718.204(b) (2000). Employer also contends that the administrative law judge did not properly consider counsel=s attorney fee petition. Claimant has responded to employer=s arguments concerning the merits of the present case and urges affirmance of the administrative law judge=s Decision and Order. Claimant=s counsel also urges affirmance of the administrative law judge=s Supplemental Decision and Order awarding attorney fees. In addition, counsel has submitted a Supplemental Application for Attorney Fees. The Director, Office of Workers= Compensation Programs (the Director), has not filed a brief in this appeal.

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[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. 80,045-80,107(2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] The regulation concerning proof of the existence of a totally disabling respiratory or pulmonary impairment, previously set forth in 20 C.F.R. ' 718.204(c) (2000), is now set forth in 20 C.F.R. ' 718.204(b). The regulation setting forth the criteria for proving that the miner=s total disability is due to pneumoconiosis, previously appearing in 20 C.F.R. ' 718.204(b) (2000), now appears in 20 C.F.R. ' 718.204(c).

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. '921(b)(3), as incorporated by 30 U.S.C. '932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to both Sections 718.202(a)(4) and 718.204(c), the administrative law judge accorded greater weight to the opinion in which Dr. Combs stated that claimant has pneumoconiosis and is totally disabled by it based upon Dr. Combs=s status as a treating physician. Decision and Order on Remand at 4; Director=s Exhibit 10; Claimant=s Exhibit 1; Employer=s Exhibit 3. The administrative law judge also noted that Dr. Combs=s diagnoses were supported by the opinions of Dr. Garcia, who examined claimant, and Dr. Cohen, who reviewed the medical evidence of record. *Id.*; Director=s Exhibit 39; Claimant=s Exhibits 8, 20, 23. The administrative law judge determined that the opinions in which Drs. Renn, Cook, and Repsher stated that claimant does not have pneumoconiosis were entitled to less weight, as Drs. Renn and Repsher did not examine claimant and Dr. Cook relied upon a smoking history that was Asubstantially shorter@ than that relied upon by the other physicians of record. Decision and Order on Remand at 4; Director=s Exhibit 23; Employer=s Exhibits 3, 6, 33, 38, 41, 49, 50, 51. Pursuant to Section 718.204(c), the administrative law judge discredited the opinions of Drs. Renn, Repsher, and Cook regarding the cause of claimant=s totally disabling impairment on the ground that none of these physicians had diagnosed pneumoconiosis.

Employer asserts that the administrative law judge erred in giving greatest weight to Dr. Combs=s medical opinion, as Dr. Combs did not indicate whether coal dust exposure was a significant or substantial factor contributing to claimant=s obstructive impairment in accordance with the definition of pneumoconiosis set forth in 20 C.F.R. '718.201. Employer=s Brief at 14. Employer raises essentially the same argument with respect to Dr. Garcia=s opinion. Regarding Dr. Cohen=s reports, employer maintains that Dr. Cohen=s findings of pneumoconiosis and total disability due to pneumoconiosis are not supported by adequate reasoning or documentation, as Dr. Cohen did not indicate to what extent coal dust exposure, as opposed to cigarette smoking, was responsible for claimant=s totally disabling obstructive impairment. Employer further alleges that the administrative law judge=s reliance upon treating or examining physician status is inappropriate in light of the holding of the United States Court of Appeals for the Seventh Circuit in *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2- (7th Cir. 2001). Employer also asserts that the administrative law judge erred in neglecting to explicitly address the CT scan evidence and the medical report of Dr. Deppe. Finally, employer argues that the administrative law judge erred in discrediting the opinions of Drs. Cook, Renn, and Repsher. These contentions have merit, in part.

Pursuant to Section 718.201(a)(2), a pulmonary impairment, such as that

diagnosed by Dr. Combs, constitutes Alegal@ pneumoconiosis if that impairment is Asignificantly related to, or substantially aggravated by, dust exposure in coal mine employment.@ 20 C.F.R. '718.201. Dr. Combs stated that claimant had chronic obstructive pulmonary disease (COPD) and restrictive lung disease and identified cigarette smoke, welding fumes, and coal and rock dust as the sources of these conditions with no explicit indication of the extent to which each exposure contributed to claimant=s respiratory and pulmonary diseases. Director=s Exhibit 10; Claimant=s Exhibit 1. Dr. Combs also diagnosed Aclinical@ coal workers= pneumoconiosis, as defined in Section 718.201(a)(1), based upon positive chest x-ray interpretations performed by Drs. Aycoth and Pathak; it is unclear from the administrative law judge=s Decision and Order on Remand whether he credited Dr. Combs=s diagnosis of clinical pneumoconiosis, his diagnosis of legal pneumoconiosis, or both. Absent an explanation in the administrative law judge=s Decision and Order on Remand of which of Dr. Combs=s diagnoses he was relying upon and identification of the underlying support for that diagnosis, the administrative law judge=s crediting of Dr. Combs=s opinion cannot be affirmed. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984).

Similarly, Dr. Garcia concluded in his medical report that claimant has severe emphysema, manifested in a totally disabling pulmonary impairment. Director=s Exhibit 39. Dr. Garcia concluded that 95% of claimant=s impairment was due to his Aextensive cigarette smoking history@ with the remaining 5% caused by coal dust exposure. *Id*. The administrative law judge did not determine whether Dr. Garcia=s finding was sufficient to establish that claimant=s impairment was significantly related to, or substantially aggravated by dust exposure in coal mine employment in accordance with Section 718.201(a)(2). In addition, Dr. Garcia also diagnosed coal workers= pneumoconiosis by chest x-ray and indicated that a CT scan of claimant=s chest was consistent with coal workers= pneumoconiosis. *Id.* The administrative law judge did not identify which of Dr. Garcia=s diagnoses of pneumoconiosis corroborated Dr. Combs=s opinion.

We reject, however, employer=s assertion that the administrative law judge erred in treating Dr. Cohen=s opinion as containing a reasoned and documented diagnosis of pneumoconiosis pursuant to Section 718.202(a)(4). Although Dr. Cohen stated that he could not precisely apportion the respective degrees to which cigarette smoking and coal dust exposure contributed to claimant=s totally disabling pulmonary impairment, he stated unequivocally that claimant=s obstructive impairment was Asubstantially related to@ claimant=s coal mine employment and that the role of coal dust exposure in causing his impairment was Asignificant.@ Claimant=s Exhibits 20, 23 at 44-46, 70. The administrative law judge acted within his discretion, therefore, in treating Dr. Cohen=s

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· The administrative law judge determined in his initial Decision and Order that the x-ray evidence was insufficient to establish the existence of pneumoconiosis.

diagnosis of severe obstructive lung disease, attributable to smoking and coal dust exposure, as a diagnosis of pneumoconiosis under Section 718.202(a)(4). *See* 20 C.F.R. '718.201(a)(2); *Wilburn v. Director, OWCP*, 11 BLR 1-135 (1988); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Employer argues that the administrative law judge=s consideration of the treating/examining status of Drs. Combs and Garcia is inconsistent with the teaching of the United States Court of Appeals for the Seventh Circuit in *McCandless*, which was issued subsequent to the administrative law judge=s Decision and Order on Remand. The court indicated in *McCandless* its continuing disapproval of any mechanical preference for the views of a treating physician or a physician who, in contrast to other physicians of record, examined the miner. The court held that the rationale that a treating physician has greater familiarity with a patient=s medical condition or that an examining physician had the opportunity to actually see the miner is merely a restatement of the preference. The court concluded that a treating/examining physician=s diagnoses must be Asupported by medical reasons if they are to be given legal effect.@ *McCandless*, 255 F.3d at 469. In the present case, the reasons that the administrative law judge provided for according more weight to the opinions of Drs. Combs and Garcia are very similar to those prohibited by the Seventh Circuit.

Accordingly, we must vacate the administrative law judge=s determination that the medical opinions of record were sufficient to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. The administrative law judge must explicitly determine whether Dr. Combs=s and Dr. Garcia=s diagnoses support a finding of clinical and/or legal pneumoconiosis and must set forth the rationale underlying his determination. *See Wojtowicz, supra*; *Fetterman, supra*; *McCune, supra*. In addition, the administrative law judge cannot rely upon a preference for treating and/or examining physicians in weighing the conflicting medical opinion evidence. Finally, the administrative law judge must address the CT scan evidence of record with respect to the issue of the existence of pneumoconiosis and the opinion of Dr. Deppe under Section 718.202(a)(4) and Section 718.204(c), if the issue of total disability causation is reached.

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· This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as claimant worked as a miner in the State of Indiana. Director=s Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

· The administrative law judge identified ADr. Combs=[s] firsthand knowledge and familiarity with claimant=s condition, coupled with the supporting opinion of Dr. Garcia, who also examined claimantY@ as factors supporting his determination that their opinions were entitled to additional weight. Decision and Order on Remand at 4.

· Dr. Deppe treated claimant for Alung disease.@ Employer=s Exhibit 2. He indicated in a letter dated December 20, 1982 that claimant was Afairly severely disabled with his lung disease@ and that claimant had a Asignificant response@ to steroids, but that recent pulmonary function testing showed worsening of claimant=s condition. *Id.*

Because the administrative law judge relied upon his finding of pneumoconiosis to discredit the opinions of Drs. Renn, Repsher, and Cook, we must also vacate the administrative law judge=s findings with respect to these opinions and the administrative law judge must reconsider these opinions on remand in conjunction with the opinions of Drs. Garcia, Combs, Deppe, and Cohen. Moreover, employer=s challenge to the administrative law judge=s decision to accord less weight to Dr. Cook=s opinion on the ground that he relied upon a smoking history that was less extensive than that supported by claimant=s statements to a majority of the physicians of record has merit. The administrative law judge noted on remand that in his initial Decision and Order, he had determined that claimant smoked one to one-and-one-half packs of cigarettes per day for thirty-four years. Decision and Order on Remand at 4. Dr. Cook examined claimant on August 9, 1993 and on July 1, 1997. In 1993, claimant informed Dr. Cook that he smoked one half of a pack of cigarettes per day for thirty-four years. Director=s Exhibit 23. During the 1997 examination, claimant reported to Dr. Cook that he smoked one-half to one-and-one-half packs of cigarettes per day for thirty-four years. Employer=s Exhibit 38. Based upon both examinations and the more extensive smoking history reported in 1997, Dr. Cook diagnosed severe obstructive airways disease and indicated that it was caused solely by cigarette smoking. Employer=s Exhibits 3 at 8-10, 50 at 35-40. Thus, the administrative law judge=s finding that Dr. Cook relied upon a Asubstantially shorter@ history of cigarette use conflicts with the administrative law judge=s previous finding and is not supported by the record. We vacate, therefore, the administrative law judge=s finding with respect to Dr. Cook=s opinion. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). The administrative law judge cannot rely upon the rationale that Dr. Cook referred to an inaccurate smoking history in weighing Dr. Cook=s opinion on remand.

Turning to employer=s arguments concerning the administrative law judge=s Supplemental Decision and Order Granting Attorney Fees, employer asserts initially that the administrative law judge erred in mechanically authorizing the hourly rates requested for the three attorneys who performed services on claimant=s behalf in this case. In reviewing an attorney fee award made by an administrative law judge, the Board will affirm the award in all respects unless it is shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989). With respect to the hourly rates set forth in the fee petition, the administrative law judge stated that:

This record contains no indication that the represented amounts are misstated.

> Therefore, I see no reason to have [counsel] reduce his represented amounts to Affidavit form. [Counsel] also indicates in his responsive statement that the requested hourly rate amounts include no enhancement due to delay of payment. Apparently, the requested amounts represent the actual hourly rates charged by

the individual attorneys at the pertinent times. I accept his representations in that regard as stated in the application materials.

Supplemental Decision and Order at 3. In *McCandless*, the Seventh Circuit stated that the rate chargeable against a mine operator must be market-based and that a determination that the rate requested is Areasonable@ is not a substitute for evidence establishing that the hourly rate is market-based. *McCandless*, 255 F.3d at 470, *citing Gusman v. Unisys Corp.*, 986 F.2d 1146, 1150 (7th Cir. 1993). Inasmuch as the administrative law judge did not perform the requisite inquiry into whether the rates charged by the claimant=s attorneys reflect the amount charged by attorneys with similar expertise in the same geographical area, we vacate the administrative law judge=s approval of the hourly rates requested in the fee petition. *See McCandless*, *supra*.

Employer next challenges the administrative law judge=s finding that counsel is entitled to reimbursement for expenses related to obtaining the expert opinions of Drs. Garcia, Cohen, and Tarver, arguing that such reimbursement is not permissible under the Act and the pertinent regulations. This contention is without merit. The regulation pertaining to recovery of fees for services performed before the district director or the administrative law judge, set forth in 20 C.F.R. ' 725.366(c), specifically requires remitting to counsel the Areasonable and unreimbursed expenses incurred in establishing the claimant=s case.@ 20 C.F.R. ' 725.366(c). In addition, the Board has explicitly held that the Act does not require that a physician testify at the hearing in order for claimant=s counsel to be reimbursed for the costs of obtaining his or her opinion whether in the form of deposition testimony or a report that is admitted into the record. *See Branham v. Eastern Associated Coal Corp.*, 19 BLR 1-1, 1-3-1-4 (1994); *DelVacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190, 195 (1984); *Hardrick v. Campbell Industries, Inc.*, 12 BRBS 265, 270 (1980).

We also affirm the administrative law judge=s determination that the fees charged by Drs. Garcia, Cohen, and Tarver were reasonable, inasmuch as employer does not identify in what manner their fees were exorbitant other than noting that these physicians charged higher rates in this case than in another case to which claimant=s counsel referred in items attached to the fee petition. *See Abbott*, *supra*. With respect to the specific expert witness related items for which counsel sought reimbursement, however, employer asserts correctly that the administrative law judge did not explain the rationale underlying his conclusion that all of these charges were Areasonable.@ Supplemental Decision and Order at 7. Accordingly, we vacate the administrative law judge=s finding in this regard.

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[@] One of the charges which the administrative law judge ordered employer to pay pertained to Dr. Cohen=s preparation of an affidavit that counsel attempted to submit before the Board. Reimbursement for this expense must be sought in a fee petition submitted to the Board. *See* 20 C.F.R. ''725.366, 802.203.

In addition, employer=s contention that the administrative law judge did not render meaningful findings regarding employer=s objection to the amount of time claimed for preparing the post-hearing brief, a brief on remand, and a brief regarding the impact of the amended regulations has merit. Employer asserted that counsel=s request for compensation for over forty hours expended in preparing these pleadings is excessive, as the remand brief was virtually identical to the brief that counsel filed before the Board and the brief concerning the new regulations was essentially copied from briefs submitted by the Director. The administrative law judge found that employer=s challenge was too general to constitute a valid objection. Supplemental Decision and Order at 7. An examination of the documents to which employer referred indicates that employer=s contention arguably has merit. Reaching a final resolution of this issue of fact falls within the sole province of the administrative law judge in his role as fact-finder.

Lastly, employer asserts that the administrative law judge erred in declining to reduce the number of hours counsel claimed with respect to the preparation of a request for a protective order regarding certain portions of Dr. Cohen=s post-hearing deposition. The administrative law judge stated that because employer did not object to specific items or Asuggest to what extent [counsel] should not be compensated for the matter,@ he would not consider employer=s argument. In employer=s Objection to Application for Attorney=s Fees, however, employer stated that the amount of hours claimed should be reduced by 6. Objection to Application for Attorney=s Fees dated July 13, 2001 at 14. In reconsidering the attorney fee petition on remand, therefore, the administrative law judge must render findings with respect to employer=s specific objections to the amount of time claimed by claimant=s expert witnesses and the amount of time spent drafting the relevant pleadings. The administrative law judge must set forth his findings in detail, including the reasoning that underlies his determinations. *See Wojtowicz*, *supra*; *Fetterman*, *supra*; *McCune*, *supra*.

Accordingly, the administrative law judge=s Decision and Order on Remand B Awarding Benefits and Supplemental Decision and Order Granting Attorney Fees are affirmed in part and vacated in part and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

The final matter before the Board in this case involves counsel=s Supplemental Application for Approval of a Representative=s Fee seeking compensation for time spent defending counsel=s prior fee petition regarding services performed before the Board in connection with claimant=s appeal of the administrative law judge=s initial Decision and Order denying benefits. In an Order issued on September 29, 2001, the Board reduced the number of hours claimed in the fee petition from 24.7 to 17.65, but approved the hourly rates of $145.00 and $100.00 and expenses in the amount of $68.39. Accordingly, the Board ordered employer to pay counsel $2,737.64, noting that the award was not enforceable unless and until the award of benefits became final. *Martin v. Peabody Coal*

*Co.*, BRB No. 99-1141 BLA (Sept. 28, 2001)(unpub. Order). Counsel now requests compensation for 7.60 hours billed at an hourly rate of $160.00 and expenses in the amount of $15.23 for a total fee of $1,231.23. Employer opposes the supplemental fee petition and states:

> Pursuant to 20 C.F.R. ' 802.219, [employer] objects to [counsel=s] supplemental requestYfor the same reasons it has stated in its other pleadings. Employer does not detail its objections here for several reasons. First, it does not want to engage in endless litigation over [counsel=s] fee petition. Second, it does not want to subject itself to additional supplemental requests for fees. Third, the Board already issued a decision in this case where it reduced several of [counsel=s] time charges because they were not reasonable. There is no reason to treat this application any differently. Fourth, there is no reason for the Board to award fees when the merits of the case [are] still on appeal before the Board. The Board=s decision could render the fee dispute moot.

Employer=s Opposition to Fees and Request That the Matter Be Held In Abeyance at 1.

As an initial matter, we deny employer=s request that the Supplemental Application be held in abeyance. The order respecting counsel=s current fee petition is not enforceable and the fees are not payable until an award of benefits becomes final, thereby reflecting successful prosecution of the claim. 20 C.F.R. ' 802.203; *Bryant v. Lambert Coal Co.*, 9 BLR 1-166 (1986).

With respect to the particulars of counsel=s Supplemental Application, Section 802.203 provides in relevant part that any fee approved by the Board Ashall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation [and] the complexity of the legal issues involved[.]@ 20 C.F.R. ' 802.203(c). In addition, counsel is entitled to be reimbursed for expenses that are reasonable and necessary to the work performed before the Board. *Picinich v. Lockheed Shipbuilding*, 23 BRBS 128 (1989). After review of counsel=s fee petition and employer=s response, we reduce the number of hours counsel claimed for preparation of the Surreply to Peabody=s Objections to Fee Petition from four to two in light of the brevity of the Surreply and its reiteration of many of the points made in prior pleadings. We also strike the one-tenth of an hour counsel spent on October 5, 2001 reviewing the Board=s Order, as the two-tenths of an hour expended the prior day on this same task was adequate. We approve the rate of $160.00 per hour as it is reasonable based upon the nature of the services performed. We also approve the expenses for which reimbursement is sought in their entirety as they were reasonable and necessary to the work performed in defense of the fee petition. Therefore, we order employer to pay directly to counsel a total of $895.23 representing 5.50 hours of legal services performed at an hourly rate of $160.00 and $15.23 in expenses related to the defense of counsel=s

prior fee petition. As indicated above, this order is not enforceable unless and until there is a final, successful adjudication of the claim. *See Bryant, supra*.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge