BRB No. 01-0874 BLA

VICTOR GLENN HALL Claimant-Respondent v. CATAWBA INDUSTRIES and AMERICAN RESOURCES INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeals of the Decision and Order - Award of Benefits, Supplemental Decision and Order Awarding Attorney's Fees and Order Denying Employer's Motion for Reconsideration of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Stumbo, Moak & Nunnery), Prestonsburg, Kentucky, for claimant.

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Award of Benefits, Supplemental Decision and Order Awarding Attorney's Fees, and Order Denying Employer's Motion for Reconsideration (01-BLA-0026) of Administrative Law Judge Daniel J. Roketenetz rendered

on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] The administrative law judge found at least ten years of coal mine employment established and adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] The administrative law judge found the relevant x-ray, biopsy, CT scan and medical opinion evidence sufficient to establish the existence of complicated pneumoconiosis and, therefore, found claimant entitled to the irrebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. The administrative law judge further found that claimant was entitled to the rebuttable presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) and that the presumption was not rebutted by the relevant evidence of record. Accordingly benefits were awarded.

On appeal, employer contends that the administrative law judge erred in determining the length of claimant's coal mine employment and, therefore, erred in finding claimant entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b). Claimant responds, urging that the administrative law judge's Decision and Order awarding benefits be affirmed. The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, has filed a letter stating his intent not to participate in the appeal.

Employer also appeals the Supplemental Decision and Order Awarding Attorney's Fees and subsequent Order Denying Employer's Motion for Reconsideration awarding attorney fees. Neither claimant nor the Director, as a party-in-interest, has responded to employer's appeal of the administrative law judge's award of attorney fees.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational,

[1] 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 20 C.F.R. Parts 718, 722, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant filed a claim on January 28, 2000, Director's Exhibit 1.

and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

In order to establish entitlement to benefits under Part 718 in this living miner's claim, it must be established that claimant suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement, *id*.

Employer first contends that the administrative law judge erred in finding that claimant established over ten years of coal mine employment. Specifically, employer contends that the administrative law judge failed to adequately explain his determination that claimant's Social Security Administration earnings statements and W-2 forms support a finding of at least ten years of coal mine employment and, therefore, erred in finding that claimant was entitled to the rebuttable presumption that his pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(b).[3] Employer's argument has merit. The administrative law judge found at least ten years of coal mine employment established, relying "primarily" on claimant's Social Security Administration earnings statements and W-2 forms, Director's Exhibits 4-5. Decision and Order at 4.[4]

---

[3] Inasmuch as the administrative law judge's finding that the relevant evidence is sufficient to establish the existence of complicated pneumoconiosis and, therefore, claimant's entitlement to the irrebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, is not challenged by employer on appeal, it is affirmed, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The record reflects claimant's Social Security Administration earnings statements and W-2 forms indicating periods of coal mine employment between 1974 and 1986, specifically:

> Earnings in coal mine employment in 1974 totaling $8916.65, with earnings in coal mine employment in all four quarters of at least $252;
>
> Earnings in 1975 totaling $6670.00, with earnings in all four quarters of at least $335.00;
>
> Earnings in 1976 totaling $8210.13, with earnings in all four quarters of at least $225.50;

Earnings in 1977 totaling $11,785.50, with earnings in the last three quarters of at least $2821.50;
Total annual earnings in 1978 of $18,188.21;
Total annual earnings in 1979 of $16,194.13;
Total annual earnings in 1980 of $7926.25;
Total annual earnings in 1981 of $22,554.89;
Total annual earnings in 1982 of $8,837.60;

(Claimant testified that there were periods when he was unemployed between 1980 and 1982, Hearing Transcript at 20);

No earnings in 1983;
Total annual earnings in 1984 of $24,685;
Total annual earnings in 1985 of $26,170;
Total annual earnings in 1986 of $7089.39, which claimant testified was earned between January, 1986, and May, 1986, Hearing Transcript at 12.

The Board will uphold the administrative law judge's determination on length of coal mine employment if it is based on a reasonable method of computation and supported by substantial evidence, *see Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988)(*en banc*). The Board will not interfere with an administrative law judge's credibility determination of the length of claimant's coal mine employment unless it is inherently incredible or patently unreasonable, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

We agree with employer that the administrative law judge's summary finding of ten years of coal mine employment is not affirmable as the administrative law judge erred in failing to identify the specific length of claimant's coal mine employment or provide any explanation or discussion of how claimant's Social Security records and W-2 slips supported his finding. Thus, we agree with employer that the administrative law judge erred in finding claimant entitled to the presumption of causality at Section 718.203(b). Accordingly, the administrative law judge's finding on length of coal mine employment and his finding that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment at Section 718.203(b) are vacated and the case is remanded for reconsideration of these issues. On remand, the administrative law judge must make a determination regarding length of coal mine employment pursuant to the regulations at 20 C.F.R. §§718.301, 725.101(a)(32)(i)-(iii).

Next, employer asserts that inasmuch as the administrative law judge erred in finding claimant entitled to a presumption of causality based on his finding of ten years of coal mine employment, he erred in requiring employer to establish rebuttal of that presumption rather than requiring claimant to prove that his pneumoconiosis arose out of coal mine employment. Employer contends that this constitutes reversible error. Further, regarding this issue, employer contends that the evidence of record fails to establish affirmatively that claimant's pneumoconiosis arose out of coal mine employment, a necessary element of entitlement.

Having found claimant entitled to the presumption that his pneumoconiosis arose out of coal mine employment, the administrative law judge noted that it could be rebutted by evidence showing another cause of claimant's pneumoconiosis. *See* 20 C.F.R. §718.203(b). The administrative law judge found, however, that because the only evidence supporting alternative causes was equivocal inasmuch as Drs. Sargent, West and Ellis diagnosed only "possible" granulomatous disease, the laboratory culture from May 11, 1997 biopsy was negative for both bacteria and fungi mitigating against a finding of granulomatous disease or granulomatous inflamation, and Dr. McManis specifically noted in his pathology report that no associated granulomatous inflamation was found in the microscopic biopsy slides he examined, it was insufficient to outweigh the contrary evidence of record, *i.e.*, the biopsy reports of Drs. Rogers and McManis and the medical reports of Drs. Rogers, Mettu and Westerfield, noting claimant's non-smoking history and attributing claimant's condition to his coal dust exposure, which the administrative law judge found to be well-reasoned and

well-documented. Director's Exhibits 8, 9, 13, 14.

A review of the record, however, reveals that while Dr. Westerfield attributed claimant's complicated pneumoconiosis to the inhalation of coal and rock dust, Director's Exhibit 14, the other evidence of record did not. While Dr. Mettu diagnosed acute bronchitis, chronic obstructive pulmonary disease, and black lung, and referred to the fact that claimant worked with rock dust, he stated that he was not sure "if this could be occupational lung disease," and he made no specific statement regarding the cause of the diagnosed diseases. Director's Exhibit 9. Additionally, while Dr. Rogers diagnosed coal workers' pneumoconiosis, he did not discuss the cause of claimant's coal workers' pneumoconiosis. Director's Exhibit 8. In addition, while Dr. Dineen diagnosed chronic obstructive pulmonary disease and complicated silicosis, he made no specific statement as to the cause of these diseases. Claimant's Exhibit 2. Further, neither Drs. Mettu nor Rogers discussed the length of claimant's coal mine employment. Director's Exhibits 9, 8. While Dr. Westerfield described coal mine employment from 1985 to 1986 and 1984 to 1985, he did not further address the length of claimant's coal mine employment. Director's Exhibit 14. Dr. Dineen stated that claimant was a coal miner for fourteen to fifteen years. Claimant's Exhibit 2. Thus, inasmuch as the administrative law judge did not make a specific length of coal mine employment finding, providing explanation and discussion as to how he arrived at that finding, and such a finding may affect his determination regarding the credibility of evidence necessary to establish that pneumoconiosis arose out of coal mine employment, this case must also be remanded for the administrative law judge to consider whether the evidence establishes that claimant's pneumoconiosis arose out of coal mine employment, if reached. *See* 718.203(c). Accordingly, this case is remanded for the administrative law judge to determine, if reached, whether claimant has met his burden of establishing that his pneumoconiosis arose out of coal mine employment. 20 C.F.R. §718.203(c); *see Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1981); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Long v. Director, OWCP*, 7 BLR 1-254 (1984).

Finally, employer also appeals the Supplemental Decision and Order Awarding Attorney's Fees and subsequent Order Denying Employer's Motion for Reconsideration of the award of attorney's fees. The award of an attorney's fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law, *see Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980). Employer contends that because employer had appealed the administrative law judge's award of benefits, the administrative law judge's Decision and Order awarding benefits was not yet final and, therefore, the administrative law judge erred in awarding attorney fees to claimant's counsel for services performed before the administrative law judge, prior to the issuance of the

Board's decision on appeal. Thus, employer contends that the administrative law judge's award of attorney fees should be overruled and that a new attorney fee order be issued once the Board's decision on appeal affirming an award of benefits is final.

Contrary to employer's contention, the administrative law judge did not err in determining the amount of fees due claimant's counsel for services performed before the administrative law judge, but the administrative law judge's award of attorney fees does not become effective, and is thus not enforceable and payable, until there is a successful prosecution of the claim by claimant's counsel, all appeals are exhausted, and an award of benefits becomes final, *see* 33 U.S.C. §928(a), (c), as incorporated by 30 U.S.C. §932(a); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-17 (1993); *Temple v. Big Horn Coal Co.*, 7 BLR 1-573, 1-576 (1984). *See also* 20 C.F.R. §§725.479, 725.481. Recognizing this, and inasmuch as employer does not otherwise challenge the administrative law judge's award of attorney fees, the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees and subsequent Order Denying Employer's Motion for Reconsideration of the award of attorney's fees are affirmed, *see Skrack*, *supra*.

Accordingly, the administrative law judge's Decision and Order awarding benefits is vacated and the case is remanded for further proceedings consistent with this opinion, but the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees, and Order Denying Employer's Motion for Reconsideration of the award of attorney's fees are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge