BRB No. 04-0404 BLA

EDWARD GRISKELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ZEIGLER COAL COMPANY	)	DATE ISSUED: 07/11/2005
	)	
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 Fourth Remand – Award of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Brenda N. Broderick and Frank E. Pasquesi (Ungaretti & Harris), Chicago, Illinois, for claimant.

Laura Metcoff Klaus and Mark E. Solomons (Greenberg Traurig, LLP), Washington, D.C., for employer.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 Fourth Remand – Award of Benefits (94-BLA-1326) of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge) 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] This case is before the Board for the fifth time. Most recently, the Board, in *Griskell v. Zeigler Coal Co.,* BRB No. 01-0760 BLA (June 12, 2002)(unpublished), noted that claimant is presumed to be totally disabled due to pneumoconiosis pursuant to a finding of invocation of the interim presumption at 20 C.F.R. §727.203(a)(4) (2000). The Board reversed the administrative law judge's finding that rebuttal of the interim presumption was established at 20 C.F.R. §727.203(b)(2) (2000), and vacated his findings on rebuttal at 20 C.F.R. §727.203(b)(3) and (b)(4) (2000). Accordingly, the Board remanded the case. The Board subsequently denied employer's Motion for Reconsideration. By Decision and Order dated January 29, 2004, the administrative law judge on remand awarded benefits, finding that employer failed to establish rebuttal at 20 C.F.R. §727.203(b)(3) or (b)(4) (2000). Accordingly benefits were awarded, with the administrative law judge determining that benefits properly commence on December 1, 1981.

Employer appeals, urging the Board to reconsider its prior decision to affirm the administrative law judge's finding of invocation at 20 C.F.R. §727.203(a)(4) (2000). Employer also alleges error in the administrative law judge's findings that the evidence was insufficient to establish rebuttal under 20 C.F.R. §727.203(b)(3) or (b)(4) (2000) and that benefits properly commence on December 1, 1981. Claimant responds, and urges affirmance of the decision below as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has not filed a response brief in the appeal.[2]

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[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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] By Order dated February 2, 2005, the Board held this case in abeyance for sixty days, pursuant to the Motion to Hold in Abeyance filed December 28, 2004 by the Director, Office of Workers' Compensation Programs (the Director). *Griskell v. Zeigler Coal Co.,* BRB No. 04-0404 BLA (Feb. 2, 2005)(Order)(unpublished). In his Motion, the Director indicated that employer, Ziegler Coal Company, was dissolved by Bankruptcy Court order on September 30, 2004. On April 7, 2005, the Director filed a Status Report asserting that a surety bond had been issued by Seaboard Surety Company that covers the claim in this appeal. On May 18, 2005, employer filed a Limited [Entry

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, 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Invocation of the Interim Presumption

Employer contends that the Board should revisit its decision to affirm the administrative law judge's finding that claimant established invocation of the interim presumption at 20 C.F.R. §727.203(a)(4) (2000). The administrative law judge indicated:

> Employer asserts that the undersigned must revisit the proof at [20 C.F.R.] §727.203(a)(4) because of the Seventh Circuit's decision in *Peabody Coal Co. v. McCandless*, 255 F.3d 465[, 22 BLR 2-311] (7th Cir. 2001). Specifically, employer argues that there was no medical reason for preferring Dr. Hessl's opinion over Dr. Castle's opinion. The Seventh Circuit's decision in *McCandless* does not signal a change in law. Rather, the Seventh Circuit points out the rather obvious proposition that a medical opinion must be reasoned and documented to be give [*sic*] legal effect. The Board affirmed the undersigned's weighing of the evidence under [20 C.F.R.] §727.203(a)(4) after determining that it was supported by substantial evidence. Therefore, the undersigned will not revisit [20 C.F.R.] §727.203(a)(4).

Decision and Order on Fourth Remand at 5 n.4. The record shows that the Board, in *Griskell v. Zeigler Coal Co.*, BRB No. 99-0897 BLA (Sept. 7, 2000)(unpublished), affirmed the administrative law judge's finding of invocation at 20 C.F.R. §727.203(a)(4) (2000), disagreeing with employer's argument that the administrative law judge gave invalid reasons for crediting the opinions of Drs. Hessl and Barnett over the contrary opinions of Drs. Castle and Cugell. *Griskell v. Zeigler Coal Co.*, BRB No. 99-0897 BLA (Sept. 7, 2000)(unpublished), slip op. at 4, 5. Employer reiterates its argument that, under *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001), the administrative law judge "cannot permissibly credit Dr. Hessl's opinion over Dr. Castle's contrary diagnosis simply because Dr. Hessl examined Griskell four times and thus can be presumed to have been more familiar with Griskell's condition." Employer's Brief at 14. Employer thus asserts that *McCandless* "stands for far more than just the 'rather obvious proposition that a medical opinion must be reasoned and documented'" to

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of] Appearance of Counsel. By Order dated June 15, 2005, the Board lifted its abeyance and informed the parties that the briefing schedule is closed and the Board will proceed with its consideration of the case.

be given legal effect, as the administrative law judge found. *Id.*; *see* Decision and Order on Fourth Remand at 5 n.4. Employer further argues that the administrative law judge's finding of invocation at 20 C.F.R. §727.203(a)(4) (2000) is flawed because he mistakenly mischaracterized Dr. Hessl as a treating physician. Employer asserts, "The only thing Dr. Hessl treating [*sic*] Griskell for was his black lung claim. Dr. Hessl examined claimant mostly, if not solely, for litigation purposes, not medical treatment." Employer's Brief at 15. Employer thus argues that *McCandless* constitutes intervening law and repudiates the administrative law judge's previously affirmed decision to accord greater weight to Dr. Hessl's opinion.

Employer's contentions lack merit. The Board held that the administrative law judge properly weighed the relevant medical evidence, crediting the opinions of Drs. Hessl, Barnett, and Cugell. *Griskell*, Sept. 7, 2000 slip op. at 4-5. With regard to Dr. Hessl's opinion, the Board specifically indicated, "The administrative law judge permissibly assigned great weight to Dr. Hessl's opinion that claimant's obstructive respiratory impairment was totally disabling, as he determined that Dr. Hessl's medical examinations performed over an extended period of time and accompanied by multiple diagnostic tests measuring the nature and severity of impairment, were fundamental in his determination of claimant's respiratory or pulmonary condition, and that Dr. Hessl, being certified in internal medicine and a B-reader, was qualified to medically assess that condition." *Id.* at 4. As the administrative law judge properly determined on remand, *McCandless* does not constitute a change in law affecting the reasons provided by the administrative law judge for crediting Dr. Hessl's opinion at 20 C.F.R. §727.203(a)(4) (2000). We therefore hold that employer presents no reason why the Board should revisit its decision to affirm the administrative law judge's finding of invocation at 20 C.F.R. §727.203(a)(4) (2000). *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993).

Rebuttal of the Interim Presumption

At issue are the administrative law judge's findings that the evidence is insufficient to establish rebuttal under either 20 C.F.R. §727.203(b)(3) or (b)(4) (2000). In order to establish rebuttal at 20 C.F.R. §727.203(b)(4) (2000), employer must establish that claimant does not have pneumoconiosis. 20 C.F.R. §727.203(b)(4) (2000). In order to establish rebuttal at 20 C.F.R. §727.203(b)(3) (2000), employer must demonstrate that claimant's total disability is not wholly or in part caused by exposure to coal dust through a preponderance of evidence that black lung disease is not a contributing cause of claimant's disability. *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994); *Zeigler Coal Co. v. Kelley*, 112 F.3d 839, 21 BLR 2-92 (7th Cir. 1997). Employer contends that the administrative law judge erred by not distinguishing his analysis of the evidence under 20 C.F.R. §727.203(b)(3) (2000) from his analysis under 20 C.F.R. §727.203(b)(4) (2000). Employer's contention has merit. The administrative law judge set forth employer's burden to establish either rebuttal at 20 C.F.R. §727.203(b)(3) (2000) by proving that claimant's total disability does not arise in whole or in part from

coal mine employment, or rebuttal at 20 C.F.R. §727.203(b)(4) (2000) by proving that claimant does not have pneumoconiosis. As employer correctly asserts, the administrative law judge considered the relevant evidence under both subsections together, determining that employer failed to establish both methods of rebuttal. Decision and Order on Remand at 5-10. A review of the record shows, however, that the administrative law judge's analysis of the evidence under both subsections together, regarding rebuttal at 20 C.F.R. §727.203(b)(3) and (b)(4) (2000), is fully discernible and separable, where the administrative law judge accorded determinative weight to Dr. Hessl's opinion, and found it supported by Dr. Barnett's opinion. *See* discussion, *infra*.

Employer relies on the opinions of Drs. Nay, Andracki, and Cugell, that claimant's respiratory problems are due exclusively to cigarette smoking, and asserts that the contrary opinions of Drs. Hessl and Barnett, who attributed claimant's respiratory impairment to coal dust exposure, are not credible. Employer argues that the administrative law judge provided "spurious reasons" for preferring the opinions of Drs. Hessl and Barnett, Employer's Brief at 19, and sets forth several reasons why the administrative law judge should not have relied on them. Employer's contentions lack merit. Contrary to employer's argument, the administrative law judge provided valid reasons for crediting the opinions of Drs. Hessl and Barnett. The administrative law judge, within his discretion, accorded controlling weight to Dr. Hessl's opinion, that claimant has pneumoconiosis and that his totally disabling respiratory impairment is due, at least in part, to pneumoconiosis, and set forth his rationale therefor. Decision and Order on Remand at 9, 10; *Amax Coal Co. v. Franklin*, 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992). Specifically, the administrative law judge noted that Dr. Hessl rendered five opinions over an eight-year period, based on four examinations of claimant over a seven-year period. *Id.* at 9. The administrative law judge properly found that each of Dr. Hessl's opinions was reasoned and documented. Specifically, the administrative law judge stated:

> These [opinions] each included both histories and physical examinations related to those histories, which demonstrated a consistently deteriorating obstructive pulmonary condition. He considered accurate accounts of Claimant's coal mine employment and smoking histories, as well as his subjective complaints. Included was a well verified finding of progressively worsening shortness of breath on exertion, based upon his clinical examinations and clinical observations. He had x-rays, pulmonary function tests and arterial blood gas studies taken; initially recognizing the lack of positive x-ray evidence to support his conclusions, and ultimately amending his reports to encompass those positive findings. His reasoning is based upon adequate data and demonstrates superior reasoning. I give his opinion more weight than that of physicians with equivalent or greater credentials in this case on the strength of his reasoning.

Id. The administrative law judge further rationally found that Dr. Barnett's conclusions, also based on physical examination, (1) that claimant's coal dust exposure is the primary etiology of his chronic bronchitis and coal workers' pneumoconiosis, with cigarette use serving as a secondary etiology, and (2) that claimant's entire impairment is attributable to his chronic bronchitis and coal workers' pneumoconiosis, supported Dr. Hessl's findings. *Id.* The administrative law judge determined that Dr. Barnett "set forth clinical observations and findings, and his reasoning is supported by adequate data. His opinion is reasoned and documented." Decision and Order on Remand at 7; *Migliorini v. Director, OWCP*, 898 F.2d 1292, 13 BLR 2-418 (7th Cir. 1990) *cert. denied*, 498 U.S. 958 (1990). We therefore reject employer's assertion that the administrative law judge provided "spurious reasons" for preferring the opinions of Drs. Hessl and Barnett over the contrary opinions of record, as it is refuted by the record.

Employer contends that the administrative law judge impermissibly discredited Dr. Castle's opinion because he did not examine claimant as often as the other physicians, a finding which, employer asserts, amounts to an impermissible counting of heads under *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). Employer asserts that the administrative law judge impermissibly substituted his opinion for that of the medical experts when he determined that Dr. Castle did not provide adequate reasoning for his finding that claimant's pulmonary impairment, as shown by pulmonary function testing, is due to smoking and not to coal dust exposure. Employer submits that Dr. Castle's opinion, that claimant's impairment is attributable to smoking, is credible. Employer's contentions lack merit. Addressing the evidence contrary to the opinion shared by Drs. Hessl and Barnett, that claimant has pneumoconiosis and the resulting impairment is due, at least in part, to coal dust exposure, the administrative law judge found that despite Dr. Castle's superior credentials as a Board-certified pulmonologist, his opinion was not credible. Specifically, the administrative law judge found that Dr. Castle opined that claimant's medical records, including the reports of Drs. Hessl and Barnett, did not reveal any significant respiratory findings, yet Dr. Castle conceded that claimant's physiologic tests may have shown a mild degree of impairment. Decision and Order on Remand at 9. The administrative law judge found that Dr. Castle "used his own finding that showed a 'slight improvement after bronchodilators' to argue that this slight waxing and waning argued against coal workers' pneumoconiosis." *Id.* The administrative law judge found that Dr. Castle's opinion, regarding the import of the pulmonary function test results, was inadequately reasoned as compared to Dr. Hessl's findings, which were better supported by the objective evidence of record.[3] *Id.* at 10.

[3] Employer argues that the administrative law judge impermissibly made medical determinations in discrediting Dr. Castle's opinion. While employer's argument is not without merit, we hold that any error by the administrative law judge in this regard is harmless as he ultimately permissibly accorded less weight to Dr. Castle's opinion

The administrative law judge thus properly determined that employer had not established rebuttal of the presumptions that claimant has pneumoconiosis and is totally disabled, at least in part, due to coal dust exposure, based on the opinion of Dr. Castle. We thus reject employer's argument that the administrative law judge's discrediting of Dr. Castle's opinion is inconsistent with *Fitts*.

Employer argues that the administrative law judge acknowledged that Dr. Nay was well qualified and submitted a reasoned and documented opinion, but ignored the physician's opinion on the basis that other opinions of record were more recent, without explaining why their recency made them more reliable. Employer's Brief at 20. Employer's contention lacks merit. The administrative law judge found that Dr. Nay's opinion was reasoned and documented and entitled to probative weight "enhanced by his board-certification in internal medicine." Decision and Order on Remand at 6. Nonetheless, in weighing Dr. Nay's opinion with the other relevant evidence of record on rebuttal, the administrative law judge found, within his discretion, that Dr. Nay's opinion, based on a 1980 examination of claimant, Dr. Andracki's opinion, based on 1976 and 1980 examinations of claimant, and Dr. Mushtag's opinion, based on a 1980 exercise stress test, were outweighed by the "more timely" opinions of Dr. Hessl, based on 1989, 1991, 1993 and 1996 examinations of claimant and Dr. Barnett, based on a 1993 examination of claimant. Decision and Order on Remand at 10; *see generally Cosalter v. Mathies Coal Co.*, 6 BLR 1-1182, 1-1183 (1984)(administrative law judge rationally found a physician's opinion entitled to less weight than the other reports of record, mainly because his report was several years older than the other two reports of record). The administrative law judge also permissibly determined that the 1980 opinion of Dr. Andracki, that claimant's mild emphysema is not related to coal dust exposure, was entitled to a lesser degree of probative weight because Dr. Andracki failed to "set forth any observations or findings" to support his conclusion. Decision and Order on Remand at 6.

Employer contends that the administrative law judge selectively analyzed the evidence by not relying on Dr. Cugell's opinion, that claimant does not have pneumoconiosis and has an airflow limitation consistent with chronic obstructive pulmonary disease, on the basis that Dr. Cugell was the physician to most recently examine claimant. Employer also asserts that the administrative law judge, relevant to rebuttal at 20 C.F.R. §727.203(b) (2000), ignored the fact that Dr. Cugell explicitly opined that claimant does not have either clinical or legal pneumoconiosis. Employer's Brief at 23-24. Employer further submits that the administrative law judge should have found that Dr. Cugell's opinion establishes rebuttal at 20 C.F.R. §727.203(b)(3) (2000) because it shows that pneumoconiosis plays no role in claimant's impairment.

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because he found it to be not as well reasoned as Dr. Hessl's opinion. *Zeigler Coal Co. v. Kelley*, 112 F.3d 839, 21 BLR 2-92 (7th Cir. 1997).

Employer's contentions lack merit. Dr. Cugell opined that claimant does not have coalworkers' pneumoconiosis, diagnosed chronic obstructive pulmonary disease for which he did not identify an etiology, and determined that claimant's airflow limitation is "not of sufficient severity to render him eligible for social security benefits." Employer's Exhibit 3. The administrative law judge found that Dr. Cugell's opinion did not support a finding of rebuttal under either 20 C.F.R. §727.203(b)(3) or (b)(4) (2000). Decision and Order on Remand at 9, 10. Because the administrative law judge could rationally determine that Dr. Cugell's opinion does not rule out coal dust exposure as a cause of claimant's condition or impairment, we affirm his conclusion that Dr. Cugell's opinion does not support employer's burden on rebuttal at either 20 C.F.R. §727.203(b)(3) or (b)(4) (2000). *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), *cert. denied*, 514 U.S. 1035 (1995); *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994); *Patrich v. Old Ben Coal Co.*, 926 F.2d 1482, 15 BLR 2-26 (7th Cir. 1991).

Employer contends that the administrative law judge failed to consider the x-ray and CT scan evidence, the weight of which, employer asserts, shows that claimant does not have pneumoconiosis. Employer's contention lacks merit. The administrative law judge properly considered the x-ray and CT scan evidence on rebuttal when he determined the weight and credibility of the medical opinion evidence. Decision and Order on Remand at 3-10; *Peabody Coal Co. v. Lowis*, 708 F.2d 266, 5 BLR 2-84 (7th Cir. 1983). Further, we reject employer's suggestion that the administrative law judge must make a separate determination regarding the weight of the x-ray and CT scan evidence, where the applicable regulatory scheme has no such requirement. *See* 20 C.F.R. §727.203(b)(3), (b)(4) (2000).

Commencement of Benefits

Employer argues that the administrative law judge's finding, that benefits properly commence on December 1, 1981, is erroneous and violates the "law of the case" doctrine. The administrative law judge on remand indicated that under 20 C.F.R. §725.503, benefits properly commence as of the time claimant became totally disabled due to pneumoconiosis. The administrative law judge stated, however, that "[t]he record does not establish the date of onset of [claimant's] total disability due to pneumoconiosis." Decision and Order on Remand at 10. The administrative law judge noted that claimant filed for benefits in 1976 and requested review of his claim in December of 1981, a request that was construed as a request for modification. *Id.* The administrative law judge found that the date of the request for modification "is the appropriate date to establish as the date of onset," and ordered benefits to commence December 1, 1981. *Id.* Employer argues that the administrative law judge's earlier finding, left undisturbed by the Board in its September 7, 2000 Decision and Order, was that benefits should commence as of September 1, 1993, "the time the change in [claimant's] condition became evident." Employer's Brief at 27, 28. Employer argues that this earlier finding

by the administrative law judge constitutes the law of the case and is determinative of the issue of when benefits commence. Employer's contentions lack merit. When the Board remanded this case by Decision and Order in 2000 for further consideration of the rebuttal issue at 20 C.F.R. §727.203(b) (2000), the issue of entitlement to benefits was, necessarily, not yet settled. The administrative law judge's finding on remand regarding the commencement of benefits is determinative of the issue, and, moreover, is consistent with the regulation at 20 C.F.R. §725.503(d)(2). Section 725.503(d)(2) applies when a claimant establishes a change in conditions but the record does not establish the onset of total disability due to pneumoconiosis. In such cases, the date of the request for modification controls as the date upon which benefits commence. *See* 20 C.F.R. §725.503(d)(2). We therefore reject employer's arguments, and affirm the administrative law judge's finding that benefits properly commence on December 1, 1981.

Based on the foregoing, we affirm the administrative law judge's findings that claimant established entitlement to benefits under 20 C.F.R. Part 727 (2000), with benefits commencing on December 1, 1981.

Attorney's Fees and Costs for Work Performed Before the Board

Claimant's counsel has filed, pursuant to 20 C.F.R. §802.203, an application for attorney's fees and costs. Counsel requests fees in the amount of $23,111.25 for one hundred twenty-nine and one-half hours of legal services performed before the Board and the United States Court of Appeals for the Seventh Circuit,[4] by four attorneys at various hourly rates. Claimant's counsel also requests reimbursement for costs in the amount of $350.28, for a total of $23,461.53. Employer has filed an Opposition to Application for Attorneys' Fees. Employer argues that claimant's counsel's fee petition is premature,

[4] On April 27, 1999, the administrative law judge issued his Decision and Order awarding benefits. On May 25, 1999, claimant's counsel filed his Application for Award of Attorney's Fees and Costs, for the periods from January 5, 1990 to April 17, 1990 and from April 23, 1993 to May 25, 1999. Employer objected to the amount requested by counsel. On September 30, 1999, the Board awarded claimant's counsel attorney's fees and costs, granting some, but not all, of the requested fees. On January 24, 2000, employer filed a Protective Petition for Review of the Board's September 30, 1999 Order with the United States Court of Appeals for the Seventh Circuit. On February 11, 2000, claimant's counsel filed a protective cross-petition for review of the Board's September 30, 1999 Order. On October 30, 2000, the Seventh Circuit dismissed both petitions for review because they were premature. *Zeigler Coal Co. v. Kerr* [*Griskell*], 240 F.3d 572, 22 BLR 2-247 (7th Cir. 2001). The Seventh Circuit originally issued its October 30, 2000 decision in *Zeigler* as an unpublished order, and subsequently published it on February 14, 2001. *Id.*

fails to establish claimant's attorneys' market rates, asks for payment for work performed before another tribunal, and contains duplicative, unnecessary, and excessive charges and expenses.

Employer contends that claimant's counsel's fee petition is premature as there is no successful prosecution of the claim pursuant to 20 C.F.R. §725.367(a) where, as in the instant case, there has been no final decision in the appeal *sub judice*, namely employer's appeal from the administrative law judge's January 29, 2004 Decision and Order awarding benefits. Alternatively, employer, citing *Wells v. Int'l Great Lakes Shipping Co.*, 693 F.2d 663, 665 (7th Cir. 1982), acknowledges that any fee awarded herein is not payable until there is a final award of benefits. We reject employer's argument that the instant fee petition is premature; any fee awarded herein is not payable unless and until claimant is ultimately successful in prosecuting the claim. 20 C.F.R. §802.203; *Wells*, 693 F.2d at 665; *see also Clark v. Chugach Alaska Corp.*, 38 BRBS 67 (2004); *Murphy v. Director, OWCP*, 21 BLR 1-116 (1999).

Employer contends that the Board does not have jurisdiction to consider the following charges and expenses incurred in connection with the litigation before the Seventh Circuit: (1) the $4,646.25 in charges between January 26, 2000 and March 13, 2000, and between September 28, 2000 and February 16, 2001; (2) the $54.20 in expenses incurred between February 15, 2000 and March 15, 2000; (3) the $9.40 in expenses incurred on January 26, 2001; and (4) the $100 circuit court filing fee. Employer's contention has merit. Counsel's fee petition includes charges and expenses related to litigation before the Seventh Circuit. Approval of those fees and costs is not properly before the Board.[5] 33 U.S.C. §928(c) (If any proceedings are had before the Board or any court for review of any action, award, order, or decision, the Board or court may approve an attorney's fee for the work done before it by the attorney for the claimant); 20 C.F.R. §§725.366(a), 802.203(d). Because the Board may not award a fee for services performed before other tribunals, *see Abbott v. Director, OWCP*, 13 BLR 1-15 (1989); *Matthews v. Director, OWCP*, 9 BLR 1-184, 1-186 (1986), we disallow the following charges:

[5] We also disallow claimant's counsel's October 31, 2001 teleconference with the Social Security Administration regarding benefits, which employer correctly challenges as unrelated to this case. *See Abbott v. Director, OWCP*, 13 BLR 1-15 (1989); *Matthews v. Director, OWCP*, 9 BLR 1-184 (1986). We note, however, that the time spent by Brenda N. Broderick in this regard is not separate from, but included within, the two and one-half hours total charge for which counsel requests $387.50 in fees. Because counsel did not separate the items within this charge, we disallow the entire $387.50 in requested fees.

Date	Amount	Hours
1/26/00	137.50	.50
1/26/00	70.00	.50
1/28/00	140.00	1.00
1/31/00	35.00	.25
2/9/00	315.00	2.25
2/10/00	525.00	3.75
2/11/00	175.00	1.25
2/14/00	105.00	.75
3/6/00	105.00	.75
3/8/00	175.00	1.25
3/9/00	420.00	3.00
3/10/00	280.00	2.00
3/11/00	70.00	.50
3/13/00	105.00	.75
9/28/00	481.25	1.75
1/12/01	157.50	.50
1/15/01	36.25	.25
1/16/01	72.50	.50
1/22/01	157.50	.50
1/22/01	290.00	2.00
1/23/01	236.25	.75

Date	Amount	Hours
1/23/01	108.75	.75
2/16/01	36.25	.25
TOTAL:	$4233.75	25.75 hours

Based on the foregoing, we disallow a total of $4,233.75 in requested fees.

Employer next contends that claimant's counsel fails to provide any evidence establishing his attorneys' customary rates. Employer argues, in the alternative that, even assuming the rates requested are customary, they are neither reasonable, as required under 33 U.S.C. §928(a), nor in line with what other claimant's attorneys are awarded in cases filed under the Act, nor justified by any increase in efficiency on the part of counsel. We reject employer's argument that claimant's counsel fails to establish that the hourly rates requested are customary. The fee petition identifies the individual attorneys who performed the work and details their hourly rates, including any changes in rates over time, depending on the status of the attorney within the law firm. Fee Petition at 4. Thus, we hold that the fee petition effectively conveys the customary rates required under 20 C.F.R. §802.203(d)(4). The fee petition also indicates, however, that the "primary attorney responsible for Mr. Griskell's case is Frank E. Pasquesi. In fact, Mr. Pasquesi's work on this file over the last thirteen (13) years has been as a junior associate, senior associate, and partner at Ungaretti and Harris. As Mr. Pasquesi's hourly rate increased with the increase in his seniority, efforts were made to transfer responsibilities to more junior attorneys to assist Mr. Pasquesi in handling this case." Fee Petition at 3. The fee petition documents this increase in Mr. Pasquesi's hourly rate from $275.00 to $350.00. We hold that these hourly rates are excessive based on what other attorneys, of similar status, are awarded for work on claims filed under the Act, and, consequently, we reduce to $225.00 the hourly rate allowable for all work performed by Mr. Pasquesi. Accordingly, we reduce to $225.00 per hour, the charges on the following dates for "FEP," or Frank E. Pasquesi:

Date	Hours	Rate	Amount	Adj. Amt. @ $225/hr	Reduction
9/14/00	1.25	275.00	343.00	281.25	$62.50
9/18/00	.50	275.00	137.50	112.50	$25.00
9/24/00	1.50	275.00	412.50	337.50	$75.00
9/26/00	.50	275.00	137.50	112.50	$25.00
6/22/01	1.00	315.00	315.00	225.00	$90.00
7/24/01	1.00	315.00	315.00	225.00	$90.00
7/26/01	.75	315.00	236.25	168.75	$67.75
7/27/01	1.50	315.00	472.50	337.50	s$135.00

7/30/01	.75	315.00	236.25	168.75	$67.50
10/31/01	.75	335.00	251.25	168.75	$82.50
11/01/01	1.00	335.00	335.00	225.00	$110.00
11/02/01	.50	335.00	167.50	112.50	$55.00
11/3/01	.75	335.00	251.25	168.75	$82.50
11/19/01	1.00	335.00	335.00	225.00	$110.00
1/02/02	.50	335.00	167.50	112.50	$55.00
6/20/02	.75	335.00	251.25	168.75	$82.50
6/27/02	.50	335.00	167.50	112.50	$55.00
9/25/02	.50	335.00	167.50	112.50	$55.00
12/23/02	.75	350.00	262.50	168.75	$93.75
12/30/02	1.00	350.00	350.00	225.00	$125.00
1/3/03	.50	350.00	175.00	112.50	$62.50
				TOTAL REDUCTION:	$1,606.50

Based on the foregoing, we further disallow $1,606.50 in requested fees.

Employer also argues that the five and one-quarter hours billed by Attorneys Pasquesi and Fahner, between September 14 and September 26, 2000, to review the Board's September 7, 2000 Decision and Order and formulate an appellate strategy, are excessive and duplicative. Employer asserts that there was no need for the involvement of two attorneys, that the five and one-quarter hours charge is excessive for the work performed, and that these charges duplicate charges that counsel submitted to the administrative law judge in claimant's counsel's March 4, 2000 Fee Application. Employer's Opposition to Application for Attorneys' Fees at 11. Employer also asserts that "to the extent any of the time charged was not related to the remand brief, it was not reasonable. Mr. Fahner's narrative for September 26, 2000 states that he contacted the Board to determine whether Griskell could appeal from the Board's [September 7, 2000] decision remanding the case. No lawyer with any expertise in black lung would spend time on this issue." *Id.* Employer properly argues that claimant's counsel did not establish a need for co-counsel for these services, as counsel is required to do. *Simmons v. Director, OWCP*, 7 BLR 1-175 (1984); *Kovaly v. Director, OWCP*, 7 BLR 1-383 (1984). We thus allow only charges for the "lead" attorney, Mr. Pasquesi, for all allowable charges during the aforementioned period. Specifically, we allow, for Mr. Pasquesi, the September 14, 2000 one and one-quarter hours charge, the September 18, 2000 half-hour charge, the September 24, 2000 one and one-half hour charge, and the September 26, 2000 half-hour charge. We disallow, in their entirety, the charges for Mr. Fahner on September 20, 2000 ($65.00 requested), on September 25, 2000 ($97.50 requested), and on September 26, 2000 ($32.50 requested), for a total disallowance of $195.00 in requested fees.

Employer next contends that claimant's attorneys "did not exercise any billing judgment" and billed all their "raw" time to claimant whether or not it was duplicative or excessive. Employer further objects to counsels' firm's use of "block billing." Employer's Opposition to Application for Attorneys' Fees at 9. While we do not disapprove of claimant's counsel's use of the quarter-hour billing method, as it is a reasonable method of billing, the Board will disallow, where appropriate, any charge that includes multiple items. *See* discussion, *infra*.

Employer argues that the charges on June 21-22, 2001 for review of the administrative law judge's Decision and Order, appear to be "duplicative of time spent working on the petition for review. Preparing the notice of appeal should have taken no more than a few minutes for attorneys with the experience that the Ungaretti attorneys allege." Employer's Opposition to Application for Attorneys' Fees at 9 n.4. Employer's contention lacks merit. A review of the fee petition reveals that these charges are not duplicative in nature and are reasonable for the work performed. We thus reject employer's assertion to the contrary.

Employer also challenges the charges on June 21, 2001, October 1, 2001, October 31, 2001, and November 1, 2001, for telephone conferences with the Office of Administrative Law Judges or the Board, and asserts that these telephone calls were not necessary. Similarly, employer urges the Board to disallow as excessive the charges on June 21, 2001 and January 2, 2002 for communicating the status of the case to claimant. We reject employer's arguments as a review of the fee petition reveals that these charges are neither unreasonable nor excessive, and that claimant's counsel may reasonably have deemed the work necessary in furtherance of claimant's case.

Employer further challenges, as excessive, time spent by counsel on various pleadings and briefs. Specifically, employer urges the Board to disallow (1) the approximately thirty-five hours spent by Mr. Fahner in drafting claimant's fifteen-page Petition for Review and supporting brief that he filed with the Board in July of 2001; (2) the approximately twenty-two hours Ms. Broderick spent in drafting the eight-page reply brief and corresponding motion to accept brief out of time filed in the 2001 appeal; and (3) the twenty-two and three-quarters hours spent by Ms. Broderick on claimant's one-page opposition to employer's motion for reconsideration, filed with the Board in 2002. Employer's Opposition to Application for Attorneys' Fees at 9. With regard to Ms. Broderick's work, employer contends that she billed these "excessive amounts because she was new to the case and needed to get up to speed. Time charges for educating Ungaretti lawyers should not be shifted to Zeigler." *Id.* at 9-10.

As an initial matter, we note that the requested hourly rate for Ms. Broderick, whom claimant's counsel characterizes as "an associate" with the firm, *see* Fee Petition at 4, ranges from $155.00 to $185.00. Thus, Ms. Broderick's relative experience is appropriately reflected in the hourly rates requested. With regard to the disputed charges,

we allow, in their entirety, the charges for counsel's drafting of the Petition for Review and supporting brief, and the reply brief and corresponding motion to accept brief out of time, as neither charge is excessive. We, however, reduce to eight hours Ms. Broderick's charges for the opposition to employer's motion for reconsideration filed with the Board in 2002. Specifically, the $3,526.25 in fees requested for twenty-two and three-quarters hours at an hourly rate of $155.00, is reduced to $1,240.00 for eight hours at an hourly rate of $155.00, for a total reduction of $2,286.25.

Employer challenges as unnecessary the one-half hour charge on September 25, 2002 by Mr. Pasquesi to "review status of Zeigler appeal to BRB and response to same." Fee Petition at 6. Employer suggests that, at the time of this September 25, 2002 work, all briefing had been completed in connection with employer's motion for reconsideration and that motion was pending before the Board; thus, no work by claimant's counsel was necessary at that time. Employer's contention lacks merit. Periodic review of the case by claimant's counsel is reasonable and compensable. *McNulty v. Director, OWCP*, 4 BLR 1-128 (1981). We thus reject employer's challenge to the one-half hour charge on September 25, 2002.

Employer next challenges as excessive the charges totaling four and one-quarter hours, from December 23, 2002 through January 7, 2003, for counsel's review of the Board's December 16, 2002 Order denying employer's motion for reconsideration, to call claimant, to formulate claimant's counsel's "next step," and to review correspondence from the Board. Employer also characterizes as excessive the February 11, 12, and 23, 2004 charges, at one-quarter hour each, for counsel's review of two one-page documents and two calls to claimant. Employer's contentions lack merit. A review of the fee petition reveals that these disputed charges are neither excessive nor unreasonable and, thus, we reject employer's arguments to the contrary.

Employer also objects to the one-hour charge on February 12, 2004 by Ms. Broderick to review the file in order to respond to claimant's inquiry about the commencement of benefits. Employer asserts that it should have taken counsel "a few minutes to find the answer" by reading the administrative law judge's January 29, 2004 Decision and Order. Employer's Opposition to Application for Attorneys' Fees at 12. Employer's contention lacks merit. The February 12, 2004 charge is not excessive on its face. Moreover, employer surmises that claimant's request to his counsel was merely a request for the date of the commencement of benefits. The pertinent narrative in the fee petition, however, refers to "Review of file materials at [request] of E. Griskell in order to respond to his inquiry regarding onset of benefits." Fee Petition at 7.

Lastly, with regard to the expenses for which claimant's counsel seeks reimbursement, employer objects to the long distance telephone charges in the amount of $10.70 because the fee petition does not identify the number called or the corresponding date of the call. Employer also summarily objects to the copying expenses as non-

specific and unverifiable. Employer further objects to the facsimile charge since, it asserts, there is no indication that it was necessary. We disallow reimbursement for all expenses for the long distance telephone calls based on claimant's failure to identify them as related to this case and to specify the work performed. *Picinich v. Lockheed Shipbuilding,* 23 BRBS 128 (1989). Further, we disallow, under *Picinich*, reimbursement for the following expenses as they constitute part of ordinary office overhead, the cost of which is borne by counsel:

Description	Amount
Postage	53.23
Copying/Printing	179.60
Fax Transmissions	6.75

Based on the foregoing, we disallow $250.28 in expenses. We also disallow the $100.00 Seventh Circuit filing fee as it is unrelated to this case. *See Abbott,* 13 BLR at 1-15; *Matthews,* 9 BLR at 1-184. Consequently, we ultimately disallow all claimed expenses, which total $350.28.

Based on the disallowances discussed herein ($387.50; $4,233.75; $1606.50; $2,286.25; $195.00; $350.28) totaling $9,059.28, we hold that claimant's counsel is entitled to a fee in the amount of $14,402.25 ($23,461.53 - $9,059.28). Claimant's counsel's fee for legal services is 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; *see Clark v. Director, OWCP*, 9 BLR 1-211 (1986). This fee becomes enforceable upon claimant's ultimate success in the prosecution of the instant claim. *Clark v. Chugach Alaska Corp.,* 38 BRBS 67 (2004).

Accordingly, the administrative law judge's Decision and Order on Fourth Remand – Award of Benefits is affirmed. Moreover claimant's counsel is awarded a fee in the amount of $14,402.25, enforceable only upon claimant's ultimate success in the prosecution of this claim.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge