BRB No. 04-0656 BLA

EDITH K. WILTROUT (Widow of WALTER WILTROUT)	)	
Claimant-Respondent	)	
v.	)	
SHANNOPIN MINING COMPANY	)	DATE ISSUED: 07/29/2005
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier- Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits and the Attorney Fee Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Robert F. Cohen, Jr. (Cohen, Abate & Cohen, L.C.), Morgantown, West Virginia, for claimant.

Laura Metcoff Klaus and Tab R. Turano (Greenberg Traurig, LLP), Washington, D.C., for employer and carrier.

Jeffrey S. Goldberg (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits and the Attorney Fee Order (2003-BLA-47) of Administrative Law Judge Michael P. Lesniak with respect to a survivor's 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). The administrative law judge accepted the stipulation of the parties that the miner had at least 34.4 years of qualifying coal mine employment and suffered from pneumoconiosis arising out of coal mine employment, and adjudicated this survivor's claim, filed on June 30, 1997, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found that new evidence submitted in support of modification of the prior denial of benefits was sufficient to establish a mistake in the ultimate fact of entitlement pursuant to 20 C.F.R. §725.310, as the weight of the evidence now established that pneumoconiosis contributed to the miner's death pursuant to 20 C.F.R. §718.205(c).[1] Accordingly, benefits were awarded.

Subsequent to the issuance of the administrative law judge's Decision and Order awarding benefits, claimant's counsel submitted a fee petition to the administrative law judge, requesting a total of $28,170.81, representing 107.50 hours of services at $225 per hour, plus $3,983.31 in expenses. Thereafter, employer filed objections. In his Attorney Fee Order, the administrative law judge disallowed 11.25 hours as excessive, and disallowed charges of $149 for photocopying and $72.41 for postage, but rejected employer's objections to counsel's hourly rate and approved the remaining number of hours claimed and expenses charged. Accordingly, the administrative law judge awarded claimant's counsel a total fee of $25,418.15, representing 96.25 hours of attorney services at $225 per hour, plus $3,761.90 in expenses.

On appeal, employer challenges both the decisions awarding benefits on the claim and the attorney fee. Specifically, employer challenges the administrative law judge's credibility determinations in finding that the weight of the evidence established that the miner's death was due to pneumoconiosis at Section 718.205(c). Employer also challenges the hourly rate and the expenses approved by the administrative law judge in awarding counsel's attorney fees. Claimant responds, urging affirmance of the award of benefits, attorney fees and expenses. The Director, Office of Workers' Compensation Programs (the Director), has declined to address the merits of this appeal, but urges the

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, as the miner was last employed in the coal mine industry in the Commonwealth of Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

Board to reject employer's arguments regarding the administrative law judge's award of expenses.

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).

Employer contends that the administrative law judge relied on impermissible rationales to find that pneumoconiosis contributed to the miner's death at Section 718.205(c). Specifically, employer asserts that the administrative law judge provided invalid reasons for discrediting employer's experts, Drs. Perper, Oesterling, Kleinerman, Tuteur and Naeye, and mechanically credited the opinion of claimant's expert, Dr. Green, by failing to subject the opinion to the same degree of scrutiny that he applied to the opinions of employer's experts. Employer's arguments are without merit.

The administrative law judge accurately reviewed the conflicting medical opinions of record, and determined that although all of the physicians agreed that the miner's death was caused by an arrhythmia resulting in cardiac arrest, they disagreed as to what caused the arrhythmia, and whether pneumoconiosis played any role, to wit: Drs. Wecht, Abraham, Elnicki and Green opined that the fatal arrhythmia was caused by cor pulmonale which resulted from the miner's pneumoconiosis and centrilobular emphysema, while Drs. Oesterling, Kleinerman, Tuteur, Perper and Naeye either concluded that cor pulmonale did not exist or did not address the condition, and opined that the miner's death was unrelated to any occupational disease. Decision and Order at 5-23. The administrative law judge compared the relative qualifications of the physicians, the documentation underlying their opinions and the rationales for their conclusions, and acted within his discretion in finding that the opinion of Dr. Green was the most persuasive, best reasoned and entitled to determinative weight.[2] Decision and

[2] Dr. Green diagnosed, *inter alia*, severe right ventricular hypertrophy; moderate left ventricular hypertrophy; subendocardial fibrosis; mild simple pneumoconiosis and moderately severe centriacinar emphysema arising out of coal mine employment; severe pulmonary hypertensive changes; and acute and chronic congestion of the liver and spleen. Because the miner exhibited physical findings commonly associated with long-standing and severe lung disease, and as the right ventricular hypertrophy was much more severe than the left ventricular hypertrophy, Dr. Green opined that the miner's emphysema, and to a lesser degree his pneumoconiosis, led to the development of severe pulmonary hypertension and cor pulmonale, which in turn led to sudden cardiac arrhythmia and death. Decision and Order at 6-13; Director's Exhibit 54; Claimant's Exhibits 4, 5; Employer's Exhibit 3.

Order at 26-30; *see Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 22 BLR 2-567 (3d Cir. 2002); *Collins v. J&L Steel*, 21 BLR 1-181 (1999). In so finding, the administrative law judge noted that Dr. Green was an eminent pathologist who researched and published extensively in the area of pulmonary emphysema and coal dust exposure, and determined that Dr. Green's detailed explanation of how the miner's pulmonary disease arising out of coal mine employment was a direct contributing factor to his death was supported by the gross findings on autopsy, the autopsy slides, physical examination findings, social history, status of internal organs such as the liver and spleen, and substantial, current research in the field. Decision and Order at 27, 30. By contrast, the administrative law judge, within a proper exercise of his discretion, found that the opinions of Drs. Kleinerman, Perper, Oesterling, Naeye and Tuteur were less persuasive and that the physicians' rationales were either incomplete or faulty in various regards, as set forth below.[3]

In evaluating the opinion of Dr. Kleinerman, that the miner's minimal pneumoconiosis did not cause, contribute to, or hasten death, the administrative law judge acknowledged that both Dr. Kleinerman and Dr. Green were the best qualified physicians of record with respect to experience and recent published research. Decision and Order at 30. In comparing the quality of the respective reasoning of the physicians, however, the administrative law judge determined that Dr. Kleinerman did not discuss the cause of the miner's fatal cardiac arrhythmia; Dr. Kleinerman opined that the miner did not have centrilobular emphysema, which was inconsistent with the findings of the other pathologists, including the prosector, who noted and measured emphysematous blebs and bullae; and Dr. Kleinerman ruled out cor pulmonale on the ground that it cannot exist when there is biventricular hypertrophy, which also was inconsistent with the opinions of

[3] The administrative law judge also accorded less weight to the opinions of Drs. Wecht, Elnicki and Abraham, which supported the opinion of Dr. Green. The administrative law judge gave less weight to the report of Dr. Elnicki, the miner's treating physician, because the physician's opinion regarding the cause of death was too equivocal. Decision and Order at 27; Claimant's Exhibit 1. While crediting the general findings and observations on autopsy of Dr. Wecht, the autopsy prosector, the administrative law judge gave less weight to Dr. Wecht's opinion regarding the cause of the miner's death because the physician's analysis was simplistic. Decision and Order at 26; Employer's Exhibit 5. Similarly, the administrative law judge found that Dr. Abraham provided a strong explanation for his diagnosis of cor pulmonale, but that Dr. Abraham's report did not discuss the objective data in relation to the miner's physical condition during his lifetime or the gross findings on autopsy, including the factor of left-sided heart failure; the administrative law judge gave less weight to the opinion overall because he found that it was not sufficiently well-reasoned. Decision and Order at 27; Claimant's Exhibit 7; Employer's Exhibit 7.

Drs. Green, Perper and Oesterling. The administrative law judge thus reasonably concluded that the opinion of Dr. Kleinerman was entitled to less weight. Decision and Order at 28; *see Kramer*, 305 F.3d at 211, 22 BLR at 2-481; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

The administrative law judge also acted within his discretion in finding that Dr. Perper's opinion was entitled to less weight because, unlike Dr. Green, Dr. Perper did not integrate the physical findings and gross autopsy findings into his report. Additionally, Dr. Perper noted that the miner's heart was enlarged, but did not discuss either right or left sided hypertrophy, instead identifying hypertrophic cardiomyopathy as the cause of the fatal arrhythmia. Decision and Order at 29-30; Director's Exhibit 54. As Dr. Green stated that this was a rare condition which would cause a specific thickening of the heart muscle near the left ventricle that would be apparent on autopsy, and as the autopsy prosector did not report any such finding, the administrative law judge permissibly found that Dr. Perper's opinion was not as well reasoned as that of Dr. Green. Decision and Order at 30; *see Kramer*, 305 F.3d at 211, 22 BLR at 2-481; *Clark*, 12 BLR 1-149; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Similarly, the administrative law judge rationally accorded less weight to the opinion of Dr. Naeye, that the miner's death was unrelated to his minimal pneumoconiosis and that the focal areas of fibrosis in the left ventricular wall of the heart were a plausible site from which the fatal cardiac arrhythmia could have arisen, as the administrative law judge noted inconsistencies in the physician's deposition testimony;[4] Dr. Naeye reported an inaccurate smoking history,[5] *see generally Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Spradlin v. Island Creek Coal Co.*, 6 BLR 1-716 (1984); and Dr. Naeye failed to integrate into his conclusions the physical findings and gross autopsy findings, such as clubbing of the fingernails, emphysematous blebs and

[4] The administrative law judge noted that in his deposition, Dr. Naeye testified that he disagreed with the diagnosis of cor pulmonale because he believed that Dr Wecht, the autopsy prosector, incorrectly measured the thickness of the ventricles for many years and Dr. Naeye was not aware of Dr. Wecht's current practice. Decision and Order at 28; Employer's Exhibit 4 at 31-33. The administrative law judge determined, however, that Dr. Wecht provided details of his procedures in his report, and Dr. Green confirmed that Dr. Wecht followed the current accepted practice. Decision and Order at 28.

[5] The administrative law judge determined that Dr. Naeye based his opinion in part on a 31-pack-year smoking history, when all the other evidence, including the widow's testimony and the histories reported by the other physicians, only documented a 12 to 15-pack-year history. Decision and Order at 29.

bullae, and increased antero-posterior diameter of the chest, all indications of significant lung disease, and reconcile them with his opinion that the miner had no clinically significant lung disorder. Decision and Order at 28-29; *see Kramer*, 305 F.3d 203, 22 BLR 2-467; *Clark*, 12 BLR 1-149; *Lucostic*, 8 BLR 1-46.

Although employer asserts that Dr. Oesterling did not rest his opinion, that the miner's death from cardiac arrest due to atrial fibrillation and biventricular failure was unrelated to coal dust exposure, on his conclusion that the miner did not have pneumoconiosis, the administrative law judge properly found that Dr. Oesterling's opinion was not as well reasoned as that of the other pathologists of record because Dr. Oesterling was the only pathologist who concluded that the miner had no disease arising out of coal mine exposure, an opinion that also was contrary to employer's stipulation to the presence of pneumoconiosis. Decision and Order at 28; Employer's Exhibits 1, 6; *see Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004)(Roth, J., dissenting). The administrative law judge further determined that, in concluding that cor pulmonale did not exist, Dr. Oesterling did not consider the size of the right ventricle in relation to the left, focused entirely on left ventricular failure, and did not discuss the gross findings on autopsy of significant lung disease, such as clubbing of the fingers, chest diameter, or the enlarged liver and spleen; and Dr. Oesterling ruled out coal dust exposure as a factor in the miner's emphysema, stating that "centrilobular emphysema is no more prevalent in coal miners than in the general population," Employer's Exhibit 6 at 21, a view which the administrative law judge noted has been rejected by the Department of Labor. Decision and Order at 28; 65 Fed. Reg. 79920, 79942 (Dec. 20, 2002). The administrative law judge thus permissibly concluded that Dr. Oesterling's opinion merited little weight. Decision and Order at 28; *see Kramer*, 305 F.3d 203, 22 BLR 467; *Clark*, 12 BLR 1-149; *Lucostic*, 8 BLR 1-46; *see also Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990).

The administrative law judge also properly gave little weight to the opinion of Dr. Tuteur, a pulmonologist, that the miner's death was unrelated to pneumoconiosis, because the physician did not diagnose pneumoconiosis, *see Soubik*, 366 F.3d 226, 23 BLR 2-82, and did not address the issue of whether the miner had cor pulmonale; Dr. Tuteur based his opinion on less evidence than the contrary opinion of the miner's treating physician, Dr. Elnicki; and Dr. Tuteur opined that one would expect resolution of symptoms after the cessation of coal dust exposure, a position which was inconsistent with the testimony of Dr. Wecht, that pneumoconiosis can progress in the absence of further exposure, as well as the regulations and relevant case law. Decision and Order at 29; 20 C.F.R. §718.201(c); *see Kramer*, 305 F.3d 203, 22 BLR 2-467; *Clark*, 12 BLR 1-149; *Lucostic*, 8 BLR 1-46.

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158,

9 BLR 2-1 (3d Cir. 986); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). The administrative law judge's findings pursuant to Sections 718.205(c) and 725.310 are supported by substantial evidence, and thus, are affirmed. Consequently, we affirm the administrative law judge's award of benefits. *See Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-101 (3d Cir. 1989).

Employer next challenges the administrative law judge's award of attorney fees and expenses, arguing that the hourly rate of $225 is excessive, and that there is no statutory authorization for expenses associated with fees for expert witnesses who did not attend or testify at the hearing.

An award of attorney fees 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. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989); *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

Employer maintains that the administrative law judge failed to apply the correct standard for determining an appropriate hourly rate, and improperly approved the requested hourly rate of $225 based on his subjective belief regarding counsel's performance rather than counsel's market rate and appropriate factors grounded in the record. We disagree. The administrative law judge addressed employer's objections to the fee petition, properly considered the factors enumerated at 20 C.F.R. §725.366(b), and acted within his discretion in finding that the approved fee was fair and reasonable under the facts of this case. Attorney Fee Order at 2-4; *see Pritt v. Director, OWCP*, 9 BLR 1-159 (1986). Although employer argues that the hourly rate of $175 which counsel charges fee-paying clients for civil litigation is more appropriate, the administrative law judge permissibly awarded counsel his customary hourly rate of $225 for black lung cases based on counsel's expertise developed in over thirty years of specialized practice in that field and the quality of his representation of claimant herein. Employer's assertion that an hourly rate of $175 would be appropriate and more consistent with the rate obtained by the legal community in Pennsylvania in this area of law is insufficient to meet employer's burden of proving that the rate awarded was excessive or that the administrative law judge abused his discretion in this regard. *See generally Jones v. Badger Coal Co.*, 21 BLR 1-102 (1998)(*en banc*); *Broyles v. Director, OWCP*, 974 F.2d 508, 17 BLR 2-1 (4th Cir. 1992); *Gillman v. Director, OWCP*, 9 BLR 1-7 (1986); *Budinski v. Director, OWCP*, 6 BLR 1-541 (1983).

We also reject employer's contention that the administrative law judge impermissibly awarded expenses associated with the development of medical evidence, including non-testifying expert witnesses, contrary to the plain language of Section 28(d)

of the Longshore and Harbor Workers Compensation Act, which explicitly provides only for the shifting of costs associated with "necessary witnesses attending the hearing at the instance of claimant." 33 U.S.C. §928(d), as incorporated by 30 U.S.C. §932(a); Employer's Brief at 9-11. Claimant and the Director correctly note that the Board previously considered and rejected employer's "plain language" argument in *Branham v. Eastern Associated Coal Corp.*, 19 BLR 1-2 (1994), and we decline to revisit the issue.[6] Moreover, the United States Court of Appeals for the Seventh Circuit also considered the language of Section 28(d), and held that the costs associated with the testimony and reports of expert witnesses that have been presented to the administrative law judge are recoverable. *See Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894, 900 (7th Cir. 2003). Since employer has failed to demonstrate an abuse of discretion, we affirm the administrative law judge's approval of a fee for attorney services in the amount of $21,656.25, plus $3,761.90 in expenses, for a total fee of $25,418.15 assessed against employer.

[6] Employer's reliance on *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 23 BLR 2-124 (D.C. Cir. 2002)(*NMA*), is misplaced. Employer's Brief at 9-11; Employer's Combined Reply Brief at 6-7. In *NMA*, the court held that the "expense rule" of 20 C.F.R. §725.459, which allowed the shifting of costs incurred by claimants' production of witnesses to an employer regardless of which party prevailed, was invalid because no specific statutory authority existed for shifting expenses incurred by unsuccessful claimants to operators; this holding is not dispositive under the facts of the present case. *See NMA*, 292 F.3d at 875.

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits and his Attorney Fee Order are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge