BRB No. 09-0539 BLA
and 09-0539 BLA-S

CARL HICKS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MAGIC MINING , INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 07/22/2010
	)	
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 on Remand and the Attorney Fee Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Laura Metcoff Klaus and W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 Remand and Attorney Fee Order (05-BLA-5588) of Administrative Law Judge Janice K. Bullard, awarding benefits on a claim filed on January 20, 2004, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case is before the Board for the second time.

In the initial decision, Administrative Law Judge Paul H. Teitler credited claimant with twenty-one years of coal mine employment[1] based on the parties' stipulation, and determined that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.203, and 718.204(b), (c). Accordingly, Judge Teitler awarded benefits.

Pursuant to employer's appeal, the Board vacated the award of benefits and remanded the case to Judge Teitler to consider Director's Exhibit 1,[2] and to determine whether this case involves a subsequent claim pursuant to 20 C.F.R. §725.309 or a request for modification pursuant to 20 C.F.R. §725.310. The Board further instructed Judge Teitler to address employer's argument that liability for benefits should transfer to the Black Lung Disability Trust Fund (the Trust Fund). *C.H.* [*Hicks*] *v. Magic Mining, Inc.*, BRB No. 07-0513 BLA, slip op. at 5 (Apr. 30, 2008)(unpub.).

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[1] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because claimant's most recent coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 10.

[2] As summarized by the Board in its prior decision, while employer's appeal was pending, the district director sent a letter to all parties, advising that a prior claim filed by claimant had been mistakenly omitted from the Director's Exhibits, and that a copy of that prior claim, marked Director's Exhibit 1, was being provided for association with the record file. Upon receipt of the letter and the missing exhibit, employer moved that the case be remanded for the claim to be adjudicated as a request for modification of the denial of claimant's prior claim, pursuant to 20 C.F.R. §725.310. Employer further maintained that due process required that it be dismissed as the responsible operator and that liability for benefits be transferred to the Black Lung Disability Trust Fund. In response, the Director, Office of Workers' Compensation Programs, argued that, contrary to employer's assertion, the case is a subsequent claim. Further, the Director urged the Board to reject employer's assertion that it was prejudiced by the district director's failure to include Director's Exhibit 1 in the record. *C.H.* [*Hicks*] *v. Magic Mining, Inc.*, BRB No. 07-0513 BLA, slip op. at 3 (Apr. 30, 2008)(unpub.).

Addressing the merits of entitlement, the Board held that Judge Teitler erred in his consideration of the x-ray evidence under Section 718.202(a)(1), and in his consideration of the medical opinion evidence under Section 718.204(c).[3] The Board therefore vacated his findings pursuant to these sections. *Hicks*, BRB No. 07-0513 BLA, slip op. at 6, 8. The Board instructed Judge Teitler to reweigh the x-ray evidence at Section 718.202(a)(1), and determine whether claimant met his burden to establish the existence of pneumoconiosis on remand. *Id*. at 8. The Board provided the following further instructions:

> If claimant is unable to establish the existence of pneumoconiosis based on the x-ray evidence, the administrative law judge must further weigh the evidence relevant to that issue pursuant to Section 718.202(a)(2)-(4), including the [computerized tomography] CT scan evidence. If necessary, the administrative law judge must also determine whether claimant has satisfied his burden of proving that he is totally disabled due to pneumoconiosis pursuant to Section 718.204(c).

Id.

On remand, because Judge Teitler was unavailable, the case was reassigned, without objection, to Administrative Law Judge Janice K. Bullard (the administrative law judge). The administrative law judge found that the instant claim is a subsequent claim and rejected employer's due-process arguments. On the merits of entitlement, the administrative law judge found that claimant established the existence of pneumoconiosis by x-ray evidence at Section 718.202(a)(1), and that his totally disabling respiratory impairment is due to pneumoconiosis under Section 718.204(c). Accordingly, the administrative law judge awarded benefits. In an Attorney Fee Order issued on June 12, 2009, the administrative law judge directed employer to pay claimant's counsel a fee of $11,700.00 for legal services rendered to claimant and $500.00 for expenses that were incurred while the case was pending before the Office of Administrative Law Judges.

On appeal, employer asserts that the administrative law judge erred in treating the instant claim as a subsequent claim, rather than a modification request. Employer alleges that, as a result, it has been denied due process and liability in this case should be imposed on the Trust Fund. On the merits of entitlement, employer asserts that the administrative law judge erred in her consideration of the x-ray evidence at Section 718.202(a)(1), and in failing to consider all evidence relevant to the existence of

[3] The Board affirmed, as unchallenged on appeal, the administrative law judge's finding that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). *Hicks*, BRB No. 07-0513 BLA, slip op. at 6.

pneumoconiosis, including the CT scan evidence. Employer further asserts that the administrative law judge erred in her consideration of the medical opinion evidence pursuant to Section 718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to affirm the administrative law judge's conclusions that the instant case is a subsequent claim under Section 725.309, and that due process does not require that employer be relieved of liability in this case. Employer filed reply briefs, reiterating its contentions.

Employer additionally appeals the administrative law judge's Attorney Fee Order, asserting that neither the hourly rate, nor the number of hours awarded by the administrative law judge, is reasonable. Claimant responds in support of the Order. Employer filed a reply brief, reiterating its contentions.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish the existence of 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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Impact of the Recent Amendments

By Order dated March 31, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. The parties have responded.

Claimant responds that Section 1556 applies to this claim. The Director and employer, however, correctly state that the recent amendments to the Act, which became effective on March 23, 2010, and which apply to claims filed after January 1, 2005, do not apply to the miner's claim because it was filed before January 1, 2005.

Procedural Issues

Subsequent Claim or Request for Modification

We initially address employer's assertion that the administrative law judge erred in considering this claim as a subsequent claim under Section 725.309, rather than as a request for modification under Section 725.310. The record reflects that claimant filed his initial claim for benefits on July 24, 2002. Director's Exhibit 1-33. No medical evidence was developed in that claim, and the district director denied the claim as abandoned on November 26, 2002. Director's Exhibit 1-21. On January 13, 2003, claimant filed a second application for benefits. Director's Exhibit 1-16. On January 27, 2003, however, claimant submitted a letter to the district director, stating "I wish to withdraw the July 2002 application . . . . Also after I withdraw, I wish to file a new claim. Please mail me an application." Director's Exhibit 1-4. By letter dated February 10, 2003, the district director informed claimant that it was too late to withdraw his 2002 claim, as it had already been denied as abandoned. Because claimant's second claim came within one year of the denial of his first claim, the letter allowed claimant fifteen days to clarify whether he wanted to pursue modification of the first claim under Section 725.310. Alternatively, the district director advised claimant of his right to file a subsequent claim pursuant to Section 725.309(d), more than one year after the denial of his first claim:

> Should you desire to file a new claim, you will not need to respond to this inquiry, but rather wait until November 27, 2003, to file a new claim. Absent a timely response from you within the noted limitations, your current claim will be administratively closed due to abandonment.

Director's Exhibit 1-2-3. The record does not reflect that claimant took any further action until filing the instant claim for benefits on January 20, 2004. Director's Exhibit 3. The district director treated claimant's claim as a subsequent claim, notwithstanding the absence from the record of Director's Exhibit 1. Director's Exhibits 42 at 12, 48 at 5.

Reviewing those facts on remand, the administrative law judge found that, the district director's February 10, 2003 letter was "merely an advisory letter," informing claimant that his previous claim was denied because he ignored the November 26, 2002 Proposed Decision and Order, which became final. Decision and Order on Remand at 7. The administrative law judge further found that claimant's conduct following the district director's letter evinced "a clear intent to file a subsequent claim," rather than pursue modification of his first claim. *Id.* Because claimant filed the instant claim for benefits more than a year after the prior denial became final, the administrative law judge found it to be a subsequent claim. *Id.* Further, finding that "it is clear from the record that [Judge Teitler] treated [the instant claim] as either a subsequent claim for which no medical evidence had been [submitted] in the previous claim, or as a new claim," and that all the

evidence contained in Director's Exhibit 1 "was duplicated elsewhere,"[4] the administrative law judge determined that employer was not prejudiced by the absence of Director's Exhibit 1 from the record. *Id*. Therefore, the administrative law judge declined to transfer liability to the Trust Fund.

Employer contends that the administrative law judge's consideration of this claim as a subsequent claim under Section 725.309 does not comport with claimant's submissions to the Department of Labor, or with the Department's correspondence. Specifically, employer asserts that the February 10, 2003 letter from the district director indicates that claimant's prior claim was not closed until February 2003, when claimant did not respond to the district director's letter. Employer's Brief at 14. The Director responds, asserting that the district director's November 2002 denial of claimant's initial claim for benefits remains the operative denial of that claim; and, since the instant claim was filed more than one year later, the administrative law judge properly adjudicated this claim as a subsequent claim.

Contrary to employer's assertion, and as the administrative law judge found, the district director's February 10, 2003 letter specifically states that claimant's prior claim was denied on November 26, 2002,[5] and that if he wished to file a subsequent claim, he must wait until November 27, 2003. Because the letter stated that claimant would be eligible to file a subsequent claim one year after the proposed decision and order denying his initial claim as abandoned, the administrative law judge rationally determined that the February 10, 2003 letter "does not constitute an order affecting [c]laimant's previous claim" and that "[e]mployer's reading of the [] letter as a denial of the previous claim is in conflict with the content of the letter." Decision and Order on Remand at 7; *see* 20 C.F.R. §725.309. Further, as the Director states, by providing claimant with the choice to either seek modification or wait a year and file a new claim, the district director effectively treated claimant's failure to respond to the February 10, 2003 letter as a constructive withdrawal of any attempt to pursue modification of the July 2002 claim. Director's Brief at 4, citing *W.C.*[*Cornett*] *v. Whitaker Coal Corp*., 24 BLR 1-20, 1-26-27 (2008) (holding that a modification request may be withdrawn before a denial of request becomes effective; and that a withdrawn modification request shall be treated as if it were never filed). Thus, we agree with the Director that, "the district director's November

[4] Director's Exhibit 1 contains claimant's divorce papers and Social Security Earnings Statement. Director's Exhibit 1.

[5] A typographical error in the letter states that the claim was denied on November 26, 2001. However, the record reflects that the district director's proposed decision and order, denying the claim as abandoned, was issued on November 26, 2002. Director's Exhibit 1-21.

[26,] 2002 denial of the 2002 claim remains the operative denial of that application." Director's Brief at 4. Because claimant filed the instant claim for benefits on January 20, 2004, more than one year after the denial of his previous claim, the administrative law judge properly adjudicated it as a subsequent claim. 20 C.F.R. §725.309(d).

Due Process

Employer additionally asserts that, because the administrative law judge improperly found this case to be a subsequent claim, rather than a request for modification, its due process rights were violated, and liability should be transferred to the Trust Fund. We disagree. As discussed, *supra*, the administrative law judge properly adjudicated this claim as a subsequent claim. The due process rights of confrontation and cross-examination, as they are incorporated into 20 C.F.R. §725.455(c), require only that the parties be allowed a reasonable opportunity to know the claims of the opposing party and to meet them. *See North Am. Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *cf. Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 884-84, 22 BLR 2-25, 2-44-45, (6th Cir. 2000) (holding that employer suffered a core violation of its due process rights where "critical" evidence in the record had been lost, thereby depriving employer of a fair day in court). Employer had full notice of the issues raised, as well as the opportunity to develop evidence to support its case and rebut claimant's evidence. Further, as the Director accurately observes, employer litigated this case, when it was before Judge Teitler, as a subsequent claim and contested entitlement. Director's Brief at 4; *see* Employer's Post-Hearing Brief. Further, substantial evidence supports the administrative law judge's finding that the evidence contained in Director's Exhibit 1 was duplicated elsewhere in the record that was before Judge Teitler, and "[n]o evidence was left unreviewed as a result of the omission." Decision and Order on Remand at 7. Thus, employer cannot claim that it was denied a meaningful opportunity to defend the instant subsequent claim, or that it was prejudiced by an absence of relevant evidence. *Cf. Holdman*, 202 F.3d at 884-84, 22 BLR at, 2-44-45. Because employer has failed to show any prejudice, we affirm the administrative law judge's findings that employer's due process rights were not violated, and that liability should not be transferred to the Trust Fund.

20 C.F.R. §725.309(d): Subsequent Claim

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim contained no medical evidence and

was denied by reason of abandonment. For purposes of 20 C.F.R. §725.309, a denial by reason of abandonment is deemed a finding that claimant has not established any applicable condition of entitlement. 20 C.F.R. §725.409(c). Thus, our prior affirmance of the administrative law judge's finding in this claim that claimant is totally disabled from a pulmonary standpoint establishes the requisite change in an applicable condition of entitlement under 20 C.F.R. §725.309(d).

Merits of Entitlement

20 C.F.R. §718.202(a): Existence of Pneumoconiosis

Relevant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered nine interpretations of four x-rays dated October 15, 2001,[6] March 9, 2004,[7] June 15, 2004,[8] and January 26, 2006.[9] Director's Exhibits 17, 31, 36, 41; Claimant's Exhibits 1, 2; Employer's Exhibits 7, 8, 11. Finding that the October 15, 2001 and January 26, 2006 x-rays were each read with conflicting results by two equally qualified physicians, the administrative law judge found these x-rays to be in equipoise. The administrative law judge found the June 15, 2004 x-ray to be negative for pneumoconiosis, finding that the two negative interpretations by Dr. Poulos outweighed Dr. Alexander's positive interpretation. Further, the administrative law judge found the March 9, 2004 x-ray to be positive for pneumoconiosis, noting that Dr. Baker's interpretation was entitled to weight because Dr. Baker is a B reader, he examined claimant, and his reading "is largely consistent with the reading of Dr. Alexander[,] [w]here both of these physicians reported

[6] Dr. Alexander, Board-certified radiologist and B reader, interpreted the October 15, 2001 x-ray as positive for pneumoconiosis, while Dr. Hayes, Board-certified radiologist and B reader, interpreted this x-ray as negative for pneumoconiosis. Director's Exhibit 31; Employer's Exhibit 13.

[7] The March 9, 2004 x-ray was interpreted by Drs. Baker, Hayes, and Alexander. Dr. Baker, B reader, interpreted this x-ray as positive for pneumoconiosis. Dr. Alexander also read this x-ray as positive, while Dr. Hayes read it as negative for pneumoconiosis. Director's Exhibits 17, 36, 41. Dr. Barrett interpreted this x-ray for quality purposes only. Director's Exhibit 18.

[8] The June 15, 2004 x-ray was interpreted by Dr. Alexander as positive for pneumoconiosis, and twice by Dr. Poulos, Board-certified radiologist and B reader, as negative for pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibit 8, 9.

[9] The January 26, 2006 x-ray was interpreted as positive for pneumoconiosis by Dr. Alexander, and as negative by Dr. Wiot, Board-certified radiologist and B reader. Claimant's Exhibit 2; Employer's Exhibit 7.

pleural thickening." Decision and Order on Remand at 10. By contrast, the administrative law judge found Dr. Hayes's interpretation of this x-ray to be entitled to less weight, because he reported "sub-pleural fat, a condition that would be unlikely to appear on a chest x-ray." Decision and Order on Remand at 10. Weighing the x-ray evidence together, the administrative law judge found the March 9, 2004 x-ray entitled to more weight than the June 15, 2004 x-ray because it was read by a dually qualified physician and by a B reader who examined claimant. The administrative law judge therefore found that the x-ray evidence established pneumoconiosis. *Id*.

Employer asserts that the administrative law judge erred in finding the March 9, 2004 x-ray to be positive for pneumoconiosis. Specifically, employer states that the administrative law judge erred in discounting Dr. Hayes's x-ray interpretation for the reasons provided, and erred in assigning increased weight to Dr. Baker's x-ray reading for the reasons provided. We agree.

As employer states, although Dr. Hayes noted the presence of subpleural fat on claimant's x-ray, no physician opined that subpleural fat is a condition that is unlikely to appear on x-ray. Thus, the administrative law judge erred in discounting Dr. Hayes's x-ray reading for this reason. *See Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987) (holding that the interpretation of medical data is for the medical experts, not the administrative law judge). As employer further states, a physician's examination of a miner has no bearing on the credibility of his x-ray interpretation. *See Lawson v. Sec'y, Health and Human Servs.*, 688 F.2d 436, 438, 4 BLR 2-151, 2-155 (6th Cir. 1982) (noting that the reliability of x-ray interpretations does not depend upon examination of the patient, rather, it depends on "the reader's personal examination of the x-ray, his professional qualifications, and his use of accepted medical procedures"). Thus, the administrative law judge erred in assigning increased weight to Dr. Baker's x-ray reading for this reason. Although the administrative law judge accurately noted that Dr. Baker's x-ray interpretation is consistent with that of a dually qualified reader, Dr. Alexander, Dr. Baker's interpretation is inconsistent with the x-ray interpretation of Dr. Hayes, who is also a dually qualified reader.

Because the administrative law judge did not provide a valid basis for her credibility determinations, we vacate her finding that the March 9, 2004 x-ray is positive for pneumoconiosis and remand this case for further consideration of the x-ray evidence. On remand, the administrative law judge must reconsider whether the March 9, 2004 x-ray supports a finding of pneumoconiosis, and determine whether the preponderance of the x-ray evidence establishes pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). In so doing, the administrative law judge must explain her credibility

determinations in accordance with the Administrative Procedure Act (APA).[10] 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

The administrative law judge accurately observed that, ordinarily, a finding that the x-ray evidence establishes pneumoconiosis at 20 C.F.R. §718.202(a)(1) would obviate the need for her to render a separate finding regarding whether the medical opinion evidence establishes the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4).[11] *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). However, in this case, the administrative law judge credited medical opinion evidence attributing claimant's total disability, in part, to "legal" pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due, in part, to coal mine dust exposure, at Section 718.204(c). Decision and Order on Remand at 16; Director's Exhibits 17, 40. Before addressing whether the evidence established that claimant's total disability was due to "legal" pneumoconiosis pursuant to Section 718.204(c), the administrative law judge should have determined first whether the medical opinion evidence established the existence of "legal" pneumoconiosis under Section 718.202(a)(4).[12] *See* 20 C.F.R.

[10] Because we previously rejected employer's assertion that the administrative law judge erred in failing to consider the computerized tomography (CT) scan evidence along with the chest x-ray evidence as to the presence or absence of pneumoconiosis, we decline to revisit this issue. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

[11] Because we are applying the law of the Sixth Circuit, based on claimant's last coal mine employment, the holding in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), that an administrative law judge must weigh all of the relevant evidence together pursuant to 20 C.F.R. §718.202(a), is not applicable.

[12] The record contains four medical opinions, relevant to the existence of legal pneumoconiosis. Dr. Baker diagnosed chronic obstructive pulmonary disease (COPD) due to coal dust exposure and smoking, and further opined that coal dust exposure contributed to claimant's arterial hypoxemia. Director's Exhibits 17; 40. Dr. Potter diagnosed a severe restrictive lung disease due to coal dust exposure. Director's Exhibit 19; Claimant's Exhibit 4. By contrast, Drs. Rosenberg and Jarboe opined that claimant does not have legal pneumoconiosis. Dr. Rosenberg explained that the abnormalities seen on claimant's objective studies are not the kind of abnormalities that are associated with coal mine dust exposure. Employer's Exhibit 3 at 25-26. Similarly, Dr. Jarboe stated that claimant's x-ray, CT scan, pulmonary function study, blood gas study, and ongoing congestive heart failure, all reflect that claimant's respiratory impairment is due to smoking and heart disease. Employer's Exhibit 6 at 16-21.

§§718.201(a)(2), 718.204(c)(1). Consequently, we instruct the administrative law judge on remand to consider whether the medical opinion evidence establishes the existence of "legal" pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[13]

Prior to evaluating the medical opinion evidence as to the existence of legal pneumoconiosis, the administrative law judge must make a specific finding as to claimant's smoking history.[14] Further, in considering the medical opinion evidence, the administrative law judge must assess whether the physicians' medical reasoning supports their respective conclusions and must explain the basis for her credibility determinations on remand.[15] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

20 C.F.R. §718.204(c): Disability Causation

Because we have vacated the administrative law judge's finding of pneumoconiosis, we vacate her disability causation determination at Section 718.204(c), and instruct the administrative law judge to reconsider this issue, if reached, on remand. Further, we agree with employer that, on remand, the administrative law judge must

[13] A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[14] Employer correctly asserts that the administrative law judge erred in discounting Dr. Jarboe's opinion as to disability causation because he relied "on what appears to be a grossly overstated smoking history," where the administrative law judge never made a specific finding as to claimant's smoking history or resolved the conflicting evidence in the record on this issue. Employer's Brief at 24, quoting Decision and Order on Remand at 16. Because the physicians' understanding of claimant's smoking history is relevant to the probative value of their opinions as to legal pneumoconiosis, the administrative law judge must properly resolve the conflict in the smoking history evidence.

[15] Employer correctly asserts that the administrative law judge erred in discounting the opinions of Drs. Rosenberg and Jarboe pursuant to 20 C.F.R. §718.204(c) for failing to "adequately explain" how claimant's arterial blood gas study results factored into their opinions that coal dust exposure played no role in claimant's pulmonary condition. The administrative law judge did not assess the credibility of the physicians' opinions on this issue or explain her finding. The administrative law judge must do so pursuant to 20 C.F.R. §718.202(a)(4) on remand.

explain the basis for her finding that Dr. Potter's disability causation opinion was entitled to "substantial weight," even though the administrative law judge found that Dr. Potter is not a pulmonary specialist, that he did not account well for claimant's smoking history, or discuss the effects of claimant's heart disease on his respiratory problems. *See* 20 C.F.R. §718.104(d)(5); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *see also Wojtowicz*, 12 BLR at 1-165. Contrary to employer's additional contention, however, if the administrative law judge, on remand, finds the existence of pneumoconiosis established, she has the discretion to accord less weight to the disability causation opinions of those physicians who did not diagnose pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989).

Attorney Fee Order

Claimant's counsel is not entitled to fees for services rendered until the claim has been successfully prosecuted and all appeals are exhausted. *See* 20 C.F.R. §725.367(a); *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 n.9 (1995). Because we have vacated the administrative law judge's award of benefits, there has not been a successful prosecution of this claim. However, in the interest of judicial economy, we will address employer's challenges to the administrative law judge's award of attorney fees.

Following the administrative law judge's decision, claimant's counsel, James D. Holliday, filed a fee petition requesting a fee of $11,700.00, representing fifty-two hours of services rendered (41.75 hours before Judge Teitler and 10.25 hours before the administrative law judge) at an hourly rate of $225.00. Additionally, claimant's counsel requested $635.73 for expenses incurred. Employer objected to the fee petition, challenging the reasonableness of the hourly rate and of the time and expenses requested.[16]

[16] Employer argued before the administrative law judge that claimant's counsel inflated the number of hours spent on the case by billing a quarter hour for eighty-nine "routine tasks" that "should not have taken more than five minutes," Employer's Opposition to Shifted Fees at 5; that claimant's counsel charged standard amounts for certain tasks, rather than the amount of time actually spent; that it was unreasonable for claimant's counsel to charge for spending three hours traveling to conduct a deposition that took only one and one-half hours where he could have handled the matter telephonically; that the requested hourly rate of $225.00 is excessive; that the $635.73 of the requested expenses is undocumented and, even if documented, $400.00 in expenses

The administrative law judge overruled employer's objections, and awarded claimant's counsel $225.00 per hour for the fifty-two hours requested, and $500.00 of the requested $635.73 of expenses. In so doing, the administrative law judge found that:

> Claimant's counsel's stated hourly rate of $225.00 is well within the hourly rate that I have routinely approved for cases brought under the Act. . . . I also find that the rate is commensurate with Claimant's counsel's years of experience and expertise, which are factors that the regulatory scheme require [*sic*] me to consider.

Attorney Fee Order at 2. The administrative law judge further found that claimant's counsel permissibly billed in quarter-hour increments for the services he rendered, and that $500.00 of expenses were documented, but the remaining transportation costs were not adequately documented. Thus, the administrative law judge awarded claimant's counsel a total of $12,200.00 in fees and expenses.

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, or an abuse of discretion, *Jones v. Badger Coal Co.*, 21 BLR 1-102 (1998) (*en banc*); *Abbott v. Director, OWCP*, 133 BLR 1-15 (1989).

Employer asserts that the administrative law judge failed to state a valid reason for finding $225.00 to be a reasonable hourly rate for claimant's counsel. We agree.

Although 20 C.F.R. §725.366 lists what factors should be considered in assessing the amount of an attorney fee award, the Sixth Circuit has held that the lodestar method of calculating fees (the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate) is "the appropriate starting point in [black-lung benefits] cases." *B&G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 662, 24 BLR 2-106, 2-119 (6th Cir. 2008). In *Bentley*, the Sixth Circuit defined "reasonable hourly rate" as "the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *Bentley*, 522 F.3d at 663, 24 BLR at 2-121. In the instant case, the administrative law judge did not address the affidavits

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for expert witness fees should be denied because the fees were not incurred at a hearing. *Id*. at 6-11.

offered regarding the reasonableness of the requested hourly rate.[17] The administrative law judge must do so on remand. *Bentley*, 522 F.3d at 664, 24 BLR at 2-121.

We additionally find merit in employer's assertion that the administrative law judge erred in overruling employer's objections to specific time entries. When the case was before the administrative law judge, employer objected to counsel's billing a quarter-hour for eighty-nine "routine tasks" that "should not have taken more than five minutes," Employer's Opposition to Shifted Fees at 5, and to counsel's alleged practice of billing a fixed amount of time for specific tasks, such as 0.5 hours for drafting motions (time charges dated 3/21/06, 4/10/06) or reviewing briefs (time charges dated 9/7/06, 9/20/08) and 7.00 hours for drafting briefs (time charges dated 8/23/09, 9/16/08). *Id*. at 3. Although the administrative law judge addressed whether billing in quarter-hour increments was appropriate,[18] she did not address employer's objections as to the reasonableness of the amount of time billed for specific services. Consequently, on remand, the administrative law judge must address employer's objections and determine whether the amount of time billed was reasonable. *Bentley*, 522 F.3d at 662, 24 BLR at 2-119.

We, however, reject employer's assertion that the administrative law judge erred in approving counsel's charge for traveling to depose Dr. Baker. The administrative law judge permissibly found claimant's counsel's travel time to be reasonable, given that "there is nothing in the prevailing regulations, Federal Rules of Civil Procedure relating to discovery, or Rules of Practice and Procedure Before the Office of Administrative Law Judges, which requires counsel to justify the method by which a deposition is conducted." Attorney Fee Order at 3; *see* 20 C.F.R. §§725.366(b),(c), 725.459(a); *Branham v. Eastern Associated Coal Corp.*, 19 BLR 1-1, 1-4 (1994); *Bradley v. Director, OWCP*, 4 BLR 1-241, 1-245 (1981).

We also reject employer's assertion that counsel is not entitled to recover expert witness fees that were not incurred at the formal hearing. *See Branham*, 19 BLR at 1-4. Further, contrary to employer's assertion, the administrative law judge acted within her discretion in finding that the canceled checks counsel made payable to claimant's expert

[17] Although the administrative law judge stated that $225.00 is well within the hourly rate that she has routinely approved for cases brought under the Act, employer correctly points out that these prior awards are not contained in the record.

[18] Contrary to employer's contention, the administrative law judge did not err in allowing counsel to bill in quarter-hour increments. *See B&G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 666, 24 BLR 2-127, 2-119 (6th Cir. 2008); *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230, 237 n.6 (1993); 20 C.F.R. §802.203(d)(3).

witnesses constituted adequate documentation supporting his request for expert witness fees. *See Jones*, 21 BLR at 1-108.

In summary, if the administrative law judge again awards benefits on remand, she must consider whether claimant's counsel's requested hourly rate is a "reasonable hourly rate." *Bentley*, 522 F.3d at 664, 24 BLR at 2-121. In so doing, the administrative law judge must address the affidavits offered regarding attorney fees, and explain her findings. Further, the administrative law judge must address employer's objections to the reasonableness of the amount of time claimant's counsel billed for specific services.[19]

[19] Claimant's counsel has submitted a fee petition to the Board, requesting a fee of $2,925.00, representing thirteen hours of services for work performed before the Board in its prior appeal, BRB No. 07-0514 BLA, at the rate of $225.00 per hour. Employer opposes the petition. Because we have vacated the award of benefits, we decline to address the fee petition at this time, as there has not yet been a successful prosecution of the claim before the Board. 33 U.S.C. §928(a), as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §725.367(a); *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139 (1993).

Accordingly, the administrative law judge's Decision and Order on Remand and Attorney Fee Order are vacated, and this case is remanded for further consideration consistent with this opinion.

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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BETTY JEAN HALL
Administrative Appeals Judge