BRB No. 10-0479 BLA

GEAROLD E. KNOWLES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MIDWEST COAL COMPANY	)	
	)	
and	)	
	)	
FIREMAN'S INSURANCE OF NEW JERSEY	)	DATE ISSUED: 07/21/2011
	)	
	)	
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 Order Granting Attorney's Fees and Denying Employer's Motion to Strike of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Scott A. White (White & Risse, L.L.P.), Arnold, Missouri, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Order Granting Attorney's Fees and Denying Employer's Motion to Strike (2008-BLA-5303) of

Administrative Law Judge Alice M. Craft rendered on a subsequent claim filed 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). Upon stipulation of the parties, the administrative law judge credited claimant with thirty-seven years of qualifying coal mine employment, and adjudicated this subsequent claim,[1] filed on December 5, 2006, pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725. The administrative law judge determined that the claim was timely filed, and that the newly-submitted evidence was sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the entire record, the administrative law judge found that the evidence was sufficient to establish that claimant was totally disabled from pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.204(b), 718.204(c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's decision on both procedural and substantive grounds. On procedural grounds, employer asserts that the administrative law judge deprived employer of due process by failing to remand or reopen the record for the parties to address the application of the recent amendments to the Act at Section 411(c)(4), 30 U.S.C. §921(c)(4), and to present new evidence to respond to the change in law.[2] On the merits, employer challenges the administrative law judge's weighing of the evidence on the issue of legal pneumoconiosis at Section 718.202(a)(4). Employer further challenges the award of attorney's fees. Claimant responds in support of the award of benefits and the award of attorney fees. The Director, Office of Workers' Compensation Programs, has declined to file a substantive brief.[3]

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[1] Claimant's initial claim was filed on April 12, 1984, and his second claim was filed on December 13, 1991. Both claims were denied by the district director for failure to establish any element of entitlement. Director's Exhibits 1, 2.

[2] Amendments to the Black Lung Benefits Act became effective on March 23, 2010, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. In pertinent part, the amendments revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis in cases where the miner has established fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b). 30 U.S.C. §921(c)(4).

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence was sufficient to establish total respiratory disability at 20 C.F.R. §718.204(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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.[4] 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).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the decision is supported by substantial evidence, consistent with applicable law, and contains no reversible error. Employer contends that the administrative law judge erred in crediting the medical opinions of Drs. Cohen, Houser, and Diaz, over the medical opinions of Drs. Repsher and Renn, on the issue of legal pneumoconiosis at Section 718.202(a)(4), and consequently erred in finding a change in an applicable condition of entitlement established pursuant to Section 725.309(d). Employer asserts that the administrative law judge should have discounted the opinions of Drs. Cohen and Diaz because substantial parts of their reports were prepared by claimant's counsel. Employer also maintains that the opinions of Drs. Cohen, Houser, and Diaz are not reasoned because the doctors did not explain how coal dust exposure actually caused or contributed to the development of pneumoconiosis or any impairment arising out of coal dust exposure, rather than smoking alone. Employer further maintains that the administrative law judge improperly shifted the burden of proof to employer to rule out coal dust as a factor in claimant's obstructive impairment, and impermissibly mischaracterized the opinions of Drs. Renn and Repsher as being contrary to the preamble to the revised regulations. Employer's arguments are without merit.

After finding that claimant has a smoking history of twenty-nine pack years, Decision and Order at 5, the administrative law judge summarized the treatment records and the conflicting medical opinions of record, noting the doctors' underlying documentation, the employment and smoking histories relied upon, the relative qualifications of the physicians, and the physicians' explanations for their respective conclusions.[5] Decision and Order at 23-36; 42-53. It is the administrative law judge's

[4] The law of the United States Court of Appeals for the Seventh Circuit is applicable, as claimant was employed in the coal mining industry in Indiana. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 5, 11.

[5] The administrative law judge additionally reviewed the opinions of Drs. Samuels, Daly, and Wilson, contained in claimant's treatment records. Dr. Samuels is an internist and is claimant's family doctor. The administrative law judge accorded his diagnoses of chronic obstructive pulmonary disease, black lung, and silicosis less weight, as the doctor insufficiently considered claimant's smoking and employment histories, and did not explain the basis for his diagnoses. Decision and Order at 44-45; Employer's

function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 13 BLR 2-348 (7th Cir. 1990); *Amax Coal Co. v. Burns*, 855 F.2d 499 (7th Cir. 1988). In this case, the administrative law judge allowed discovery of the communications between claimant's counsel and Drs. Cohen and Diaz, and determined, in her discretion, that the exchanges constituted attempts by counsel to identify whether the case had merit; discussions of strategy; or attempts to explain a legal standard. She further determined that the summaries that were exchanged represented facts of the case that were in agreement with her findings of fact. Finding that the exchanges did not improperly influence the substance of the physicians' reports, the administrative law judge concluded that none of the reports should be discounted on the basis of bias. We find no abuse of the administrative law judge's discretion, and employer presents no reason to disturb her determination. Decision and Order at 49; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*); *see generally Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 295 n. 23, 23 BLR 2-430, 2-467 n.23 (4th Cir. 2007).

The administrative law judge also determined that Dr. Cohen was a "highly qualified" pulmonologist with a "special expertise in black lung,"[6] and acted within her discretion in crediting his opinion, that claimant's coal dust and smoking exposures were significantly contributory to his emphysema, as it was supported by the evidence available to him, namely, claimant's treatment records, physical findings and the objective testing. She also permissibly determined that his diagnosis of clinical pneumoconiosis was neither supported, nor refuted, by her finding that the x-ray and CT scan evidence was inconclusive for pneumoconiosis. Decision and Order at 49-50; Claimant's Exhibits 8, 15; *see Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001); *Clark*, 12 BLR at 1-153. Similarly, the administrative law judge

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Exhibit 3. Dr. Daly is claimant's treating pulmonologist, who diagnosed chronic lung disease, tobacco habituation, and industrial-related pneumoconiosis. The administrative law judge determined that his opinion was not entitled to controlling weight, because the doctor insufficiently considered claimant's employment history and insufficiently explained the rationale for his findings. Decision and Order at 46; Employer's Exhibit 1. Lastly, the administrative law judge reviewed the opinion of Dr. Wilson, claimant's treating physician, who is Board-certified in family medicine. The administrative law judge accorded his opinion little weight on the issue of legal pneumoconiosis, as he did not attribute his diagnoses of bronchitis/pneumonia/congestive heart failure/interstitial fibrosis to coal dust exposure. Decision and Order at 46; Employer's Exhibit 8.

[6] The administrative law judge determined that Drs. Houser and Diaz are "well qualified" pulmonologists, and Drs. Repsher and Renn are "highly qualified" pulmonologists. Decision and Order at 46-51.

permissibly found that Dr. Houser's diagnosis of emphysema secondary to the inhalation of coal dust with contribution from smoking, based on physical examination findings and his underlying objective testing, was documented and reasoned, and entitled to probative weight. Decision and Order at 46-47; Director's Exhibits 17, 50; *see Poole*, 897 F.2d at 894, 13 BLR at 2-355; *Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). While the administrative law judge found that the opinion of Dr. Diaz, that claimant's coal dust exposure contributed significantly to his severe emphysema and pulmonary fibrosis, was consistent with the evidence of record, she rationally concluded that the opinion was less persuasive and entitled to diminished weight because the doctor did not identify the objective testing upon which he relied when making his diagnosis. Decision and Order at 47-48; Claimant's Exhibit 7; *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR 1-19 at 1-22. The administrative law judge permissibly found that the opinions of Drs. Renn and Repsher, that claimant's emphysema was due entirely to smoking, were unpersuasive because the physicians did not adequately explain how claimant's thirty-seven years of coal dust exposure could be eliminated as a source of claimant's obstructive disease. Decision and Order at 50-51; Employer's Exhibits 9, 17, 18, 19, 25, 26; Director's Exhibit 37; *see generally Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356 23 BLR 2-472, 2-483 (6th Cir. 2007). Further, she properly accorded little weight to both Dr. Repsher's opinion, that coal dust exposure does not cause or significantly contribute to centrilobular emphysema, and Dr. Renn's opinion that, in the absence of CT scan evidence of coal macules, claimant's centrilobular emphysema was not related to coal dust exposure, as the administrative law judge found them to be inconsistent with the prevailing medical science contained in the preamble to the revised regulations. 65 Fed. Reg. 79941 (Dec. 20, 2000); *see* 20 C.F.R. §718.201(a)(2); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009). Because the administrative law judge determined that the opinions of Drs. Renn and Repsher were insufficiently reasoned, the administrative law judge rationally accorded dispositive weight to the opinions of Drs. Cohen and Houser, as supported by the opinion of Dr. Diaz. 20 C.F.R. §718.202(a)(4); *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *Clark*, 12 BLR at 1-155; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). As substantial evidence supports the administrative law judge's credibility determinations, we affirm her finding that the weight of the medical opinion evidence of record was sufficient to establish legal pneumoconiosis pursuant to Section 718.202(a)(4). Since claimant failed to establish the existence of pneumoconiosis in his earlier claims,[7] we reject employer's argument that the administrative law judge improperly found a change in applicable

[7] Claimant was diagnosed with chronic bronchitis in his first claim, Director's Exhibit 1, and with symptomatic bronchitis due to environmental factors in his second claim. Director's Exhibit 2. A respiratory or pulmonary impairment must arise out of coal mine employment to constitute a diagnosis of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a).

condition of entitlement at Section 725.309(d), and we affirm the administrative law judge's findings thereunder. *See* 20 C.F.R. 725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1 (2004).

Because we have affirmed the administrative law judge's determination that claimant suffers from legal pneumoconiosis, and employer has not alleged any specific error in the administrative law judge's weighing of the evidence on the issue of disability causation at Section 718.204(c), employer has presented no basis for disturbing the administrative law judge's disability causation finding. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 60-62. We therefore affirm the administrative law judge's determination, under Section 718.204(c), that claimant is totally disabled as a result of his pneumoconiosis, and affirm her award of benefits.

We find no merit to employer's procedural argument, that the administrative law judge erred in failing to either remand this case or reopen the record to allow employer to respond to the change in law effectuated by the recent amendments to the Act. The administrative law judge properly concluded that it was not necessary to reopen the record, as she found entitlement established without ocnsidering the rebuttable presumption of total disability due to pneumoconiosis under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Because the administrative law judge awarded benefits under the same burden of proof that the parties anticipated, when they prepared their respective cases, a burden that is more difficult for claimant than that imposed under amended Section 411(c)(4), employer has not demonstrated any prejudice or due process violation. *See generally Harlan Bell Coal Co. v. Lamar*, 904 F.2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986).

Lastly, employer challenges the administrative law judge's award of attorney's fees as unreasonable and excessive. Claimant's counsel, Thomas E. Johnson, submitted a fee petition to the administrative law judge, requesting a fee of $51,915.45, representing 206.94 hours of legal services performed at an hourly rate of $235.00 for Thomas E. Johnson; 9.79 hours of legal services at an hourly rate of $235.00 for Ann Megan Davis; and 45.67 hours of paralegal services at an hourly rate of $20.00 for Jacob R. Riesberg. Claimant further requested reimbursement of expenses in the amount of $3,394.72. After considering employer's objections and claimant's counsel's response thereto, the administrative law judge approved the hourly rates, but reduced the number of hours requested by Attorney Johnson to 202.61; reduced the number of hours requested by Attorney Davis to 8.29; and reduced expenses to $3,198.67. Accordingly, the administrative law judge awarded a fee of $50,474.90 plus $3,198.76 in expenses, for a total award of $53,673.57.

The award of an attorney 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, 1-108 (1998)(*en banc*), *citing Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

On appeal, employer challenges counsel's use of affidavits to establish the appropriate market rate; objects to the number of "block-billed" hours requested by counsel as unreasonable and excessive; and contends that reimbursement for the cost of obtaining medical reports from Drs. Cohen, Diaz, and Houser should be disallowed. Employer's arguments are without merit.

The review of a fee petition requires the administrative law judge to decide whether, at the time counsel performed the service, counsel could reasonably regard it as necessary to establish entitlement and whether the amount of time expended was excessive or unreasonable. *See Lanning v. Director, OWCP*, 7 BLR 1-314 (1984); *Robel v. Director, OWCP*, 7 BLR 1-358 (1984). In finding that the "block-billed" hours claimed by counsel were not excessive, the administrative law judge noted that "employer did not point to any specific 'block-billing' entry that is excessive for the services outlined in the entry." Order at 4. Given the complexity of the case, and the varied issues raised, the administrative law judge also rejected employer's objection to the consultation of two attorneys in this claim. *Id*. The administrative law judge stated that she "carefully reviewed" each of the twenty-eight entries, determined that many entries involved tasks that were intertwined, and acted within her discretion in finding that both the method of itemization and the time spent performing the tasks were reasonable. *Id.*; 20 C.F.R. §725.366; *see Lanning*, 7 BLR at 1-317. Because employer has not demonstrated an abuse of the administrative law judge's discretion, we reject employer's challenge to the block-billed hours claimed for services rendered.

We also reject employer's assertion that the administrative law judge did not apply the correct method for determining counsels' market hourly rate, and merely based the fee "upon what other attorneys get." In finding that the requested hourly rate of $235.00 was reasonable, the administrative law judge appropriately considered an affidavit from a black lung attorney attesting to the skills of Attorney Johnson; past fee awards to both counsel; the arguments of the parties; the nature of the issues involved; the degree of skill with which claimant was represented; and the customary rates of counsel. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 289, 24 BLR 2-269, 2-290 (4th Cir. 2010); *B&G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 663 24 BLR 2-106 (6th Cir. 2008); *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004); *see generally* 20 C.F.R. §725.366(b). Further, the administrative law judge found that counsel established that the area of black lung litigation is highly specialized, that the market for such legal services is a national market. Order at 3; *see Jeffboat v. Director, OWCP*, 553 F.3d 487

(7th Cir. 2009). As no abuse of discretion has been demonstrated, we affirm the administrative law judge's finding that the requested hourly rate of $235.00 represents a reasonable market rate.

Lastly, we reject employer's argument that, because there is no proof that checks were ever sent to the physicians, the administrative law judge erred in reimbursing claimant's counsel $50.00 for the cost of Dr. Houser's letter; $1,200.00 for the cost of Dr. Diaz's report; and $930.00 for the cost of Dr. Cohen's report. As correctly noted by the administrative law judge, counsel submitted invoices for the requested expenses, and Section 725.366 does not require counsel to produce cancelled checks. Order at 6; 20 C.F.R. §725.366. Consequently, we affirm the administrative law judge's award of attorney's fees and costs in all respects.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and the Order Granting Attorney's Fees and Denying Employer's Motion to Strike 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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BETTY JEAN HALL
Administrative Appeals Judge