U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0453 BLA

ROBERT L. WALKER (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOUTHERN ILLINOIS LAND COMPANY	)	
	)	DATE ISSUED: 07/18/2016
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 Second Remand Awarding Benefits and Supplemental Order Awarding Attorney's Fees and Costs of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Second Remand Awarding Benefits and Supplemental Order Awarding Attorney's Fees and Costs (2008-BLA-5846) of Administrative Law Judge Paul C. Johnson, Jr., rendered on a miner's subsequent claim, filed on March 15, 2007, pursuant to the provisions of the Black Lung Benefits Act, as

amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] This case is before the Board for the third time.

In his initial decision, the administrative law judge found that claimant invoked the presumption under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), that he was totally disabled due to pneumoconiosis. Next, the administrative law judge found that employer established that claimant did not have clinical pneumoconiosis,[2] but nevertheless failed to rebut the Section 411(c)(4) presumption, because it failed to establish that claimant did not have legal pneumoconiosis[3] or that there was no connection between his coal mine employment and his disabling respiratory impairment. Accordingly, the administrative law judge awarded benefits. The administrative law judge also awarded claimant's counsel a fee of $11,424.00. The fee was $4,080.00 less than requested, because the administrative law judge approved only 10 of the 27 hours counsel requested, at a rate of $240.00 per hour, for preparing claimant's closing brief.

Upon review of employer's appeal, the Board held that the administrative law judge erred in weighing the evidence relevant to rebuttal of the Section 411(c)(4) presumption, and vacated the award of benefits.[4] *Walker v. Sahara Coal Trust*, BRB No. 11-0323 BLA/A, slip op. at 5-6 (May 22, 2012) (unpub.). The Board instructed the administrative law judge on remand to reassess all of the evidence relevant to rebuttal of

[1] Claimant's first claim, filed on October 2, 1980, was denied as abandoned. Director's Exhibit 1. His second claim, filed on January 28, 2003, was denied by the district director on October 14, 2003, because he did not establish that he was totally disabled. Director's Exhibit 2. Claimant died on July 6, 2010, and his widow is pursuing the current claim on his behalf.

[2] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[3] "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).

[4] The Board affirmed the administrative law judge's unchallenged findings that claimant had thirty-one years of underground coal mine employment, was totally disabled pursuant to 20 C.F.R. §718.204(b), established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and invoked the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4) (2012). *Walker v. Sahara Coal Trust*, BRB No. 11-0323 BLA/A, slip op. at 3-4 n.3 (May 22, 2012) (unpub.).

the Section 411(c)(4) presumption. Addressing claimant's cross-appeal of the award of a reduced fee, the Board held that the administrative law judge failed to explain why he disallowed portions of the time for which counsel sought to bill. *Walker*, BRB No. 11-0323 BLA/A, slip op. at 7. The Board instructed the administrative law judge that if he awarded benefits on remand, he should reconsider whether the time claimant's counsel billed was reasonable, and provide his reasons for disallowing any time he found excessive. *Id.*

On remand, the administrative law judge found that employer rebutted the Section 411(c)(4) presumption by establishing that claimant did not have pneumoconiosis. The administrative law judge therefore denied benefits.

Upon review of claimant's appeal, the Board vacated the administrative law judge's finding that employer established that claimant did not have clinical pneumoconiosis, and instructed him, on remand, to reconsider the analog and digital x-ray evidence, and CT scan evidence, relating to clinical pneumoconiosis. *Walker v. Sahara Coal Trust*, BRB No 13-0326 BLA, slip op. at 4-11 (Apr. 29, 2014)(unpub.). The Board also vacated the administrative law judge's determination that the opinions of Drs. Repsher and Rosenberg established that claimant did not have legal pneumoconiosis. *Walker*, BRB No. 13-0326 BLA, slip op. at 11-12. The Board instructed the administrative law judge, on remand, to consider whether Dr. Rosenberg's opinion adequately addressed whether coal mine dust exposure was a factor in claimant's oxygenation abnormality, and to determine whether the record supported the opinions of Drs. Repsher and Rosenberg that claimant did not have legal pneumoconiosis because he did not have an obstructive impairment. *Id.* at 12.

On remand for the second time, the administrative law judge found that employer failed to establish that claimant had neither clinical nor legal pneumoconiosis, and failed to establish that pneumoconiosis did not contribute to his totally disabling impairment. Therefore, having found that employer failed to rebut the Section 411(c)(4) presumption, the administrative law judge awarded benefits. Furthermore, in accordance with the Board's instructions when it first remanded this case, the administrative law judge reconsidered claimant's counsel's fee petition and found counsel's request for 27 hours for preparing claimant's closing brief to be reasonable. Accordingly, the administrative law judge awarded claimant's counsel the full $15,504.00 she sought in fees.

On appeal, employer argues that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in awarding fees for all of the time claimant's counsel requested. Claimant has filed a response, urging the Board to affirm both the award of benefits and the attorney's fee. The Director, Office of Workers' Compensation

Programs, has not filed a response. Employer has filed a reply brief, reiterating its arguments on appeal.

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.[5] 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).

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden of proof shifted to employer to rebut the presumption by establishing that claimant had neither clinical nor legal pneumoconiosis, or by establishing that "no part" of claimant's totally disabling impairment was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found that employer failed to rebut the presumption by either method.

In considering whether employer established that claimant did not have legal pneumoconiosis, the administrative law judge weighed the opinions of Drs. Repsher and Rosenberg, both of whom opined that claimant did not have legal pneumoconiosis, but suffered from a restrictive impairment due to usual interstitial pneumonitis (UIP) or idiopathic pulmonary fibrosis (IPF) that was unrelated to coal mine dust exposure.[6] Decision and Order at 33-36; Director's Exhibit 22; Employer's Exhibits 1, 7, 8, 12. The administrative law judge discredited the opinions of Drs. Repsher and Rosenberg on multiple grounds, finding them to be unpersuasive and not probative. Decision and Order at 34-36. Accordingly, the administrative law judge found that employer failed to establish that claimant did not have legal pneumoconiosis. *Id.* at 36.

More specifically, the administrative law judge determined that Dr. Repsher's opinion was "generalized and conclusory, and fails to consider why [claimant] could not have suffered from legal pneumoconiosis." *Id*. at 34. The administrative law judge also discredited Dr. Repsher's opinion as contrary to the regulations, because Dr. Repsher

[5] Claimant's coal mine employment was in Illinois. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[6] The administrative law judge also considered the opinions of Drs. Houser, Rasmussen, and Sanjabi, all of whom concluded that claimant had legal pneumoconiosis. Director's Exhibit 8; Claimant's Exhibits 4, 5, 7.

"opined that [claimant] did not suffer from legal pneumoconiosis because [claimant] did not have an obstructive impairment such as COPD or emphysema." *Id.* The administrative law judge discounted Dr. Rosenberg's opinion for the same reason, noting that Dr. Rosenberg opined that claimant did not have legal pneumoconiosis because he did not have an obstructive impairment. *Id.* at 35. The administrative law judge concluded, moreover, that Dr. Rosenberg failed to explain his position in light of his receipt of claimant's treatment records, which contained a diagnosis of COPD. *Id.*

In addition, the administrative law judge noted that Dr. Rosenberg relied on x-ray and CT-scan evidence showing honeycombing and a lack of upper-lobe opacities in claimant's lungs, whereas legal pneumoconiosis could exist in the absence of clinical pneumoconiosis. *Id.* The administrative law judge also determined that Dr. Rosenberg "did not explain fully" why coal mine dust exposure was not a factor in the oxygen abnormality that Dr. Rosenberg identified in claimant. *Id.* Finally, the administrative law judge found that Dr. Rosenberg's description of IPF as an aggressive disease with an average of five years between diagnosis and death was inconsistent with his opinion that IPF was indicated by a drop in claimant's PO2 over a five-year period. *Id.* The administrative law judge also found that Dr. Rosenberg's conclusion that claimant had IPF rather than legal pneumoconiosis was inconsistent with his testimony that claimant's gradual, persistent increase in shortness of breath was more consistent with pneumoconiosis than IPF. *Id.*

Employer argues that the administrative law judge erred in discrediting the opinions of Drs. Repsher and Rosenberg that claimant did not have legal pneumoconiosis. Employer contends that the administrative law judge "overlook[ed]" Dr. Repsher's opinion, which, in employer's view, "considered at length" the possibility that claimant had legal pneumoconiosis. Employer's Brief at 24 (unpaginated). Employer thus argues that the administrative law judge's reasons for discrediting Dr. Repsher's opinion are "inaccurate and internally inconsistent." *Id.* Employer also contends that the administrative law judge substituted his opinion for that of Dr. Rosenberg regarding the time between onset of IPF and death. *Id.*

Employer, however, does not challenge, either in its brief or its reply brief, the administrative law judge's decision to discredit both physicians' opinions as being contrary to the regulations, as they concluded that claimant did not have legal pneumoconiosis because he did not have an obstructive impairment.[7] We therefore

[7] Dr. Repsher wrote in a supplemental report that claimant "does not have legal pneumoconiosis, because he does not have an obstructive impairment, such as COPD or emphysema." Employer's Exhibit 12. In his deposition, Dr. Rosenberg testified that claimant did not have an obstructive impairment, and agreed when asked if the lack thereof eliminated a diagnosis of legal pneumoconiosis. Employer's Exhibit 7 at 13. In

affirm the administrative law judge's unchallenged decision to discredit the opinions of Drs. Repsher and Rosenberg on that basis.[8] *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Moreover, such a challenge would lack merit. In light of the Section 411(c)(4) presumption that claimant had legal pneumoconiosis, which the regulations define to include "any chronic *restrictive or obstructive* pulmonary disease arising out of coal mine employment," it was reasonable for the administrative law judge to discredit the opinions of Drs. Repsher and Rosenberg. *See* 20 C.F.R. §718.201(a)(2) (emphasis added); *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1321, 19 BLR 2-192, 2-206 (7th Cir. 1995).

Because the administrative law judge permissibly discredited the only two medical opinions to conclude that claimant did not have legal pneumoconiosis, we affirm his determination that employer failed to establish that claimant did not have legal pneumoconiosis. As a result, employer cannot rebut the Section 411(c)(4) presumption by establishing that claimant did not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i). Therefore, we need not consider employer's arguments regarding the existence of clinical pneumoconiosis, *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985), and we affirm the administrative law judge's finding that employer failed to rebut the presumption by proving that claimant did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); Decision and Order at 36.

Finally, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that pneumoconiosis did not contribute to claimant's totally disabling impairment, pursuant to 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge credited the opinions of Drs. Rasmussen and Houser that pneumoconiosis was "a substantially contributing cause" of claimant's disabling impairment, and discredited the contrary opinions of Drs. Repsher and Rosenberg, reasoning that "[i]t would be illogical to conclude that exposure to coal dust did not cause or contribute to the Claimant's disability based on the medical

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addition, Dr. Rosenberg wrote in a supplemental report that "without the presence of obstructive lung disease, [claimant] does not have legal CWP." Employer's Exhibit 13.

[8] Nor does employer anywhere challenge, with the exception of the administrative law judge's evaluation of Dr. Rosenberg's opinion concerning the time between onset of IPF and death, the several other grounds on which the administrative law judge discredited Dr. Rosenberg's opinion. Therefore, we affirm them. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

opinions of doctors who have opined that the Claimant did not have pneumoconiosis."[9] Decision and Order at 37-38. It was reasonable to discredit the opinions of Drs. Repsher and Rosenberg on the issue of disability causation because they did not diagnose claimant with legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove legal pneumoconiosis.[10] *See Consolidation Coal Co. v. Director, OWCP* [*Burris*], 732 F.3d 723, 735, 25 BLR 2-405, 2-425-26 (7th Cir. 2013). Therefore, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption, and affirm the award of benefits.

Attorney's Fees

Employer argues that it was irrational and arbitrary for the administrative law judge to award claimant's counsel all 27 hours she requested for preparing her closing brief before the administrative law judge. Employer's Brief at 25-26 (unpaginated). Employer contends that counsel's use of "block billing" for the 27 hours failed to identify the work she performed on particular days or how much time she spent on those tasks. *Id*. Employer also argues that the administrative law judge failed to explain why his previous award of 10 hours was insufficient. *Id*. We reject employer's allegations of error.

The amount of an attorney's fee awarded by an administrative law judge 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 applicable law. *Zeigler Coal Co. v. Director, OWCP* [*Hawker*], 326 F.3d 894, 902 (7th Cir. 2003); *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc). We must review the

[9] The administrative law judge appears to have mistakenly cited the "substantially contributing cause" standard for disability causation, pursuant to 20 C.F.R. §718.204(c), rather than the "no part" standard applicable for rebuttal of the Section 411(c)(4) presumption, pursuant to 20 C.F.R. §718.305(d)(1)(ii). As we explain above, however, the administrative law judge reasonably discredited the disability causation opinions of Drs. Repsher and Rosenberg. Thus, any error by the administrative law judge in citing an incorrect rebuttal standard was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985).

[10] Because the administrative law judge provided a valid reason for his determination that Dr. Repsher's opinion on the cause of claimant's disability was not probative, we need not consider employer's argument that Dr. Repsher's opinion, that claimant was disabled "from his age alone," rebutted the Section 411(c)(4) presumption. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Employer's Brief at 24-25 (unpaginated); Employer's Exhibit 8 at 53-54.

administrative law judge's finding that counsel spent a reasonable amount of time on her closing brief under "a highly deferential version of the 'abuse of discretion' standard." *Hawker*, 326 F.3d at 902.

Claimant's counsel billed, in one entry in her fee application, a total of 27 hours between March 28 and March 31, 2010, and between July 14 and July 16, 2010, for preparing claimant's closing brief and a statement on the applicability to this claim of Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148, which reinstated the Section 411(c)(4) presumption while this claim was pending. *Id*. In his initial decision, the administrative law judge found only 6 hours for the PPACA statement and 4 hours for the closing brief to be appropriate. The Board vacated this determination because the administrative law judge failed to provide a clear explanation for why he disallowed 17 of the 27 hours requested for these tasks. *Walker*, BRB No. 11-0323 BLA/A, slip op. at 9. After awarding benefits following the Board's second remand, the administrative law judge reexamined counsel's closing brief and determined that all of the time spent was necessary and reasonable:

> This case was complex, with a plethora of medical evidence. Ms. Fogel's brief contains an exceptionally detailed and thorough summary and analysis of the medical evidence. Furthermore, Ms. Fogel began writing the brief before the PPACA went into effect, and then was required to go back and include an issue statement. Although an attorney of Ms. Fogel's expertise should not normally require 27.00 hours to write a closing brief, the change in the law necessitated a comprehensive and in-depth analysis of case law with no recent precedent. I note there were exceptional circumstances at hand in this case, and in light of the foregoing factors, I find . . . the entry dated March 28 to March 31, 2010 and July 14 to July 16, 2010, to be reasonable.

Decision and Order at 39. Accordingly, the administrative law judge found claimant's counsel entitled to the full 27 hours requested in her application. *Id*.

Employer has not shown that the administrative law judge abused his discretion in awarding claimant's counsel the full amount she requested in fees, or that his decision was arbitrary or irrational. *See Hawker*, 326 F.3d at 902. Nor has employer explained why counsel's use of "block billing" would have prevented the administrative law judge

from determining whether counsel's requested hours were reasonable.[11] To the contrary, the administrative law judge clearly explained why he found 27 hours reasonable, properly citing the quality of counsel's work, her qualifications, the complexity of the issues, and the "exceptional circumstances" created by the change in law while the claim was pending. *See* 20 C.F.R. §725.366(b); *Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316-17 (1984). We therefore affirm the administrative law judge's determination that claimant's counsel was entitled to all 27 hours she requested, and we affirm his award of $15,504.00 in attorney's fees.

[11] Claimant's counsel detailed the work she performed over those 27 hours: "Prepare and file Claimant's post-hearing brief: outline procedural history, miner's history, issues; review and analyze rulings on evidentiary issues and the medical evidence; draft, research, review & edit; supplement with argument re: 15 year presumption and include two additional reports from RO experts, draft final issue argument, final review, revisions and edit[.]" Attorney Fee Application at 7.

Accordingly, the administrative law judge's Decision and Order on Second Remand Awarding Benefits and Supplemental Order Awarding Attorney's Fees and Costs are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge