

BRB No. 02-0681 BLA

SANDRA K. RAY)	
(Widow of RICHARD C. RAY))	
)	
Claimant-Respondent)	
)	
v.)	
)	DATE ISSUED:
MIDLAND COAL COMPANY)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-In-Interest)	DECISION and ORDER

Appeal the Decision and Order and Supplemental Decision and Order Awarding Attorney's Fees of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

James M. Phemister (Legal Practice Clinic, Washington & Lee University School of Law), Lexington, Virginia, for claimant.

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

Michelle S. Gerdano (Howard M. Radzely, Acting 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and Supplemental Decision and

Order Awarding Attorney's Fees (1999-BLA-1204) of Administrative Law Judge Fletcher E. Campbell, Jr. rendered on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).

¹ The miner died on September 26, 1997, and claimant filed her application for survivor's benefits on March 9, 1998. Director's Exhibit 1. The district director initially denied benefits, Director's Exhibit 14, but upon consideration of additional medical evidence, later awarded benefits. Director's Exhibit 32. Employer requested a hearing, Director's Exhibit 33, which was held before the administrative law judge on January 16, 2002.

In the ensuing Decision and Order, the administrative law judge credited the miner with "more than ten years" of coal mine employment,

² Decision and Order at 5, found that the x-ray evidence was inconclusive for the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but found that the medical opinion evidence established that the miner's chronic lung disease was due in part to coal mine dust exposure and thus constituted legal pneumoconiosis. See 20 C.F.R. §§718.202(a)(4); 718.201. The administrative law judge found that the miner's death was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded survivor's benefits. In a Supplemental Decision and Order, the administrative law judge awarded claimant's counsel a fee of \$7,360.00 for services performed, and \$2,831.58 for costs incurred, while the case was pending before the Office of Administrative Law Judges.

On appeal, employer contends that the administrative law judge erred in his analysis of the medical opinion evidence pursuant to Sections 718.202(a)(4) and 718.205(c)(2). Employer also contends that the administrative law judge erred in awarding claimant's counsel a fee based on an hourly rate of \$200.00, and in awarding medical expert fees. Claimant responds, urging affirmance of the award of benefits and of the award of attorney's fees and medical expert fees. The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing with

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² Because the miner's coal mine employment occurred in Illinois, Director's Exhibits 3, 4, 36-2, 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*).

employer that the administrative law judge improperly presumed that the miner's chronic obstructive pulmonary disease (COPD) arose out of coal mine employment. Employer has filed reply briefs reiterating its contentions regarding both the benefits award and the fee award.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. See 20 C.F.R. §718.205(a)(1)-(3); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). For survivor's claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Peabody Coal Co. v. Director, OWCP [Railey]*, 972 F.2d 178, 183, 16 BLR 2-121, 2-128 (7th Cir. 1992). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.202(a)(4), employer argues that the administrative law judge erred in finding that the miner had COPD. Employer's Brief at 11-14. The physicians of record agreed that the miner was totally disabled by a respiratory impairment, much of which was restrictive in nature, and that he eventually died of respiratory failure. Treatment records document that the miner had advancing pulmonary fibrosis³ and was a candidate for a lung transplant. Director's Exhibit 30.

Most of the physicians of record, including those who were treating the miner for his progressive pulmonary problems, also diagnosed COPD. Director's Exhibits 9, 25, 30, 31, 36-8; Claimant's Exhibits 1, 2, 4; Employer's Exhibit 6 at 25-28 and 51-52. Dr. Fino, however, believed that the miner had only restriction related to the lung fibrosis, not obstruction, and thus did not have COPD. Employer's Exhibit 2, 7 at 14-15. Dr. Renn diagnosed restriction, but did not indicate whether the miner also had COPD. Employer's Exhibit 4. However, Dr. Renn did diagnose bullous emphysema, Employer's Exhibit 4 at 6, a condition that other physicians had identified as evidence of COPD. Employer's Exhibit 6 at 25-28 and 51-52; Claimant's Exhibit 1 at 2.

³ The administrative law judge did not find the miner's pulmonary fibrosis to be pneumoconiosis.

The administrative law judge found that the miner had COPD. Employer alleges that the administrative law judge merely counted the number of physicians diagnosing COPD to find Dr. Fino's opinion outweighed, contrary to the holding of the United States Court of Appeals for the Seventh Circuit in *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). Employer's Brief at 11-14. Employer's contention lacks merit. The administrative law judge found that the miner had COPD not merely because "fully seven physicians, including Decedent's treating physician . . . have at one time or another opined that Decedent had COPD," the administrative law judge also considered that Dr. Wheeler, "[e]mployer's consultant and a noted radiologist," diagnosed COPD based on CT scans and x-rays.

⁴ Decision and Order at 6. The administrative law judge considered Dr. Fino's opinion that pulmonary function studies demonstrated the absence of COPD, but was not persuaded that "such tests constitute the 'gold standard' of COPD diagnosis." *Id.* Because the administrative law judge did not merely count the number of physicians diagnosing COPD, and because the weighing of expert opinions is for the administrative law judge, *Livermore v. Amax Coal Co.*, 297 F.3d 668, 672, 22 BLR 2-399, 2-407 (7th Cir. 2002), we affirm the administrative law judge's discretionary determination that there was "insufficient basis on which to credit Dr. Fino over the seven contrary experts." Decision and Order at 6.

Employer alleges that the administrative law judge mischaracterized Dr. Renn's opinion as supporting a finding of COPD when Dr. Renn diagnosed a restrictive disorder. Employer's Brief at 12-13. Review of the Decision and Order reveals that the administrative law judge found that Dr. Renn's opinion did not necessarily contradict a finding of COPD. Decision and Order at 6 ("I find that Dr. Renn did not rule out COPD.") The administrative law judge's rationale for this finding was reasonable and is supported by substantial evidence. The administrative law judge noted correctly that although Dr. Renn did not use the term COPD, he diagnosed bullous emphysema, a condition that other physicians identified as consistent with COPD. Decision and Order at 6, citing Dr. Wheeler's deposition testimony. Employer argues that the administrative law judge substituted his own judgment for that of Dr. Renn, but in reality, the administrative law judge relied on the opinion of one of employer's own experts in evaluating Dr. Renn's opinion. The administrative law judge's analysis of the expert opinions was reasonable. See *Livermore*, 297 F.3d at 672, 22 BLR at 2-407. Consequently, we affirm the administrative law judge's finding that the miner suffered from COPD.

Both employer and Director contend that the administrative law judge erred by

⁴ The record reflects that Dr. Koenig, a pulmonologist, shared Dr. Wheeler's opinion that bullous emphysema on the miner's x-rays and CT scans demonstrated COPD. Claimant's Exhibit 1 at 2.

presuming that the miner's COPD arose out of coal mine employment. Employer's Brief at 10-11, 14-15; Director's Brief at 1. This contention has merit. The burden is on claimant to establish by a preponderance of the evidence that the miner had pneumoconiosis as defined under Section 718.201. 20 C.F.R. §§718.205(a)(1), 718.202(a)(4); *Trumbo*, 17 BLR at 1-87-88. Here, the administrative law judge did not determine whether claimant established that the miner's COPD was "significantly related to, or substantially aggravated by, dust exposure in coal mine employment," 20 C.F.R. §718.201(b), but instead employed the presumption of pneumoconiosis causation contained in Section 718.203(b) to find that there was no evidence that the COPD was not caused or aggravated by coal mine employment. Decision and Order at 7. The Section 718.203(b) presumption that a miner's pneumoconiosis arose out of coal mine employment is invoked only after the claimant establishes the existence of pneumoconiosis pursuant to Section 718.202(a). 20 C.F.R. §718.203(b); see *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70, 1-76 (1990). Because the administrative law judge placed the burden on employer to disprove that the miner's COPD was related to coal mine dust exposure, rather than requiring claimant to prove that the miner's COPD was pneumoconiosis, the administrative law judge's Decision and Order is not in accordance with law. 33 U.S.C. §921(b)(3). Consequently, we vacate the administrative law judge's finding pursuant to Section 718.202(a)(4) and remand this case for him to determine whether claimant has established by a preponderance of the evidence that the miner's COPD was pneumoconiosis as defined under Section 718.201. See *Trumbo*, 17 BLR at 1-87-88.

Employer contends that on remand the administrative law judge must consider that it is scientifically impossible for the miner to have developed legal pneumoconiosis ten years after leaving mining. Employer's Brief at 13; Reply at 7-9. The Director responds that Section 718.201, which recognizes pneumoconiosis as "a latent and progressive disease," 20 C.F.R. §718.201(c), makes no distinction between clinical and legal pneumoconiosis with regard to progressivity. Director's Brief at 2. Section 718.201(c) is intended to mean that pneumoconiosis may be progressive. *Natl Mining Ass'n v. Department of Labor*, 292 F.3d 849, 869, --- BLR --- (D.C. Cir. 2002)(Discussing agency's construction of Section 718.201(c)). In this case, the record contains evidence that the miner had progressive respiratory deterioration, and medical opinions connecting part of the miner's impairment to coal mine dust exposure. The record contains no scientific evidence to counter the regulatory assumption that pneumoconiosis may be progressive. See *Old Ben Coal Co. v. Scott*, 144 F.3d 1045, 1048, 21 BLR 2-391, 2-396-97 (7th Cir. 1998)(Whether pneumoconiosis is progressive is a question of legislative fact). Therefore, we reject employer's argument that as a matter of science the administrative law judge cannot find that the miner developed pneumoconiosis.

Pursuant to Section 718.205(c), employer contends that the administrative law

judge made several errors in finding that legal pneumoconiosis hastened the miner's death. Because we have vacated the administrative law judge's finding that the miner had legal pneumoconiosis, we also vacate the finding that legal pneumoconiosis hastened the miner's death pursuant to Section 718.205(c)(2). However, to guide the proceedings on remand in the event the administrative law judge again finds the existence of pneumoconiosis established, we briefly address certain issues raised by employer.

Employer's contention that the administrative law judge erred by analyzing Dr. Amin's undated death causation opinion under revised Section 718.104(d), because there is no evidence that Dr. Amin's report was generated after the effective date of the revised regulations, lacks merit. Employer's Brief at 16; see 20 C.F.R. §718.101(b)(Providing that the revised quality standards apply to all evidence developed after January 19, 2001 in connection with a claim). Dr. Amin's report is undated, but as the administrative law judge correctly noted, Dr. Amin's curriculum vitae (CV), which Dr. Amin attached to his report and faxed to claimant's counsel along with the report, refers to a clinical study that Dr. Amin conducted in March, 2001. Claimant's Exhibit 1, CV attachment at 6. The administrative law judge also noted, correctly, that Dr. Amin faxed his report in December, 2001. Claimant's Exhibit 1, bearing "12/18/01" date stamp. The administrative law judge's finding that Dr. Amin's report was generated after January 19, 2001 was reasonable, and the Board will not substitute its inferences for those of the administrative law judge. *Mays v. Piney Mountain Coal Co.*, 21 BLR 1-59, 1-64 (1997)(Dolder, J., concurring and dissenting). Therefore, on remand the administrative law judge should apply the criteria of Section 718.104(d) to Dr. Amin's opinion.

Employer argues that the administrative law judge erroneously rejected Dr. Fino's death causation opinion on the ground that Dr. Fino was mistaken as to whether the miner had COPD, because Dr. Fino assumed that the miner had COPD in rendering his opinion that the miner's death was unrelated to pneumoconiosis. Employer's Brief at 19. Review of Dr. Fino's report and testimony reveals no point at which Dr. Fino assumed that the miner had COPD for purposes of assessing death causation. Employer's Exhibits 2, 7. Dr. Fino's view was that the miner did not have COPD, and he therefore disagreed with the view that COPD related to coal mine dust exposure hastened the miner's death. Employer's Exhibit 7 at 19. If on remand the administrative law judge finds that the miner's COPD constituted legal pneumoconiosis, then for purposes of assessing whether pneumoconiosis hastened the miner's death, the administrative law judge could permissibly find that Dr. Fino's death causation opinion was rendered under the mistaken belief that the miner did not have COPD. See *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986).

Employer challenges the administrative law judge's award of an attorney's fee, alleging that the hourly rate is unreasonable and that the administrative law judge erred in awarding expert witness fees for witnesses who did not attend the

hearing. 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, 1-108 (1998)(*en banc*).

Subsequent to the issuance of the administrative law judge's Decision and Order, claimant's counsel submitted a complete, itemized fee petition to the administrative law judge, requesting \$7,660.00 for 38.3 hours of services at \$200.00 per hour, plus \$2,831.58 in expenses. Employer filed objections to the requested hourly rate and to several time and expense entries. Upon consideration of the fee petition and employer's objections thereto, the administrative law judge found that \$200.00 an hour was a reasonable rate. Supplemental Decision and Order at 2. Additionally, the administrative law judge struck 1.5 hours of time, but rejected employer's argument that claimant was not entitled to recover the fees of experts who did not attend the hearing. *Id.* at 2-3. The administrative law judge awarded a fee of \$7,360.00 plus \$2,831.58 in expenses. *Id.* at 3.

Employer argues that the administrative law judge abused his discretion in finding counsel's requested hourly rate of \$200.00 to be reasonable. Employer asserts that counsel did not offer sufficient proof that his customary hourly rate is \$200.00. Employer's Brief at 5-6. The record reflects that in counsel's fee petition, he represented that \$200.00 an hour has been the customary billing rate for attorneys working with the Legal Practice Clinic at Washington & Lee University since January, 2000. Fee Petition Cover Letter, July 8, 2002, and "Counsel's Statement Regarding Customary Hourly Rate." He documented several occasions on which he was awarded that rate by the Office of Administrative Law Judges (OALJ). Fee Petition, Attachments (2)(d). The administrative law judge considered the factors required by Section 725.366(b) and found that \$200.00 an hour was reasonable in light of the quality of counsel's representation and the nature of the issues involved in the case. Supplemental Decision and Order at 2; 20 C.F.R. §725.366(b). The administrative law judge also found "very persuasive" the attached OALJ orders previously granting fees at the \$200.00 rate. *Id.*

We detect no abuse of discretion in the administrative law judge's finding that \$200.00 was a reasonable hourly rate. See *Jones*, 21 BLR at 1-108. Employer argues that the administrative law judge erred by relying on prior fee awards to determine that counsel's hourly rate was reasonable in this case. Employer's Brief at 5-6. In *Amax Coal Co. v. Director, OWCP*, [*Chubb*], 312 F.3d 882, 895, --- BLR --- (7th Cir. 2002), the Seventh Circuit court held that claimant's counsel properly documented her fee petition to the administrative law judge by showing what she was awarded in other black lung cases. Consequently, we reject employer's allegation of error.

Employer argues that the administrative law judge abused his discretion in awarding expert witness fees for witnesses who did not attend the hearing.

Employer's Brief at 3-5. Employer's contention lacks merit. Section 28(d) of the Longshore Act permits the recovery of fees for medical experts who do not attend the hearing. *Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894, 899-902, - -- BLR --- (7th Cir.

2003), *aff'g Hawker v. Zeigler Coal Co.*, 22 BLR 1-177 (2001). Therefore, we reject employer's contention. Because employer has not demonstrated an abuse of discretion in the administrative law judge's award of a fee and expenses, we affirm the fee award. See *Jones*, 21 BLR at 1-108. A fee award is not enforceable until the claim has been successfully prosecuted and all appeals are exhausted. *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 n.9 (1995).

Accordingly, the administrative law judge's Decision and Order is affirmed in part and vacated in part and the case is remanded for further consideration consistent with this opinion, and the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge