BRB No. 03-0627 BLA

BOB L. SZCZEBLEWSKI	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 06/29/2004
	)	
OLD BEN COAL COMPANY	)	
	)	
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 and Supplemental Decision and Order Awarding Attorney's Fees of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

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

Kathy L. Snyder (Jackson & Kelly, PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order and Supplemental Decision and Order Awarding Attorney=s Fees (2001-BLA-0561) of Administrative Law Judge Robert L. Hillyard awarding benefits and attorney fees 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 administrative law judge found twenty-eight years of coal mine

[1]The Department of Labor has amended the regulations implementing the Federal Coal

employment and that employer was the responsible operator. Decision and Order at 4-5. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718, the administrative law judge, after reviewing all of the relevant evidence of record, concluded that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4) and the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304.[2] Decision and Order at 18-27. Accordingly, benefits were awarded. In a supplemental decision, the administrative law judge also awarded attorney fees to both counsels who represented claimant during the litigation of this claim.

On appeal, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1), (4) and that the evidence was sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Employer further challenges the award of attorney fees. Claimant responds, urging affirmance of the award of benefits and attorney fees as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.[3]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 in a living miner's claim filed pursuant to 20 C.F.R. Part 718, 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; *Gee v. W.G. Moore and Sons*, 9

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]The record indicates that claimant, Bob L. Szczeblewski, filed his claim for benefits on October 5, 1999, in which benefits were awarded by the district director on November 1, 2000. Director's Exhibits 1, 23. Employer requested a hearing on November 28, 2000 and the case was transferred to the Office of Administrative Law Judges on February 27, 2001. Director's Exhibits 28, 31.

[3]The administrative law judge's length of coal mine employment and responsible operator determinations as well as his findings pursuant to 20 C.F.R. §718.202(a)(2) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

BLR 1-4 (1986)(*en banc*). 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*).

Employer initially contends that the administrative law judge's Decision and Order fails to comport with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).[4] We agree. Employer asserts that the administrative law judge erred in failing to explain his finding that the x-ray evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). The administrative law judge initially noted that there were two x-rays read by twenty-six physicians. Decision and Order at 18. The administrative law judge further stated that he would not consider the readings by the physicians with no expertise in reading x-rays. Decision and Order at 18. The administrative law judge found that twenty-four interprtations were conducted by physicians who are B readers and fifteen of whom were also Board-certified radiologists. Decision and Order at 18; Director's Exhibits 10, 11, 17-19, 21, 24-26; Claimant's Exhibits 1-10; Employer's Exhibits 1, 3, 6, 7, 10. The administrative law judge further noted that eight of the fifteen interpretations by the dually qualified physicians were read as positive and seven were read as negative and of the nine physicians who were B readers only, three were positive, five were negative and one was unreadable. Decision and Order at 18; Director's Exhibits 10, 11, 17-19, 21, 24-26; Claimant's Exhibits 1-10; Employer's Exhibits 1, 3, 6, 7, 10. Considering this evidence, the administrative law judge determined that the positive interpretation by Dr. Miller, a B reader and Board-certified radiologist, was entitled to little weight as the physician noted that the film quality was poor. Decision and Order at 18-19. The administrative law judge then concluded that based upon the numerous positive interpretations by the highly qualified readers, the x-ray evidence establishes the existence of pneumoconiosis. Decision and Order at 19.

Focusing upon the October 6, 2000, and the December 6, 1999, x-rays, the administrative law judge found that eight dually qualified doctors read these x-rays as positive, while seven such doctors read them as negative. The administrative law judge further found that of the B readers, three read these x-rays as negative while five read them as positive.[5] Ultimately, the administrative law judge concluded that "[b]ased upon the numerous positive interpretations by the highly qualified readers…the x-ray evidence

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[4]The Administrative Procedure Act requires each adjudicatory decision to include a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record...." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

[5]One additional B reader classified one of the x-rays as unreadable.

establishes the existence of pneumoconiosis." Decision and Order – Award of Benefits at 18. As indicated earlier, in claims arising under Part 718, claimant has the burden to establish entitlement to benefits. *Gee*, 9 BLR 1-4 (1986); *Trent*, 11 BLR 1-26 (1987); *Perry*, 9 BLR 1-1 (1986). The mere conclusion that claimant has submitted "numerous" positive interpretations does not sufficiently explain the basis for determining that claimant has met his burden of establishing the existence of pneumoconiosis by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994). We therefore vacate the administrative law judge's finding that the x-ray evidence establishes the existence of pneumoconiosis and we remand this case for reconsideration of the evidence pursuant to Section 718.202(a)(1). *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); *see also Witt v. Dean Jones Coal Co.*, 7 BLR 1-21 (1984); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Additionally, as the administrative law judge relies upon his analysis of the x-ray evidence in finding the existence of complicated pneumoconiosis established pursuant to Section 718.304, Decision and Order at 20-21, we also vacate that finding and instruct the administrative law judge to reconsider the evidence pursuant to that section.

With respect to the administrative law judge's consideration of the medical evidence pursuant to Sections 718.202(a)(4) and 718.304, employer contends that the administrative law judge violated the APA as he failed to consider all of the relevant evidence or fully explain his weighing process. We agree. Employer asserts that the administrative law judge erred in relying upon Dr. Tuteur's opinion to find complicated pneumoconiosis, failed to consider the CT scan interpretations of Drs. Repsher and Hippensteel and impermissibly substituted his opinion for those of medical experts when he found that the evidence of record supported a finding of simple and complicated pneumoconiosis. Employer's Brief at 10-17.

Employer contends that the administrative law judge erred in failing to consider the CT scan interpretations by Drs. Repsher and Hippensteel. Employer=s Brief at 10. In his discussion of the CT scan evidence, the administrative law judge specifically considered the interpretations by Drs. Cohen, Perme, Wiot, Rosenbaum, Spitz, Meyer, Fino, Renn and Castle but does not mention the interpretations by Drs. Repsher and Hippensteel. Decision and Order at 21; Director's Exhibits 21, 24-26; Claimant's Exhibit 11; Employer's Exhibits 1, 3, 5, 6, 7-9, 12, 13. Because it is unclear as to whether the administrative law judge actually considered all the CT scan evidence, we vacate the administrative law judge's findings with respect to the CT scan evidence and remand the case for further consideration. *See Consolidation Coal Co. v. Director, OWCP [Stein]*, 294 F.3d 885, 22 BLR 2-409 (7th Cir. 2002).[6]

[6]This case arises within the jurisdiction of the United States Court of Appeals for the

Employer further asserts that the administrative law judge impermissibly substituted his opinion for those of medical experts when he found that the medical opinion evidence of record supported a finding of simple and complicated pneumoconiosis. Employer's Brief at 13, 15-17. In concluding that claimant established the existence of complicated pneumoconiosis, the administrative law judge considered the CT scan and medical opinion evidence which did not diagnose complicated pneumoconiosis but instead offered other possible diagnoses such as tuberculosis, histoplasmosis, or other granulomatous disease. Decision and Order at 21-23. The administrative law judge found, however, that because there was no clinical correlation which established that claimant has or had any of those diseases, *i.e.*, there was no evidence that claimant ever had tuberculosis and there was no evidence of record supportive of a finding that claimant has or had histoplasmosis or other granulomatous disease, he accorded "those opinions less weight" and found that they "are outweighed by the better reasoned, documented, and supported opinions of the physicians who read the Claimant=s x-rays and CT scan as showing complicated pneumoconiosis." Decision and Order at 23. The administrative law judge also relied upon this basis to accord less weight to the opinions stating that claimant does not have coal workers' pneumoconiosis pursuant to Section 718.202(a)(4). Decision and Order at 23-26.

Although the weighing of the evidence is for the administrative law judge, the interpretation of medical data is for the medical experts. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984); *see also Peabody Coal Co. v. Helms*, 859 F.2d 486, 13 BLR 2-449 (7th Cir. 1988). However, as employer contends, there is no medical evidence of record suggesting that a medical history of tuberculosis or granulomatous disease is necessary in order to make a diagnosis of histoplasmosis or any other granulomatous disease. Moreover, the physicians who offered these opinions were highly qualified and based their diagnosis upon objective clinical data and explained the basis for their opinions. *See* Director's Exhibits 21, 24-26; Employer's Exhibits 1-9, 11-13. Because the administrative law judge irrationally substituted his own conclusions for those of the medical experts, we vacate his findings under Sections 718.202(a)(4) and 718.304 and remand the case for further consideration. *Marcum*,11 BLR 1-23.

Employer additionally asserts that the administrative law judge made a factual error in relying on Dr. Tuteur's medical opinion to find the existence of complicated pneumoconiosis, citing to the Decision and Order at 24, 26. Employer's Brief at 14. We disagree. The administrative law judge did not rely upon this opinion, as employer asserts, to

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Seventh Circuit as the miner was last employed in the coal mine industry in the State of Illinois. *See* Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

find the existence of complicated pneumoconiosis pursuant to Section 718.304. Director's Exhibit 21; Decision and Order at 20-23. Rather, contrary to employer's arguments, the administrative law judge accurately summarized Dr. Tuteur's medical diagnosis of simple pneumoconiosis in his analysis of the evidence pursuant to Section 718.202(a)(4). Director's Exhibit 21; Decision and Order at 23-26.

We further reject employer's assertion that the administrative law judge is required to determine if the presence of pneumoconiosis is established pursuant to Section 718.202(a) by weighing all of the relevant evidence together in light of *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d. Cir. 1997). Employer's Brief at 8-9. The United States Court of Appeals for the Third Circuit held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a claimant suffers from the disease. *Williams,* 114 F.3d 22, 21 BLR 2-104. Consequently, within the jurisdiction of the Third Circuit, if the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis pursuant to any part of Section 718.202(a), then the administrative law judge must weigh all the evidence relevant to Section 718.202(a)(1)-(4) together in determining whether claimant suffers from pneumoconiosis. *Williams,* 114 F.3d 22, 21 BLR 2-104. However, inasmuch as the instant case arises within the jurisdiction of the Seventh Circuit, *see n. 5*, and the Seventh Circuit has not adopted the reasoning by the Third Circuit, we decline to apply the holding of *Williams,* in this case. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *contra*, *Williams*, 114 F.3d 22, 21 BLR 2-104; *Island Creek Coal Co. v. Compton,* 211 F.3d 203, 22 BLR 2-164 (4th Cir. 2000).

With respect to the award of attorney fees, employer contends that the administrative law judge erred in failing to find the hourly rate of $200 to be excessive. Employer's Brief at 18-24. Claimant responds asserting that the administrative law judge properly awarded the requested hourly rate as it is based on substantial evidence. Claimant's Brief at 15-17.

An award of attorney fees is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion or not in accordance with law. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989); *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

With respect to the issue of attorney's fees, counsel, Sandra M. Fogel, requested a fee of $10,697.00 for 39.50 hours of services performed by her at an hourly rate of $200.00, for eight hours of services at an hourly rate of $200.00 by Attorney Bruce Wissore, and reimbursement for expenses totaling $1,197.00.[7] Employer objected to the hourly rate. In

[7]As employer does not challenge the administrative law judge's award of $1,197.00 in expenses, it is affirmed. *Skrack*, 6 BLR 1-710.

his Supplemental Decision and Order Awarding Attorney's Fees, the administrative law judge found the hourly rate to be reasonable and therefore granted counsel a fee of $10,697.00. Supplemental Decision and Order at 3.

Employer argues that the administrative law judge erred in failing to consider the applicable mandatory factors set forth in 20 C.F.R. §725.366(b), which include the quality of representation, qualifications of the representatives, complexity of the legal issues involved, level of proceedings to which the claim was raised, and the level at which counsel entered the proceedings. 20 C.F.R. §725.366(b); Employer's Brief at 19; *Pritt v. Director, OWCP*, 9 BLR 1-159 (1986). Contrary to employer's argument, however, a review of the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees reveals that he specifically considered these factors in awarding the attorney fee in this instance. 20 C.F.R. §725.366(b); Supplemental Decision and Order at 2-3; *Pritt*, 9 BLR 1-159.

Employer further argues that the administrative law judge erred in finding that $200.00 per hour was the customary billing rate for the attorneys representing claimant in this case, citing *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 22 BLR 2-311 (7th Cir. 2001). Employer's Brief at 19-24. In *McCandless*, the Seventh Circuit stated that the rate chargeable against a mine operator must be market-based and that a determination that the rate requested is "reasonable" is not a substitute for evidence establishing that the hourly rate is market-based. *McCandless*, 255 F.3d at 470, *citing Gusman v. Unisys Corp.*, 986 F.2d 1146, 1150 (7th Cir. 1993).

In the instant case, counsel submitted a fee petition before the administrative law judge stating that the usual and customary rate was $200.00 per hour and included a list of cases in which this fee was awarded. Counsel further informed the administrative law judge that the firm only handled black lung claims and had no fee paying clients from which to determine a market-based rate. Supplemental Decision and Order at 2. The administrative law judge considered this information in conjunction with the subsequent decision by the Seventh Circuit in *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 23 BLR 2- (7th Cir. 2002) and concluded that employer's assertion that the hourly rate was excessive and unreasonable lacked merit. Supplemental Decision and Order at 2-3.

Contrary to employer's contention, the administrative law judge acted within his discretion in determining that the hourly rate was not excessive. *See Chubb*, 312 F.3d 882. The record clearly indicates that $200.00 per hour is the usual and customary fee, that the firm only litigates black lung cases and does not have any regular fee-paying clients to determine a market-based rate, that this hourly rate has been awarded in a number of similar cases and employer has not submitted any specific contrary evidence that the fee is unreasonable. Based upon the circumstances of this case, the administrative law judge properly concluded that a rate of $200.00 per hour was not unreasonable or excessive. *See*

Chubb, 312 F.3d 882*; Peabody Coal Co. v. Estate of J.T. Goodloe*, 299 F.3d 666, 22 BLR 2-483 (7th Cir. 2002). Because employer has not demonstrated that the administrative law judge's award of attorney's fees is arbitrary, capricious, an abuse of discretion or not in accordance with law, we affirm the administrative law judge's attorney fee award. *See Chubb*, 312 F.3d 882*; Goodloe*, 299 F.3d 666; *Abbott*, 13 BLR 1-15 (1989); *Marcum*, 2 BLR 1-894 (1980).

We note, however, that in order to be entitled to an award of attorney's fees under Section 28(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928, as incorporated into the Act by 30 U.S.C. §932(a), claimant's counsel must engage in the successful prosecution of a claim.[8] *See Beasley v. Sahara Coal Co.*, 16 BLR 1-6 (1991); *see generally Director, OWCP v. Baca*, 927 F.2d 1122, 15 BLR 2-42 (10th Cir.1991); *Yates v. Harman Mining Co.*, 12 BLR 1-175 (1989), *aff'd on recon.*, 13 BLR 1-56 (1989) (*en banc*). As we have vacated the award of benefits, counsel is not entitled to a fee until claimant has succeeded in obtaining benefits.

[8]A prosecution of a claim is successful when claimant receives an economic benefit resulting from an adversarial proceeding. *See* 33 U.S.C. ' 928(a), as implemented by 20 C.F.R. ' 725.367(a); *see also Bethenergy Mines Inc. v. Director, OWCP* [*Markovich*], 854 F.2d 632 (3d Cir. 1988), *aff'g sub nom. Markovich v. Bethlehem Mines Corp.*, 11 BLR 1-105 (1987).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge